

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

Decision No: [2011] NZIACDT 31

Reference No: IACDT 007/10

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

CD
Complainant

AND

QXF
Adviser

PUBLICATION COPY

DECISION

REPRESENTATION:

Adviser

In person

Date Issued: 20 September 2011

Decision

The Referral

- [1] The Registrar of the Immigration Advisers Authority referred this matter to the Tribunal pursuant to section 45 of the Immigration Advisers Licensing Act 2007 ("the Act").
- [2] The grounds for referral related to section 44 of the Immigration Advisers Licensing Act 2007, which makes dishonest or misleading behaviour and also breaches of the Code of Conduct (the Code) grounds for complaint. The Code was developed pursuant to section 37 of the Act (published www.iaa.govt.nz).
- [3] The complaint alleged misappropriation of funds and other unethical conduct. The unethical conduct was said to be misrepresentations to clients; in particular, alleging the Adviser misrepresented to clients he was a principal and engaged them on that basis. In fact, the Complainant's company employed him and client relationships should have been on that basis.
- [4] The Adviser denied the allegations.

Facts

Process

- [5] The Tribunal undertook a review of the whole of the papers presented and issued minutes dated 11 April 2011 and 5 August 2011. The minutes recognised the Adviser denied the allegations and identified the need for an oral hearing to make findings on the complaint.
- [6] The Tribunal's process is inquisitorial; usually matters are determined on the papers. The purpose of the oral hearing was to allow inquiries to be made into the allegations. The Complainant was not obliged to attend and present a case and did not do so. The material supporting the complaint was before the Tribunal. It has been considered and given due weight.
- [7] The Adviser attended the oral hearing and gave evidence.
- [8] There is a related complaint; it is the subject of a separate decision. The material supporting that complaint was considered in relation to the present matter (as indicated to the parties in the minute issued by the Tribunal). The other complaint has been dismissed and the reasons are given in a separate decision.

Evidence

- [9] The complaint in essence alleged:
 - [9.1] The Adviser had sold his business to the Complainant (held through a company).
 - [9.2] The Adviser continued in the practice as an employee and received a salary.
 - [9.3] The Adviser took fees from clients, banked them into his own bank account, failed to account for them and thereby committed theft.
 - [9.4] The Adviser was interviewed and admitted stealing the money.
- [10] The complaint was supported by a report from a private security organisation that provided investigative services. The report included briefs of evidence, a transcript of an interview and other material.

The Adviser's evidence

- [11] The Adviser denied any dishonesty or failure to fulfil professional obligations. He said, on the contrary, he was put into an invidious position and his actions were proper ones and necessary to protect clients.
- [12] The Adviser suspected his employer, the company running the practice, was failing financially. The Adviser thought he was personally responsible for fees collected from clients. He found the credit card his employer provided to pay fees to Immigration New Zealand was dishonoured from time to time. Funds already paid by clients to pay the fees to Immigration New Zealand were not available for the purpose they had delivered. His concerns regarding the financial state of his employer were heightened as the company's unpaid creditors were approaching him and demanding the payment of outstanding debts. The Adviser was no longer a shareholder or director so had no control over the company's financial position.
- [13] He sought legal advice, consulted with the Authority, and was told he was personally responsible to clients for fees, as he was the only person holding a licence in the practice and the Act and the Code made a licensed immigration adviser personally responsible for financial and other dealings with clients.
- [14] Accordingly, he paid some fees he received into his personal bank account, used some of the money to pay fees to Immigration New Zealand, and accounted to his employer for the balance due.
- [15] On 29 May 2009, the Adviser went to the home of the Complainant after being asked to do so. To his surprise, a private investigator was in attendance and asked him to consent to being interviewed. He agreed, and was told the only purpose of the interview was to establish more secure systems to run the practice, and the information would not be used for other purposes. The investigator did not tell the Adviser his attendance was voluntary, that he was entitled to legal advice, or warn him of the nature of the allegations that were about to be made.
- [16] The interview progressed and allegations of dishonesty were put to the Adviser. The Adviser became distressed. He explained how the company's financial difficulties had led to him having to protect clients and he had accounted for funds after paying fees. The interview progressed over some hours and the Adviser eventually made statements accepting responsibility for fault and failure, which he now recognises he should not have made. The record of the interview and the Adviser's evidence suggest the Adviser was concerned he may not have taken the proper action in his efforts to protect clients and felt vulnerable. He says his admissions should be seen in that light and with regard to the very vulnerable state he was reduced to.
- [17] After the interview, that Adviser notified the Authority he wished to forfeit his licence. He did so at the direction of the Complainant.
- [18] The Adviser then promptly went to the Police and told them what had happened and also sought legal advice. He wanted the Police to be aware of the allegations made against him, and explain he had accounted properly for all funds. He also sought and obtained medical assistance as he was so traumatised by his treatment at the interview. The medical assistance supported the view he was put into an emotional state where his statements at the interview could not be relied on.
- [19] The Adviser withdrew the forfeiture of his licence after he had the opportunity to compose himself.
- [20] The private investigator prepared a report which was given to the Police. The Police were told in the covering letter: "You will observe that we have prepared this file in a manner with the charge being 'Theft'." The "file" had the appearance of a police prosecution file. However, there were very significant differences in terms of the substance when compared with a police prosecution file, which I discuss below.
- [21] The Police did investigate the allegations fully. They obtained all the relevant bank records and other material. The Adviser had given the Complainant full access to all records including his

