

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

Decision No: [2011] NZIACDT 32

Reference No: IACDT 03/10

**IN THE MATTER**

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

**BY**

**Immigration Advisers Authority**  
Authority

**BETWEEN**

**HE and SD**  
Complainants

**AND**

**QXF**  
Adviser

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**DECISION**

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**REPRESENTATION:**

**Adviser**

In person

Date Issued: 20 September 2011

## Decision

### The Complaint

- [1] The complaint against the Adviser is that he misappropriated fees, overcharged, and misrepresented himself as a principal rather than an employee. In addition, that he failed to establish a client relationship in accordance with the Code which governs his profession.
- [2] The Adviser said he acted ethically and properly to protect his clients in a situation where his employer was failing financially. He accepted he may have made errors in establishing the client relationship but they were not more than oversights.

### Issues

- [3] The Tribunal must assess the credibility of the Adviser's explanation and whether any admitted potential shortcomings in establishing the client relationship are grounds for upholding the complaint.

### Hearing

- [4] The Tribunal's process is inquisitorial; usually matters are determined on the papers. An oral hearing was convened to inquire into the allegations.
- [5] The Complainants were not obliged to attend and present a case, and did not do so. The Adviser attended the oral hearing, and gave evidence. The Tribunal now has a good deal of information that could not have been known to the Complainants when they lodged the complaint.

### Related complaint

#### *The CD complaint*

- [6] There is a related complaint for which a separate decision has issued. 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). CD, the principal of the company that employed the Adviser, made the other complaint.
- [7] CD's complaint alleged the Adviser misappropriated fees, including the fees paid by the Complainants. CD said the Complainants gave support to his complaint, which included fees from other clients also. The Complainants, in a letter they sent to the Authority, referred to CD's involvement in this complaint:

"We delayed taking our case to the tribunal until our return to New Zealand in approximately six months time but just before we left the country we were visited at our boat by the director of [the Company employing the Adviser] CD, who was investigating a payment into his bank which was in fact our deposit which had been paid to [the Adviser] more than two months previously. CD had no record of our existence or of our employing [the Adviser's] services.

Due to his diligence in operating his business he made a special journey to see us in Whangarei and find out why we were disputing the invoice and to find out exactly what happened. CD and his partner B have made every effort to help us and have now refunded some of the monies that we feel we were overcharged. It is clear by some statements made in emails to us, asking us to send documents directly to his address in Russell; that his intention was not to conduct our business in a professional manner and exclude [his employer].

- [8] The CD complaint has been dismissed and the reasons are given in a separate decision.

*Overlap between the present complaint and the CD complaint*

- [9] The key elements in the present complaint are:
- [9.1] The Adviser failed properly to establish a professional relationship in accordance with the Code. The Code was developed pursuant to section 37 of the Act (published [www.iaa.govt.nz](http://www.iaa.govt.nz)). There was no written agreement, no notice of the complaints procedure and other information.
  - [9.2] An unreasonable fee was charged and supported by fabricated invoicing.
  - [9.3] A deposit of \$2,000 was paid to the Adviser and instead of placing it in his employer's bank account he paid it into his personal account and only later paid the funds to his employer's account.
  - [9.4] The Adviser misrepresented his personal bank account as a trust account.
  - [9.5] The Adviser communicated in ways that were intended to exclude his employer from the relationship with the Complainants.
- [10] The CD complaint mainly focused on a claim that the Adviser misappropriated fees by paying them into his personal bank account and treating clients as though he was dealing with them as a principal.
- [11] The issues, in addition to the CD complaint, to address in this case are an alleged failure to establish a professional relationship in accordance with the Code (including failing to have a written agreement for the provision of professional services) and overcharging of fees.

**The complaint of misappropriation of fees and misrepresentation of the Adviser's role**

*The evidence supporting the complaint*

- [12] The evidence provided in support of the CD complaint was more extensive than the evidence provided on the same issue in the present case. The whole of the evidence has been considered in relation to each complaint.
- [13] CD, in support of his complaint, claimed:
- [13.1] The Adviser had sold his business to CD (held through a company).
  - [13.2] The Adviser continued in the practice as an employee and received a salary.
  - [13.3] The Adviser took fees from clients, banked them into his own bank account, failed to account for them and thereby committed theft.
  - [13.4] The Adviser was interviewed and admitted stealing the money.
- [14] 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.
- [15] The Complainants in this matter provided evidence of funds going into the Adviser's personal bank account and communications that did not involve his employer.

