

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

Decision No: [2012] NZIACDT 14

Reference No: IACDT 025/10

IN THE MATTER

of a referral under s 48 of the Immigration
Advisers Licensing Act 2007

BY

Immigration Advisers Authority
Authority

BETWEEN

Josephine Ravina Nair
Complainant

AND

Hema Ben Parekh
Adviser

DECISION

REPRESENTATION:

Complainant

In person

Adviser

In person

Date Issued: 28 March 2012

DECISION

Preliminary

- [1] Ms Parekh is a licensed immigration adviser, who was acting for Ms Nair in relation to her immigration status.
- [2] There was some uncertainty as to whether Ms Nair's employment had the necessary attributes to found an application for a residence permit, which she wished to obtain.
- [3] Immigration New Zealand, on the information initially submitted to seek a permit, was not satisfied Ms Nair's employment did meet the requirements. Immigration New Zealand sought further information. Ms Parekh did not obtain the information from Ms Nair to respond to Immigration New Zealand. Ms Nair's application necessarily failed for lack of a response to the query.
- [4] Ms Nair complained that Ms Parekh did not adequately advise her on the issues relating to her employment, and then failed to communicate with her effectively.
- [5] The issues to be determined are:
 - [5.1] Whether Ms Parekh's advice to proceed to apply for a permit was adequate.
 - [5.2] Whether she met her obligations when required to respond to Immigration New Zealand's queries.

The Complaint and Response

- [6] The details of the complaint are :
 - [6.1] Ms Nair engaged Ms Parekh to assist her to obtain a residence permit, and to vary a work permit.
 - [6.2] She had previously applied unsuccessfully for a residence permit. In the earlier application she stated her employment was as a "Nursing Support Worker".
 - [6.3] Ms Parekh told Ms Nair her employment should be correctly described as a "Community Support Worker", and her employment would qualify her for a residence permit.
 - [6.4] Ms Nair paid a fee of \$2,120 for the work required to progress her application.
 - [6.5] Ms Parekh prepared and submitted an Expression of Interest under the Skilled Migrant policy and presented it to Immigration New Zealand. That was the first step in seeking a residence permit. Ms Nair's case was selected from the pool on 12 August 2009 and considered by Immigration New Zealand.
 - [6.6] On 1 September 2009, Immigration New Zealand wrote and queried whether Ms Nair's employment met the requirements for the number of points claimed; the issue being that a potential conclusion was that Ms Nair's employment and work experience did not substantially match the job title defined as "Community Support Worker" under immigration policy. Accordingly, the points could not be claimed.
 - [6.7] Initially, the time for a response was until 15 September 2009. An extension was granted on Ms Parekh's application to 25 September 2009. There was no response and Ms Nair's Expression of Interest was declined on 5 October 2009.
 - [6.8] Ms Nair had repeatedly attempted to contact Ms Parekh and left messages. Ms Parekh failed to respond and had not informed Ms Nair that her Expression of Interest had been declined.