computer. Records had also been gathered from Immigration New Zealand. After examining this material and questioning the Adviser, the Police found there were no grounds for a prosecution as all funds had been fully accounted for.

- [22] The company that was conducting the practice went into insolvent liquidation and the Complainant became personally bankrupt shortly after that point.
- [23] The Adviser has continued to hold a licence as a licensed immigration adviser, and has continued to operate his practice on his own account, successfully.

Factual conclusions

- [24] I accept the Adviser's evidence. The central evidence supporting the complaint is the file prepared by the private investigator. That file raises concerns. It is evident from the file itself, and in the Adviser's evidence, the private investigator did not apply the principles that ensure an interview can be safely relied on as evidence. Deficiencies in the process included:
- [24.1] Failure to ensure the Adviser knew he was not obliged to participate in the process, which is particularly significant given he was an employee and subject to direction.
- [24.2] The Adviser was not told in advance of the nature of the allegations to be made.
- [24.3] The Adviser was not told he was entitled to take legal advice or given sufficient information to appreciate he may need it.
- [24.4] Misrepresentation of the potential use of the interview.
- [24.5] The interview proceeding over a period of hours where the Adviser was put under pressure by an interrogator. The interrogator did not simply record answers and explanations in relation to matters that could later be determined by reference to banking and other records. He instead kept asking the same questions, and applying pressure, until the Adviser gave answers he preferred.
- [25] The file the investigator prepared and sent to the Police was concerning. The investigator had made an effort to make the material look like a police prosecution file, extended to having a "Summary of Facts" to present to the Court. It appeared as though the author expected the Police to adopt the file as their own and simply rely on it to lodge a prosecution.
- [26] The contents of the file were adequate as a complaint, which the Police could investigate, but wholly inadequate as an investigation.
- [27] The interview, and in particular the "admissions" gained after extensive interrogation, were wholly or substantially the evidence relied on for the allegation of theft.
- [28] The product of the interview was in itself of little probative value, given the deficiencies of the interview process, and the Adviser's denial of wrongdoing. The Adviser asserted a proper investigation of the records which he willingly presented would show he had accounted for all funds.
- [29] It was possible to examine bank accounts and third parties' records and thereby ascertain whether money had been accounted for or not. The Adviser provided an entirely plausible explanation for receiving funds, and either he had accounted for those funds as he said he had, or not. If he had accounted for the funds, his explanation was entirely credible.
- [30] The Police did undertake the investigative work, found the Adviser had accounted for the funds, and accordingly found no evidence of dishonesty or theft. Nothing in the material before me or the evidence I have heard has cast doubt on the conclusion the Police reached.

Decision

- [31] It is not uncommon for this Tribunal to have to deal with the situation where an individual is a licensed adviser and they are held accountable for issues relating to fees which are held by their employer. The Adviser rightly identified he was personally responsible to clients and took

steps to protect clients. He did so when he had adequate information to believe his employer was in a financially parlous situation and potentially going to leave clients at risk.

[32] There is no evidence of substance that raises concerns the Adviser misrepresented his role to clients and I am satisfied he fully accounted for all funds.

[33] It follows the complaint is dismissed.

DATED at WELLINGTON this 20th day of September 2011

G D Pearson
Chair