

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

Decision No: [2011] NZIACDT 25

Reference No: IACDT 09/10

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

Christine Whiles-Clarry
Stephen Whiles-Clarry
Complainant

AND

Glen William Standing
Adviser

DECISION
IMPOSITION OF DISCIPLINARY SANCTIONS

REPRESENTATION:

Adviser

In person

Complainants

In person

Date Issued: 8 August 2011

Decision

The decision on the complaint

- [1] In a decision dated 30 June 2011, the Tribunal upheld a complaint in this matter.
- [2] The facts and background are set out in the earlier decision. The three elements of the complaint that were upheld were, in outline:
- [2.1] The Adviser negligently failed to provide adequate advice to the Complainants when they migrated to New Zealand. The decision found:
- [2.1.1] The Adviser had an incorrect understanding of the material policy requirements,
- [2.1.2] Failed to review his clients' options, and
- [2.1.3] Failed to engage with his clients in an informed way, and address his erroneous understanding when his error was discovered.
- [2.2] The Adviser misled his clients in an attempt to justify the incorrect advice he gave. He falsely claimed there had been a policy change, and a more liberal regime had been introduced.
- [2.3] The Adviser (through an associate) retained a passport and demanded the payment of fees before the passport would be released.
- [3] The conduct was in breach of section 44 of the Act and the Code of Conduct.
- [4] 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

- [5] The Complainants provided a submission on the appropriate disciplinary sanction. They seek compensation, and a return of fees paid, in total a sum of \$33,159.12.

- [6] The foundation for their claim is that Mr Whiles-Clarry was entitled to an open work permit immediately after the family arrived in New Zealand, but was told he had to apply for a work visa after securing work in a specific occupational category.
- [7] Available employment opportunities were lost. The Complainants were given specific advice about the limited employment options Mr Whiles-Clarry could pursue.
- [8] The family had modest means and spent all their savings of \$25,464.33 while Mr Whiles-Clarry sought work. They would have then been destitute were it not for the assistance of family members. While Mr Whiles-Clarry sought work, the family initially stayed at a motel, and later in substandard rental accommodation. They could not take settled accommodation until Mr Whiles-Clarry knew where he would be employed.
- [9] The compensation sought is categorised:
- [9.1] Refund of professional fees paid to the Adviser \$6,523.67.
 - [9.2] Loss of income \$9,935.45.
 - [9.3] Fee for applying for residency \$700.
 - [9.4] General damages for stress, and additional expenses \$16,000.
- [10] The Adviser made a submission on the disciplinary sanctions, including the Complainants' claim for compensation. His submission was that:
- [10.1] The Tribunal's decision upholding the complaint was wrong as, contrary to the Tribunal's finding, there was no evidence the Adviser gave any incorrect advice.
 - [10.2] He had successfully applied for an appropriate visa and that was what he was engaged to do.
 - [10.3] He was not liable for compensation.
 - [10.4] He sought that his name not be published.

Decision

Negligence

- [11] The mistake the Adviser made was identified by Immigration New Zealand and initially relayed to the Adviser by Ms Whiles-Clarry. The error has been set out by this Tribunal in the earlier decision.
- [12] All professionals make errors. It is fundamental obligation of a professional to be willing to understand and take responsibility for error.
- [13] In the present case, the Adviser made an error that was in itself significant but apparently one of oversight. Of more concern is that at the time he was advising his clients he failed to undertake a process of reviewing and communicating the options his clients had; and, later, when confronted with his error, failed to address the mistake he made that gravely affected his clients.
- [14] The Adviser still maintains he is not at fault, as he made an application his clients engaged him to make. Clients engage professionals to get an informed understanding of what the best options are and to then pursue them.
- [15] The Adviser does not accept or does not understand what his professional obligations were and why he breached them. Even in relation to the technical error he made, he has denied he was wrong and demonstrated an inability to distinguish between fundamental immigration concepts.

Misleading clients

- [16] The Adviser misled a client to hide his own error. That is a grave lapse from professional standards. Any form of misrepresentation or dishonesty raises the question of whether a licensed immigration adviser is fit to practise as a member of the profession. He has offered no explanation for his conduct.

Retaining a passport while demanding payment of fees

- [17] It is a fundamental obligation on a licensed immigration adviser that they will not retain passports as leverage to require the payment of fees. That is clearly evident in the Code which every practitioner is required to be familiar with.