- [6.9] The terms of engagement were in writing and dated 20 July 2009. They identified that Ms Nair was a nursing support worker and had an offer of employment as a residential care officer. The terms identified, among other things, that:
- [6.9.1] Ms Parekh would submit an Expression of Interest, and an application to vary Ms Nair's existing permit to allow her to take up the offer of employment.
 - [6.9.2] That there would be consultation between Immigration New Zealand and Work and Income New Zealand to evaluate whether the employment could be filled by a New Zealand worker. Ms Nair was warned her lack of appropriate work experience may create difficulty.
 - [6.9.3] Whether the applications would succeed was in the hands of Immigration New Zealand, and the outcome was not certain.
- [7] Ms Parekh responded to the complaint, and stated:
- [7.1] When first advising Ms Nair, she reviewed her work history and job offer. When entering into the agreement, Ms Parekh explained to Ms Nair her Expression of Interest may fail and that was a matter for Immigration New Zealand.
 - [7.2] She had taken steps to keep Ms Nair informed of developments with her application.
 - [7.3] On 25 August 2009, Immigration New Zealand requested details of Ms Nair's job description and employment contract, and those documents were obtained by Ms Parekh from Ms Nair at that point in time.
 - [7.4] Immigration New Zealand queried Ms Nair's eligibility by letter on 1 September 2009, at which time Ms Parekh:
 - [7.4.1] Left a message for Ms Nair that day on her home telephone requesting that she contact Ms Parekh.
 - [7.4.2] The following day, as there was no response, a further message was left on her cell phone.
 - [7.4.3] Ms Nair was contacted at work by one of Ms Parekh's staff by telephone, and arrangements made for further contact.
 - [7.4.4] An extension of time to respond to Immigration New Zealand was sought and granted, and a further message left for Ms Nair.
 - [7.4.5] Ms Nair failed to respond to the attempts to discuss the issues with her.
 - [7.4.6] Ms Parekh says she then communicated via an email address she had for Ms Nair's brother. It was an email address previously used by Ms Parekh to communicate with another family member.
 - [7.5] In a letter dated 5 October 2009 Immigration New Zealand wrote to Ms Nair, care of Ms Parekh. This letter said the Expression of Interest had been declined, as there had been no response to the 1 September 2009 letter.
 - [7.6] Following those steps, on 21 October 2009, both Ms Parekh and Ms Nair were requested to provide further information regarding Ms Nair's application to vary her work permit.
 - [7.7] Ms Parekh pointed out that Ms Nair had provided the relevant documentation when Immigration New Zealand made the queries in the 25 August 2009 letter. That demonstrated she had communicated with Ms Nair and she had responded.

- [7.8] Ms Parekh has implemented new processes for contacting clients, to ensure there is written as well as oral communication, and a record created.
- [7.9] Ms Parekh said concerning Ms Nair's attempts to contact her: "There [are] hundreds of clients who call and if no number with full name is given then certainly it is not possible to return a call."
- [7.10] Ms Parekh's practice deals with large numbers of clients and does that successfully.

Minute and Further Responses from the Parties

- [8] The Tribunal issued a minute reviewing the papers, and the conclusions that could be reached. The parties were given the opportunity to review whether they sought to provide further information, or make submissions.
- [9] The minute identified the two issues in the complaint, and potential findings. The parties were invited to provide further submissions and information.
- [10] Both Ms Parekh and Ms Nair responded to the material in the minute.

Ms Parekh's response

- [11] Ms Parekh first explained she was committed to providing a service that was professional, and fully meeting the standards of her profession; and that she accepted the standards the Authority and the Tribunal required.
- [12] Ms Parekh then addressed the issue of her workload, and how she managed it. Some concerns had been raised in the course of inquiring into the complaint that Ms Parekh had a workload that was excessive. It suffices to record Ms Parekh satisfactorily explained that her workload was appropriate, and she had office systems commensurate with the workload.
- [13] In terms of the mode of notification to clients, Ms Parekh had generally found clients preferred phone, text messages or emails. Since this complaint, she has introduced a regime of getting written instructions on the modes of communication, emphasised the importance of keeping contact information up to date, and used couriers to underpin the system.
- [14] Ms Parekh produced her file, and acknowledged that the communication with her client should have included written communication, as it was "prejudicial information", and important. She said she had learned a "hard lesson", and changed several operational systems to ensure the same issues would not arise again.
- [15] In relation to whether Ms Parekh's advice concerning whether Ms Nair's employment would be a basis for obtaining residence, she said the decisions by Immigration New Zealand were not consistent in this area. Ms Parekh considered she would not have adequately advised Ms Nair if she rejected the possibility of her work qualifying. She said, she met with Ms Nair and her family, and fully reviewed the question of whether the employment would qualify.
- [16] Ms Parekh also explained in some detail how she organised her practice to maintain high standards in the delivery of professional services.

Ms Nair's response

- [17] Ms Nair's brother responded on behalf of Ms Nair, and made a submission in response to the minute.
- [18] Ms Nair's brother said his family had been represented by Ms Parekh in immigration matters, and the family was satisfied with, and appreciative of, the services she provided.
- [19] Ms Nair did not want to take any further action on her complaint, but sought a refund of fees.