*The Adviser's evidence*

- [16] 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.
- [17] The Adviser suspected his employer, the company CD controlled, was failing financially. That company was operating the practice and entered into agreements with clients for the Adviser to provide professional services as an employee.

- [18] The Adviser thought he was personally responsible for fees collected from clients even though he was not personally entering into a contract with them. 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.
- [19] He sought legal advice, consulted with the Authority regarding his personal liability should the company fail, and was told he was personally responsible to clients for fees due to his professional obligations. 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. That includes protecting money that has been paid in advance for fees and not yet earned.
- [20] Accordingly, he paid some fees he received into his personal bank account, used some of that money to pay fees to Immigration New Zealand, and accounted to his employer for the balance due.
- [21] On 29 May 2009, the Adviser went to the home of CD after being asked to do so. To his surprise, a private investigator was in attendance who 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.
- [22] 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 emotional state he was reduced to.
- [23] After the interview, the Adviser notified the Authority he wished to forfeit his license. He did so at the direction of CD.
- [24] 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.
- [25] The Adviser withdrew the forfeiture of his licence after he had the opportunity to compose himself.
- [26] 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 of that file when compared with a police prosecution file which I discuss below.
- [27] The Police did investigate the allegations fully. They obtained all the relevant bank records and other material. The Adviser had given CD full access to all records including his computer and 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.

- [28] The company conducting the practice went into insolvent liquidation and CD became personally bankrupt.
- [29] The Adviser has continued to hold a licence as a licensed immigration adviser and has operated his practice on his own account, successfully.

*Factual conclusions*

- [30] I accept the Adviser's evidence. The central evidence supporting the claims of theft by misappropriating fees 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:
- [30.1] 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.
- [30.2] The Adviser was not told in advance of the nature of the allegations to be made.
- [30.3] The Adviser was not told he was entitled to take legal advice or given sufficient information to appreciate he may need it.
- [30.4] Misrepresentation of the potential use of the interview.
- [30.5] 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. Those pressured answers later proved not to be consistent with the true facts.
- [31] 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.
- [32] The contents of the file were adequate as a complaint, which the Police could investigate, but wholly inadequate as an investigation.
- [33] The interview and in particular the "admissions" gained after extensive interrogation were wholly or substantially the evidence for the allegation of theft.
- [34] 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 indicated would show he had accounted for all funds.
- [35] 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.
- [36] 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 heard has cast doubt on the conclusion the police reached.

*Decision in relation to misappropriation of fees and misrepresentation of the Adviser's role*

- [37] 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 in relation to fees held by their employer. The Adviser rightly identified he was personally responsible to clients for managing fees until they were earned 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.

- [38] When understood in this context, I am not satisfied there was anything inappropriate in the communications between the Adviser and the Complainants regarding his role and that of his employer. The Complainants stated the Adviser misled them by stating his employer's business was his own. The Adviser denies that. I am not satisfied the Adviser did mislead the Complainants. He was the only person holding a licence which the business depended on to operate. He was personally responsible for the delivery of professional services. There was a significant opportunity for misunderstanding as the delivery of professional services was in fact personal to the Adviser. He was at the time facing a significant difficulty with that relationship as his employer was facing impending insolvency.
- [39] The Complainants' concerns were genuine and understandable, no doubt heightened by CD reporting the Complainants had been misled and indicating their fees had been misappropriated. The Complainants did not know the true facts. The events that led to the insolvent liquidation of the company and CD becoming bankrupt were apparently not disclosed to them and essential to truly understand the manner in which the Adviser communicated with them.
- [40] I am satisfied the Adviser did not misrepresent his professional position and that he fully accounted for all funds appropriately. Further, that he acted to protect Complainants and other clients. There were of course other ways in which he could have done so which would have left less room for misunderstanding. However, he dealt honestly with a significant professional crisis and met his professional obligations to clients.

### **Remaining grounds of complaint**

#### *The issues*

- [41] The remaining grounds of complaint are failure to establish the professional relationship in accordance with the Code, including having an appropriate written agreement and providing various information. In addition, the Complainants say the Adviser grossly overcharged for his services.