The Adviser's licence is cancelled

- [18] The Act has established licensed immigration advisers as a professional group. With limited exceptions, they have an exclusive right to provide immigration advice. That exclusive right is enforced by criminal sanctions.
- [19] Until the profession was regulated, the great majority of advisers were professional people acting responsibly and providing skilled services. A small minority of unskilled and unscrupulous people provided immigration services. Immigrants are a vulnerable group and, in some instances, suffered serious harm from such people. Immigration advisers have an important professional role in assisting clients. Their honesty, professionalism, and competence are fundamental requirements.
- [20] The Act records in section 3 its purpose is:
- “... to promote and protect the interests of the consumers receiving immigration advice, and to enhance the reputation of New Zealand as an immigration destination, by providing for the regulation of persons who give immigration advice.”
- [21] When the Act came into force, many people had experience of giving immigration advice. There were no professional qualifications specifically targeted at New Zealand immigration advisers; though of course there were various relevant qualifications that some advisers held.
- [22] To establish the profession, a relatively low threshold was applied. It required a person demonstrate competent handling of immigration applications in the past, a knowledge and understanding of the new professional environment, and also language and communication skills. A significant number of people who had relied on providing immigration advice for their livelihood could not meet those standards. They lost their livelihoods.
- [23] The entry to the profession was quite different from the conventional entry to an established profession where an extended period of academic training and then work experience with mentoring from established members of the profession is the norm. The entry requirements for the profession will move over time to the conventional model, but it is necessary to first establish appropriate training courses. Accordingly, to this point, entry to the profession has been under a transitional regime.
- [24] Mentoring by colleagues for a new member of a profession is of inestimable value, not only for the development of technical skills, but to understand the ethical and behavioural standards required of a professional person. Mentoring from senior members of a profession is not something that can be required when a new profession is established.
- [25] The Authority has required licensed immigration advisers to demonstrate understanding of their professional obligations. In addition, the Authority has established a Code of Conduct under the Act, which prescribes what the Adviser's obligations in day to day professional practice entail.
- [26] However, the inevitably low threshold for entry into the profession, in that entry has not required a long period of academic training with mentored experience, has resulted in some

people entering the profession with no real commitment to maintaining professional standards. It is important that this Tribunal exercise the power to remove people from the profession who are in this category. In a sense, the transitional entry has put a correlative obligation on entrants to the profession to ensure they attain professional standards, having been entrusted with entry to the profession.

- [27] The grounds on which the present complaint has been upheld: negligence, failure to accept professional responsibility, misleading clients, and retaining passports are typical of the conduct the Act was intended to stop. I am satisfied the Adviser should not be permitted to continue to practise on his own account unsupervised until he develops the professional skills he requires to act as a licensed immigration adviser.
- [28] The Adviser appears not to have had the benefit of a mentored entry to the profession. I am willing to leave open the possibility of the Adviser re-establishing himself as a member of the profession. However, a substantial period of supervision is required.
- [29] Accordingly, his full licence will be cancelled, but I will not exclude the Adviser from applying for a provisional licence on appropriate terms.

Compensation - Principles

- [30] It has been a longstanding criticism of some professional disciplinary processes that they do not include jurisdiction to require a professional who is at fault to compensate the client. That had required a separate, and potentially, expensive second process.
- [31] The Act addresses that perceived shortcoming by providing this Tribunal may require an Adviser to refund fees and pay reasonable compensation when a complaint has been upheld.
- [32] Section 51 of the Act confers these powers using general language. The application of the power is relatively uncomplicated where the grounds on which the complaint has been upheld would establish a civil claim for breach of contract, negligence, or another tort; given the standard of proof before this Tribunal is no less than would be the case for bringing the claim in a civil proceeding.
- [33] Accordingly, in such circumstances, the Tribunal will ordinarily apply the principles that apply in a civil claim, including causation, quantum and the other principles that regulate entitlement.

Compensation – this case

- [34] I am satisfied all of the fees paid by the Complainants should be repaid. The work undertaken was not competent, and in fact caused serious harm through negligent advice. That harm included seeking employment in an unnecessarily narrow category. To the extent the fees related to job search services, they were an unnecessary expense, and a loss caused by the negligent advice. The evidence before the Tribunal establishes those fees are \$6,523.67.
- [35] There will be no compensation for the fee of \$700 payable to Immigration New Zealand for Mr Whiles-Clarry to apply for a residence permit. The Complainants did indicate they wished to progress to Mr Whiles-Clarry gaining a residence permit, so the fee would have been required.
- [36] The Complainants seek compensation for 16 weeks of lost income. Their claim was originally articulated in a letter dated 28 July 2009 addressed to the Adviser. The claim was on the basis of \$600/week for 16 weeks, whereas they had been in New Zealand for 21 weeks at that time. Their submissions refined the calculation to \$9,935.45, and pointed out that, if Mr Whiles-Clarry had been in a position to take work of a kind in which he had experience, a calculation of \$14,080 may have been more appropriate.
- [37] There is an element of estimation given the claim is for a lost opportunity and not a certainty. I am satisfied the evidence establishes the Complainants received repeated advice to the effect opportunities could not be pursued. That was only resolved when Ms Whiles-Clarry personally contacted Immigration New Zealand and was informed Mr Whiles-Clarry was entitled to an

open work visa. The period of time and level of remuneration in the calculation are apparently reasonable, and the Adviser has not challenged them.