Decision

Adequacy of Ms Parekh's advice

- [20] The first issue is the advice Ms Parekh gave to Ms Nair.
- [21] The issue of whether a particular position of employment meets immigration policy requirements is inherently uncertain in many cases. The issue is not simply how a position is labelled, it goes to the nature and quality of the work, and the particular duties an employee is required to discharge. In many cases certain categorisation is not possible. I accept Ms Nair's employment was in a position where categorisation for immigration purposes was not certain, and that view is consistent with Immigration New Zealand pursuing further inquiries.
- [22] The central question is accordingly whether Ms Parekh adequately advised Ms Nair of the uncertainty. I am satisfied there was a process of meeting and discussing the issues in which Ms Nair, her family, and Ms Parekh engaged. The uncertainty was also recorded in writing at the time Ms Parekh was engaged.
- [23] I am not satisfied this process was inadequate or inappropriate, either in its form of communication or in relation to the substance of the advice Ms Parekh gave. Accordingly, I am satisfied Ms Nair was properly advised, and gave her informed consent to the course of action adopted.
- [24] That aspect of the complaint must be dismissed.

Communication with Ms Nair regarding Immigration New Zealand's 1 September 2009 letter

- [25] Ms Parekh accepts there were inadequacies in her communication with Ms Nair when Immigration New Zealand said their preliminary assessment was that Ms Nair's position of employment did not meet the criteria.
- [26] Ms Parekh has also explained she has taken remedial steps, and I accept those steps are both substantial and appropriate to ensure that there is a "back up", so clients receive notifications and are aware they must keep an up-to-date means of communication.
- [27] In relation to this particular case, Ms Parekh has offered to make a full refund of all fees and expenses to address the effects on Ms Nair.
- [28] Accordingly, I am satisfied Ms Nair's complaint that there was inadequate communication is justified. First, Ms Parekh failed to take the necessary steps required, given the importance of a response to Immigration New Zealand. She needed to attempt to inform Ms Nair in writing, and explain the importance of a response. I accept Ms Parekh did take some steps, but they were not commensurate with the importance of the communication.
- [29] Ms Nair was repeatedly attempting to make contact, and Ms Parekh did not have systems in place to ensure Ms Nair could reasonably contact Ms Parekh.
- [30] Nonetheless, I am equally satisfied Ms Parekh has responded as a concerned professional to remedy the shortcoming. Ms Parekh has addressed this; first by offering to ensure Ms Nair is not directly disadvantaged by agreeing to refund fees, and second by ensuring the same problem will not arise for other clients.
- [31] Given the importance of the communication following the 1 September 2009 letter, I must find the complaint is upheld in relation to the lack of effective communication.
- [32] Ms Parekh breached clause 1.1 of the Code of Conduct (www.iaa.govt.nz) developed pursuant to section 37 of the Act. The failure in relation to communication involved a lack of care and diligence of sufficient gravity to require that conclusion. A breach of the Code is a basis for upholding a complaint pursuant to section 44(2) of the Act.

Sanctions

- [33] The sanctions which are potentially open are prescribed by section 51, however it is open to the Tribunal to uphold the complaint, but take no further action.
- [34] Ms Nair has indicated she considers an appropriate outcome from her point of view would be a full refund of her costs and expenses, and Ms Parekh has indicated she would be willing to agree to that.
- [35] Accordingly, I am willing to give an indication, subject to further submissions, that I will consider taking no further action if Ms Parekh has fully refunded the fees, and all expenses to Ms Nair.
- [36] The parties have the opportunity of making submissions on the potential sanctions, in accordance with the following timetable:
- [36.1] Ms Nair and the Authority may provide submissions within 10 working days of this decision being issued;
- [36.2] Ms Parekh may make submissions within a further 5 working days of the expiry of that period.
- [37] The parties are requested to inform the Tribunal whether all fees and expenses have been refunded, even if there are no submissions.

DATED at WELLINGTON this 28th day of March 2012


G D Pearson
Chair

