

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

Decision No: [2012] NZIACDT 24

Reference No: IACDT 029/10

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

CBC

Complainant

AND

KFTO

Adviser

DECISION

REPRESENTATION:

Adviser

S Laurent, Laurent Law, Auckland

Complainant

In person

Date Issued: 25 May 2012

DECISION

Outline

- [1] This complaint primarily relates to miscommunication between Ms CBC and Ms KFTO.
- [2] Ms CBC was in South Africa, and wished to work in New Zealand and potentially take up residence here. Ms KFTO, a licensed immigration adviser whose practice is in New Zealand, agreed to assist with that process.
- [3] Ms CBC expected the immigration requirements would be met when she arrived, and Ms KFTO would obtain work for her. She arrived and found that process was only commencing, and terminated her agreement with Ms KFTO. They disagreed over the refund of fees, and the services Ms CBC should have expected.
- [4] The issues to resolve are whether Ms KFTO adequately communicated with Ms CBC in relation to the terms of her engagement, and whether her dealings in relation to fees being withheld were acceptable.

The Complaint, and the Adviser's Response

The complaint

- [5] Ms CBC says she understood she engaged Ms KFTO to find a position of employment and obtain a work permit for her; and she paid \$2,500 in advance for those services.
- [6] Ms KFTO subsequently said it was up to Ms CBC to find employment, and she could not get a work visa until she did so. Ms CBC was not satisfied and believed she had been misled by Ms KFTO, and terminated the professional relationship.
- [7] Ms KFTO refused to refund the money paid to her.
- [8] Ms CBC supported her complaint with the following details:
 - [8.1] She made contact with Ms KFTO in December 2009 by email.
 - [8.2] Ms KFTO led her to believe she would provide the professional services required for Ms CBC to obtain work in New Zealand, and the appropriate immigration visa.
 - [8.3] Ms CBC produced email correspondence from this period. This included:
 - [8.3.1] An email dated 8 March 2010 in which Ms KFTO gave advice regarding Ms CBC's CV.
 - [8.3.2] Emails of 19 March 2010 in which Ms CBC asked questions regarding work opportunities, and Ms KFTO's advice on that issue.
 - [8.4] Ms CBC entered into a written agreement dated 15 April 2010 and paid \$2,500 to Ms KFTO's company for the services, although the bank records and tax invoice she produced shows that \$2,250 was paid. Ms CBC provided a copy of the agreement, and the material features of it are as follows.
 - [8.4.1] The agreement states that Ms KFTO will provide "services". While it is not very precise, the wording appears to identify the services as being those contained in a schedule. The schedule refers to:
 - [8.4.1.1] \$500 payable "upon registration", but does not explain what is contemplated by "registration".

- [8.4.1.2] A further \$1,500 for "Application for Work Permit or Lodging of Expression of Interest – Whichever comes first payable upon lodging of application."
- [8.4.2] The agreement provides that if the agreement is terminated by the client, then all fees become payable; and if terminated by the adviser all fees and costs paid at the time of termination will be non-refundable.
- [8.5] Ms CBC came to New Zealand on 31 August 2010, and endeavoured to see Ms KFTO. A meeting was arranged after a short delay.
- [8.6] Ms KFTO did no substantial work, and achieved nothing for Ms CBC, so Ms CBC purported to terminate the professional relationship.
- [8.7] This arose as Ms CBC understood Ms KFTO would seek employment for her. However, Ms KFTO said that was not her responsibility and she would only assist with applying for a work permit, but first Ms CBC had to find employment.
- [8.8] Ms CBC considered Ms KFTO led her to believe she was providing a full service, where she would take the necessary steps to assist Ms CBC to obtain a work permit and a position of employment.
- [8.9] Ms KFTO refused to refund the fees paid by Ms CBC.
- [8.10] Ms CBC considers Ms KFTO's behaviour and attitude unprofessional, and failed to meet what she expected from a person conducting themselves in accordance with the Licensed Immigration Advisers Code of Conduct (the Code) (found at www.iaa.govt.nz) developed pursuant to section 37 of the Immigration Advisers Licensing Act.