#### *The evidence*

- [42] The Complainants allege failure to deal with the issues in relation to establishing a professional relationship and they support that with the claim the Adviser was intentionally obscuring his employer's role in the professional relationship.
- [43] A written agreement would have named his employer and been between that company and the Complainants.
- [44] Having found the Adviser was not hiding the identity of his employer to misappropriate money, there is no room to find the Adviser failed to present a written agreement to further that objective.
- [45] The Adviser accepts the Complainants' evidence that they did not sign a written agreement. However, he does not accept that he delinquent or intentionally proceeded without complying with the Code, even though a written agreement is required.
- [46] The Adviser said he first met the Complainants unexpectedly. They knew an existing client whom he had come to see in Whangarei, from Russell where he was based. The Complainants inquired whether they could have an initial discussion with the Adviser while he was there.
- [47] He explained he was not prepared for the meeting as he had had no prior notice and had not brought his stationery such as a written agreement and the other documents required when dealing with a new client. He met with the Complainants on a preliminary basis and they wished to progress with their application for a residence permit.

- [48] The Adviser said matters progressed quickly and he believes he posted the documentation to the Complainants but it was not returned. He does accept he was under a good deal of pressure at the time and frankly admitted he could not be certain he overlooked sending the papers given the Complainants have not signed an agreement.
- [49] The timeline began when the Complainants first met with the Adviser on 23 February 2009. The Adviser assisted one of the Complainants to find work and she started work a few days later. The employment did not work out and less than a month from the initial meeting they decided not to proceed with their immigration application. The money for fees to be paid to Immigration New Zealand of \$600 was refunded. The Complainants then disputed the fees charged as they did not accept the balance of the deposit was required for fees in relation to work undertaken.
- [50] The Adviser said he believed he had promptly sent the complainants the forms and matters had moved to the termination of the instructions before he realised the process of engagement may not have been completed. By the time there was a dispute it was obviously not appropriate to seek to have the agreement signed.
- [51] The Adviser wrote to the Complainants and said the normal terms for fees was that when an engagement was accepted the initial fees would not be refundable. However, he claimed in the present case, on a time basis, he had undertaken work to the value of the fees paid. He also gave oral evidence to that effect. The material before me does not satisfy me the fee was excessive for the work undertaken. The Complainants have had a partial refund of the fees from CD. The Adviser says he would have been receptive to a reduction in fees given the decision not to proceed. However, the fee was not unreasonable and accordingly he left the issue to CD.
- [52] I accept it is probable the Complainants did not receive a written agreement. However, I accept the Adviser's evidence that was due to inadvertent failure on the part of the Adviser. I also accept that in the short timeframe he failed to realise there had been an oversight. I am satisfied this was not a case of an adviser intentionally failing to comply with his professional obligations.
- [53] It is of course not necessary for an Adviser to intentionally breach the Code for a complaint to be established. There is nonetheless a threshold before a disciplinary complaint can be established.
- [54] Section 50 allows a complaint to be upheld without necessarily imposing a sanction. It follows it is not necessary to find that a disciplinary sanction is required to uphold a complaint. However, not every lapse or manifestation of human frailty should result in an adverse professional disciplinary finding. There will be occasions when advisers are responsible for a lapse from acceptable standards but still not justify upholding a disciplinary complaint.
- [55] It is a reality many errors and mistakes are too trivial to warrant an adverse disciplinary finding and the Act recognises that. Section 45(1) provides the Authority may treat a complaint as trivial or inconsequential and should not be pursued or treat it as a matter that is best settled between the parties.
- [56] Accordingly, it is necessary and appropriate for this Tribunal to be mindful there is a threshold before a complaint of negligence or want of care and diligence is established. The Act does not attempt to further prescribe where the boundary lies and any attempt by this Tribunal to do so is unlikely to be successful. It is necessary to consider the facts of each complaint.
- [57] In this case, I am satisfied the Adviser did intend to comply; either he sent the relevant papers or failed to do so through oversight. The papers were not signed and no follow up occurred prior to the termination of the engagement. The Adviser was under considerable pressure at the time. He is entitled to the benefit of the doubt. I find that the error was inadvertent and does not reach the threshold to uphold the complaint. That finding does not lessen the importance of complying with the Code when establishing professional relationships. It is a cornerstone of the Code. In this case, a set of exceptional circumstances leads me to conclude the oversight does not justify an adverse disciplinary finding.

**Conclusion**

[58] The complaint is dismissed.

**DATED** at WELLINGTON this 20<sup>th</sup> day of September 2011

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**G D Pearson**  
Chair