- [38] Accordingly \$9,935.45 compensation for loss of wages will be directed to be paid.
- [39] The Complainants seek compensation of \$16,000 for stress, and the additional costs they faced while Mr Whiles-Clarry was prevented from seeking work effectively. In support of this claim, the Complainants have provided evidence of the erosion of their savings. They had an extended stay at a motel due to the uncertainty of where Mr Whiles-Clarry might ultimately find work, and then moved to substandard accommodation until they could settle. There is a degree of imprecision as to the quantum of this loss, and furthermore it is important not to "double count" by failing to have regard to the compensation that will be ordered in respect of loss of wages. In addition, there was expenditure on enduring assets, which assisted with seeking work such as a motor vehicle and a computer. That was not a loss.
- [40] The information before me, and the nature of the claim, requires me to deal with this aspect of compensation as being in the nature of a claim for general damages. There was no doubt a great deal of pressure which was difficult for a family migrating. However, compensation will be at a modest level for that. My view on the basis of the material before me is that the majority of the costs the Complainants faced were incremental to the costs they would have faced regardless. For example, in respect of the motel cost of \$450 per week, they would have faced a portion of those costs for regular accommodation. On the basis of the information before me, I am satisfied compensation of \$1,000 is appropriate as recognition of the stress and difficulty the Complainants faced and a further payment of \$2,000 should be made for additional expenses they faced.

Penalty

- [41] The Adviser would normally face a substantial financial penalty for the misconduct established. In particular in relation to misleading a client, and withholding a passport. Having regard to the compensation orders that will be made and that his license will be cancelled, the penalty will be reduced to \$2,000.

Publication

- [42] The Adviser has sought non-publication of his name. The Tribunal will routinely publish the name of an Adviser and the reasons for its decision where a complaint is upheld. That is a usual incident of open justice. The Adviser provided no reason why publication should not follow in this case. Accordingly, the decision will be published in the normal way.

Order

- [43] The Adviser is censured.
- [44] The Adviser's licence, which he presently holds, is cancelled, with effect one week from the date of this decision. The delay is to allow him to refer clients to another licensed immigration adviser.
- [45] The Adviser is prevented from reapplying for a full licence for a period of two years from the date his licence is cancelled.
- [46] The Adviser is also prevented from applying for any other licence, except a provisional licence, for a period of two years from the date his licence is cancelled, and may only apply for a provisional licence if:
- [46.1] The Registrar is satisfied the Adviser will work under the direct supervision of an appropriate fully licensed immigration adviser (and meet the standards for the issue of the licence in other respects);
- [46.2] The Registrar is satisfied any supervisor has been supplied with a copy of this decision by the Adviser and the Registrar has also approved a written protocol setting out with

the terms of supervision, which have been agreed between the Adviser and the supervisor;

- [46.3] Leave is reserved to the Adviser to seek directions from the Tribunal from time to time as to whether a particular person is appropriate to act as a supervisor, and the terms of the protocol, in the event the Registrar does not approve a person nominated or the protocol; and further that
- [46.4] The period of supervision will continue for two years, or until the Adviser is entitled to, and has obtained, a full licence.
- [47] The Adviser is ordered to pay a penalty of \$2,000.
- [48] The Adviser is ordered to pay compensation and refund fees amounting to \$19,459.12 to the Complainants, being:
- [48.1] Refund of fees \$6,523.67.
- [48.2] Loss of income \$9,935.45.
- [48.3] Compensation for additional costs and recognition of stress and difficulty \$3,000.
- [49] There has been no application for an order for payment of the costs and expenses of the inquiry, so no order is made.
- [50] These orders are made with due consideration for the possibility the Adviser may not be able to obtain employment in an environment where he is supervised, and the effect may be he is effectively excluded from the profession. However, the integrity issues, and his lack of insight into the requirements of professional practice require that he undertake a mentored re-entry into the profession before providing unsupervised services. To require less would be to fail to protect the public in the manner the Act contemplates. It is the Adviser's responsibility to find employment in an environment where he can gain the experience and skills he requires to practise on his own account.

DATED at WELLINGTON this 8th day of August 2011

G D Pearson
Chair