The response

- [9] Ms KFTO responded to the complaint, and stated:
 - [9.1] Ms CBC made contact by email on 10 December 2009, seeking advice on coming to New Zealand. She provided a copy of all the email correspondence that followed. Until Ms KFTO met with Ms CBC in person on 6 September 2010, after she arrived in New Zealand, all communication was by email.
 - [9.2] Ms KFTO produced emails which included:
 - [9.2.1] Emails in January 2010 relating to Ms CBC's CV.
 - [9.2.2] An email dated 1 February 2010 in which Ms KFTO inquired of Ms CBC "would [you] be interested in a job in Hawkes Bay? We have a vacancy for a head chef and there are 3 other [South Africans] working there. Please let me know soonest".
 - [9.2.3] An email dated 23 February 2010 in which Ms KFTO said "I can assist you with the entire process from picking you up from the airport, booking accommodation to assisting with finding a job and the entire work permit and residency application. You most certainly will qualify for residency".
 - [9.2.4] An email dated 19 March 2010 in which Ms KFTO forwarded an agreement to engage her, and discussed "the job market", indicating it was favourable for Ms CBC's skills.
 - [9.2.5] An email dated 30 March 2010 in which Ms CBC inquired whether the payment required was "just for immigration advice". The emailed reply from Ms KFTO of the same date addressed other matters in Ms CBC's email, and made no comment on the query Ms CBC raised regarding the scope of work for the engagement.

- [9.3] Ms CBC entered into the agreement dated 15 April 2010 to engage Ms KFTO's services. The agreement provided that unless Ms KFTO did something wrong, Ms CBC was not entitled to cancel the agreement.
- [9.4] Ms CBC paid \$2,250, not \$2,500.
- [9.5] Ms KFTO also produced emails that were sent after the agreement was signed, and fees paid, which included:
 - [9.5.1] On 20 April 2010 Ms KFTO acknowledged the agreement being signed, and the fees paid. The following day Ms CBC sent an email to Ms KFTO saying she wanted to start work as soon as possible after travelling to New Zealand, which she expected to be at the end of August
 - [9.5.2] On 17 May 2010 Ms CBC sent an email inquiring "is there any news on a job yet?" Ms KFTO replied on the same date saying it was Ms CBC's responsibility to find work.
 - [9.5.3] On 1 July 2010 Ms CBC sent an email saying she had arranged to travel to New Zealand on 30 August 2010, and wanted to know when she would get her work visa. Ms KFTO replied on 2 July 2010, and said there was a misunderstanding, and Ms CBC would have to come to New Zealand to find employment, and after that she could apply for a work permit.
 - [9.5.4] On 2 July 2010 Ms CBC sought confirmation she could travel to New Zealand without a work permit, and expressed concern that if she did not have a work permit, and arrived with her professional equipment, that would raise concerns at the border. On 12 July 2010 Ms KFTO said Ms CBC should arrive as a visitor, find employment, then apply for a work visa; and should freight her professional equipment to her sister "as a gift". In a second email of that date Ms KFTO asked Ms CBC whether she would be interested in working at a restaurant in Hawkes Bay as "I have a role at a top restaurant there".
- [9.6] On Wednesday 1 September 2010, Ms CBC sent Ms KFTO an email saying she had arrived in New Zealand the previous day, and wanted to meet with her. Ms KFTO arranged an appointment the following Monday (6 September 2010).
- [9.7] Ms KFTO also produced an email dated 7 September 2010 in which, following the meeting, Ms CBC terminated the professional engagement. She said she engaged Ms KFTO understanding she would assist with finding employment. She had paid the full fee for Ms KFTO's services, expecting she would have a work permit when she came to New Zealand. In the circumstances she sought a refund of fees paid, with the exception of \$500 which she understood to be an assessment fee.
- [9.8] Ms KFTO believes the difficulties arose as Ms CBC thought she could apply for a work permit prior to having an offer of employment, which was not the case, and that she believed Ms KFTO would find employment for her, which was also incorrect.
- [9.9] Ms KFTO relies on her emails of 17 May and 2 July 2010 where she made it clear it was Ms CBC's responsibility to find employment after coming to New Zealand, and accordingly she says she communicated appropriately.
- [9.10] Ms KFTO had difficulty with the format of a CV provided by Ms CBC, and while she provided what assistance she could to direct Ms CBC to pursue work, that was not part of what Ms KFTO was engaged to do.
- [9.11] Ms KFTO contended that she acted professionally and respectfully at all times, and provides excellent service to her clients who value her work.

Minute Issued by the Tribunal

- [10] The Tribunal reviewed the papers before it, and issued a minute giving notice of the potential findings on the papers then before the Tribunal. The parties were given the opportunity to provide further evidence and submissions; and if appropriate to seek an oral hearing.
- [11] The minute gave notice that the potential findings on the papers then before the Tribunal were:
 - [11.1] The complaint could be upheld on the basis Ms KFTO failed to communicate to Ms CBC the terms of the agreement to provide services, and all significant matters relating to it prior to Ms CBC entering into it (Code clause 1.5(a)).
 - [11.2] The terms of that agreement did not contain a full description of the services to be provided (Code clause 1.5(b)).
 - [11.3] Ms KFTO's response to Ms CBC terminating her engagement, being to rely on the agreement to refuse to refund unearned fees, was unprofessional (Code clause 1.1).

Response to the Minute

- [12] Ms CBC responded to the minute and explained that the discrepancy between the payment of \$2,500 in fees Ms CBC says were paid, and the \$2,250 Ms KFTO says were received, were bank fees.
- [13] She also observed Ms KFTO had offered her two employment opportunities, but not in Auckland where she had accommodation.
- [14] Mr Laurent responded to the minute on Ms KFTO's behalf.
- [15] He set out the process required for Ms CBC to be entitled to work in New Zealand. She would enter New Zealand with a visitor's permit which would be uncomplicated as South Africa is a "visa free" country, she would secure employment when here, and then apply for a work permit. Ms KFTO's role was to deal with immigration issues, but she would, without being formally committed, provide some assistance with seeking employment.
- [16] Mr Laurent said Ms CBC misunderstood the position, and believed she would receive an offer of employment, and a work visa before coming to New Zealand.
- [17] Accordingly a key issue was whether Ms KFTO was responsible for this misunderstanding; and in particular whether the 15 April 2010 agreement for the delivery of professional services was entered into with adequate communication and understanding. That could come from both the agreement itself, and the surrounding communications.
- [18] Mr Laurent emphasised there was a significant chain of communication prior to 15 April 2010. One of the communications he said was important was the email of 23 February 2010 in which Ms KFTO said Ms CBC needed to be in New Zealand to find employment.
- [19] A matter of context that was also important in Mr Laurent's submission was that potential migrants from South Africa would usually have an awareness of the immigration process; and in Ms CBC's case she had been referred by a friend. Ms KFTO knew that friend had been through the process, as had some of Ms CBC's family members. Accordingly, Ms KFTO understood that she had explained adequately, without a detailed review of the process.
- [20] Mr Laurent discussed the detail of the agreement itself, and its adequacy in terms of defining the services to be provided. He contended the services were adequately defined, and did not include some of the services previously discussed as being available in the email correspondence.
- [21] Mr Laurent also submitted that Ms KFTO expressly said that Ms CBC could not apply for a work permit until she came to New Zealand. He relied on the 23 February 2010 email.

- [22] In relation to the refund of fees Mr Laurent acknowledged Ms KFTO only asked for payment of \$500, and Ms CBC paid \$2,250 after the agreement was signed.
- [23] Mr Laurent said Ms KFTO was “technically” entitled under the signed agreement to retain fees already paid. He questioned whether the Tribunal could effectively set aside the terms of an agreement for services, as its jurisdiction is to order a refund of fees as a result of a complaint being upheld for “some other perceived wrongdoing”.
- [24] He defended the appropriateness of the term in the contract which provided that if the client terminates the agreement, then “all fees plus cost (if any) shall immediately become due and payable.”
- [25] The justification was that a client may withdraw after a critical point having gained a certain amount of value. He said such a provision was not uncommon for licensed immigration advisers. Further, Ms KFTO had undertaken a good deal of work prior to the contract being signed, so the fees had in fact been earned at the time the contract was terminated.
- [26] Mr Laurent said that initially Ms KFTO felt she was justified in retaining the fee, but after reflection had in fact proposed to make a full refund of \$2,250, and prepared a cheque to make that payment in December 2010. She had however taken legal advice, which was to the effect that she could compromise her response to the complaint, as the refund could be viewed as an admission.

Decision

Failure to communicate significant matters prior to written terms of engagement

- [27] The issues that arise in the present case arise from miscommunication. Mr Laurent correctly identified the crux of the miscommunication:
 - [27.1] Ms CBC understood she would come to New Zealand, at least with a work permit, and likely a job;
 - [27.2] Ms KFTO always anticipated Ms CBC would arrive and enter New Zealand with a visitor's permit, find work here, and then apply for a work permit.
- [28] I accept Mr Laurent's submission that Ms KFTO made assumptions Ms CBC had a greater understanding of the process than she did. However, that does not establish Ms KFTO discharged her professional duties.
- [29] It was Ms KFTO's duty to ensure her client could provide informed consent to the course of action proposed by the time she engaged Ms KFTO. There will be cases where an adviser is engaged, such as to give initial advice, with little background. In the present case, the agreement to engage Ms KFTO involved a substantial commitment from Ms CBC, as she was committing to migration.
- [30] Ms CBC's plans involved committing to travel to New Zealand, at least suspend her career in South Africa, and take up work here; she contemplated potentially residing permanently in New Zealand.
- [31] Such decisions are significant life events, and Ms KFTO had a professional duty to ensure Ms CBC understood the immigration processes. Without that understanding, she could not sensibly engage Ms KFTO to provide professional services to implement her plans.
- [32] Clause 1.5(a) of the Code requires that before any agreement is entered into, clients must be made aware, in writing and in plain language, of the terms of the agreement and all significant matters relating to it. In the present case, the agreement was to assist with services relating to Ms CBC migrating from South Africa to New Zealand. It was necessary for her to be informed of at least the process she was engaging with.
- [33] The requirements would be readily fulfilled by a letter or “factsheet” which contained the essential information. It did not need to be complex, but Ms CBC should have been told Ms

KFTO's proposal was that: Ms CBC travel to New Zealand and enter with a visitor's permit, then she would seek employment, and only when she had a job offer could she then apply for a work permit. The material before the Tribunal indicates Ms CBC was never given this information, so made her own and incorrect assumptions. It followed that the professional relationship between Ms CBC and Ms KFTO was founded on misunderstanding.

- [34] I am satisfied Ms KFTO's failure to provide Ms CBC with a basic understanding of the immigration requirements and process amounted to a breach of clause 1.5(a) of the Code.
- [35] The preliminary advice needed to cover other issues such as what Ms CBC's prospects of obtaining a work permit were. The correspondence does appear to deal adequately with that issue.
- [36] I note Ms KFTO indicated to Ms CBC that she should not expect to find employment until she came to New Zealand; however she never explained that she needed an offer of employment before the process of applying for a work permit could begin.

Inadequate description in the written terms of engagement

- [37] Clause 1.5(b) of the Code requires that agreements provide a full description of the services to be provided. In the present case, the description is limited. It in fact only describes points where fees become payable, and does not attempt to describe the work, even in an abbreviated way.
- [38] It is appropriate to give due consideration to any background understanding, which may make a brief description understandable to the parties. However, Ms CBC did not understand the process, as Ms KFTO had failed to set it out. Further, Ms CBC was under the impression that far more services than Ms KFTO intended to provide were offered, and it was a reasonable view given the extensive description of services in Ms KFTO's email of 23 February 2010, and the failure to set out the services to be provided in the agreement.
- [39] I am satisfied Ms KFTO did not comply with the clause 1.5(b) of the Code as she failed to set out what services she was to provide in the agreement.
- [40] Further, the description of services does not make it clear whether the services contracted for relate to a work permit; or a work permit and completing an application for residence; or either a work permit or residence as alternatives. The schedule to the agreement refers to fees relating to both processes, but does not describe the work to be undertaken.

Setting fees that were not fair and reasonable

- [41] The remaining issue is the manner in which Ms KFTO dealt with Ms CBC terminating her engagement.
- [42] Mr Laurent has submitted the Tribunal has no power to "effectively set aside the terms of an agreement for services". That is no doubt correct. However, the Tribunal may well find that a complaint should be upheld on the basis that a licensed immigration adviser has included inappropriate terms in an agreement, contracted for the payment of excessive fees, or applied the agreement in a manner that breaches the Act, or the Code.
- [43] In the present case, Ms CBC complains that Ms KFTO has set fees that were not fair or reasonable, and accordingly retained funds to which she is not entitled. The Code required her to set fees that were fair and reasonable, and the terms of an agreement will not override that obligation.
- [44] It appears Ms CBC was a trusting client, who willingly relied on Ms KFTO as a professional person to deal with the issues arising. The ready trust of clients is one of the benefits derived from being a member of a licensed profession. The practitioner's obligation is to ensure that trust is respected and discharged.
- [45] Ms KFTO acknowledges Ms CBC paid more than she was required to pay on signing the agreement. The initial payment required was \$500, and she paid \$2,250.

- [46] When Ms CBC came to New Zealand she was surprised, as she had not understood the process Ms KFTO contemplated. I have found that was due to Ms KFTO failing to provide adequate information for Ms CBC.
- [47] When Ms KFTO's engagement was terminated, she elected to use the terms of the agreement to refuse to repay Ms CBC any of the money she paid. That included \$1,750 which Ms CBC had not even been expected to pay at that point.
- [48] Mr Laurent has pointed out Ms KFTO did a good deal of work prior to the agreement.
- [49] He has also said penal terms in agreements between licensed immigration advisers and their clients, where all fees will be payable and immediately recoverable on a client terminating an agreement, are common.
- [50] I do not consider either proposition assists Ms KFTO.
- [51] First, Ms KFTO was not entitled to payment for work prior to her engagement, and she has not demonstrated the work went beyond dealing with some routine pre-engagement emails.
- [52] Second, a professional person may reasonably expect to recover the cost of a cancelled engagement which results in time lost that cannot be recovered. However, a penal provision that results in a client having to pay all the fees for a service that has not been provided may well be unprofessional.
- [53] A professional relationship involves trust and personal qualities, and a professional service provider must respect a client's right to choose a new provider. Applying a penalty intended to "lock in" a client, rather than reflect true costs may well amount to unprofessional conduct.
- [54] However, in the present case it is not necessary to determine whether the penalty clause and the application of it was unprofessional.
- [55] That is because I am satisfied Ms KFTO set fees for the services she provided which were not fair or reasonable in the circumstances. In an email dated 8 September 2010 from Ms KFTO to Ms CBC, Ms KFTO said in relation to her refusal to refund fees:
- "Please refer to the agreement you signed, unless I have done something wrong or refuse to do something there is no grounds for you to cancel. As explained previously, the work starts when you arrive."
- [56] The terms of the agreement did not absolve Ms KFTO from her obligation to set fees that were fair and reasonable. The requirements of clause 8 of the Code cannot be contracted out of.
- [57] Ms KFTO was demanding a fee of \$2,250. She was aware \$1,750 had been paid when it was not due. She had done virtually no work pursuant to the agreement, as she acknowledged "the work starts when you arrive". Ms CBC had effectively terminated her engagement at the point when she did arrive.
- [58] Ms KFTO has not justified the fee in terms other than that the agreement gave her the right to take it.
- [59] I am satisfied Ms KFTO breached clause 8 the Code, as she set fees that were not fair and reasonable in the circumstances.
- [60] I accept that in December 2010 Ms KFTO had decided to refund the fees in full, and has deferred doing so on legal advice.

Conclusion

- [61] A breach of the code is a ground for upholding a complaint pursuant to section 44(2)(e). It follows that the complaint is upheld, due to the breaches of clause 1.5(a) and (b), and also clause 8.

Submissions on Sanctions

- [62] Given the findings, disciplinary sanctions under section 51 of the Act may be imposed by the Tribunal.
- [63] Section 51 provides for disciplinary sanctions to be imposed when a complaint is upheld.
- [64] Ms CBC has indicated she seeks a refund of fees paid. That is part of the compensation the Tribunal will consider. I will treat the fees paid as \$2,250, and a bank fee paid of approximately \$250 to effect the transfer of the fees, unless there is any indication to the contrary. I note that Ms KFTO has indicated she proposed to refund the fees in full. If that occurs prior to dealing with disciplinary sanctions it will be taken into account.
- [65] 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.
- [66] Ms KFTO will have the opportunity to respond to any submissions from the Authority and Ms CBC. Whether or not they make submissions, Ms KFTO may provide submissions on penalty.
- [67] The timetable for submissions will be as follows:
- [67.1] The Authority and Ms CBC are to make any submissions within 10 working days of the issue of this decision.
- [67.2] Ms KFTO is to make any submissions (whether or not the Authority, or Ms CBC, make submissions) within 15 working days of the issue of this decision.
- [68] 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 25th day of May 2012

G D Pearson
Chair