

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

Decision No: [2012] NZIACDT 25

Reference No: IACDT 020/10

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

Vishal Saraswat

Complainant

AND

Marion Chase-Seymour

Adviser

DECISION

REPRESENTATION:

Adviser

In person

Complainant

In person

Date Issued: 29 May 2012

DECISION

Outline

- [1] This complaint concerns an initial consultation between Mr Saraswat and Ms Chase-Seymour. Mr Saraswat sought Ms Chase-Seymour's advice regarding immigration issues.
- [2] They disagree regarding whether there was to be a fee for this consultation.
- [3] Mr Saraswat says they had a preliminary discussion regarding a potential application for residence; and she told him there would be no fee, but he was charged \$250.
- [4] Ms Chase-Seymour says she charges an initial consultation fee, as some potential clients otherwise get free advice, and then undertake the work themselves. She said she told Mr Saraswat the fee would be \$250 before the consultation, and that was routine in her practice.
- [5] However, the Tribunal has indicated to the parties that rather than trying to resolve the different claims regarding communications between Mr Saraswat and Ms Chase-Seymour, the issue is whether Ms Chase-Seymour went through the correct procedure to charge a fee. That procedure is intended to avoid disputes of this kind.
- [6] Accordingly, the issue for the Tribunal is to identify the correct procedure to set a fee for an initial consultation, and consider what occurred in the present case.

The Tribunal's Identification of the Issues

- [7] The Tribunal issued a minute identifying the issues on the basis of the papers then before the Tribunal, and giving the parties the opportunity to respond. The parties were put on notice regarding the following matters.
- [8] There was a conflict in what Mr Saraswat and Ms Chase-Seymour say regarding whether there was an agreement for a free consultation.
- [9] Any party could seek to have an oral hearing convened. However, it appeared unlikely that such a hearing would be of real value in determining the complaint.
- [10] The key issue as it appeared from the papers was that Ms Chase-Seymour did not go through the client engagement process 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 2007 (the Act). She has regardless charged a fee for immigration advice.
- [11] An objective of the Code is to minimise misunderstanding regarding fees. The Code requires that fees must be set out before commencing work incurring costs.
- [12] When the Code is complied with, there is little scope for the sort of dispute that has arisen in the present case. One possibility was that Mr Saraswat and Ms Chase-Seymour had each misunderstood what the other party believed in relation to fees. That appears to be one reason the Code requires a written agreement before any fees are charged for client services.
- [13] Clause 8 of the Code provides:
 - "8. Fees
 - A licensed immigration adviser must:
 - a) set fees that are fair and reasonable in the circumstances; and
 - b) before commencing work incurring costs, set out the fees and disbursements (including Immigration New Zealand fees and charges) to be charged, including the hourly rate and the estimate of the time it will take to perform the services, or the fixed cost for the services;"

[14] Clause 1 of the Code provides:

“1.5 Written Agreements

A licensed immigration adviser must ensure that:

- a) before any agreement is entered into, clients are made aware, in writing and in plain language, of the terms of the agreement and all significant matters relating to it; and
- b) agreements contain a full description of the services to be provided by the adviser; and
- c) clients are advised that they are entitled to seek independent legal advice before entering into agreements; and
- d) clients confirm in writing that they accept the terms of agreements; and
- e) changes to the terms of agreements are recorded and agreed in writing.”

[15] The papers provided no evidence of Ms Marion Chase-Seymour having set out the fees she proposed to charge, with a written communication notifying Mr Saraswat of the obligation to pay fees, and the amount. The Code, it appeared, required that.

[16] The minute noted that these requirements appeared fair and appropriate, and if the service is a fixed fee initial consultation, a simple written agreement reflecting that is both possible and adequate. A written agreement for a modest fixed fee for a very specific service need not be a complex document, and indeed will likely communicate more effectively if it is not. If engaged to provide further services, a subsequent agreement identifying the services required, and addressing the issues potentially arising in an ongoing professional relationship, would then follow.

[17] The Tribunal recognised it is important that potential clients and advisers can discuss their requirements, and those services may be provided before a formal engagement. If there is no fee charged for this type of initial consultation, a written agreement is not required.

[18] Accordingly, the view was open Ms Chase-Seymour's business practice of charging a fixed fee for an initial consultation is understandable, and proper. However, she needed to do so using a simple written communication, and giving the relevant information to her client, as required by the Code.

[19] It would also have been open to Ms Chase-Seymour to use the model of an initial consultation that would or would not lead to an agreement to engage her; but unless she was engaged and an agreement was reached to pay fees in accordance with the Code, no fees could be recovered.

[20] Accordingly, the Tribunal expressed the view the complaint could be upheld on the following grounds:

[20.1] Ms Marion Chase-Seymour breached Clause 1 of the Code, as:

[20.1.1] She was required to make her client aware of the terms of any agreement she had with him, in writing, and in plain language.

[20.1.2] Clause 8 of the Code required that before commencing work incurring costs, she was required to set out the fees to be charged.

[20.1.3] She sought to recover fees from her client on the basis he agreed to engage her services, and pay for them. She had failed to make her client aware in writing that he agreed to pay fees to her.

[20.2] However, while acting in that manner she gave an accurate overview of the relevant issues, correctly noting further investigation would be required if she was engaged to undertake ongoing work.

Response to the Minute

Ms Chase-Seymour

- [21] Ms Chase-Seymour responded to the minute with a submission that there was a distinction between “potential clients”, and “clients”. She said clause 1.5(a) of the Code does not apply to potential clients, only clients.
- [22] As Mr Saraswat was only a potential client, the requirements did not apply.
- [23] Ms Chase-Seymour emphasised she conducted her practice with respect for the Code, and its requirements, and if she was in error it was a product of misinterpretation and not any intentional wrongdoing.

Mr Saraswat

- [24] Mr Saraswat reiterated his claims regarding an agreement that the consultation would be free, and complained regarding Ms Chase-Seymour endeavouring to collect the fee.
- [25] Ms Chase-Seymour responded to that submission. She challenged Mr Saraswat’s evidence, and the practicability of compliance with the Code.

Decision

- [26] I am satisfied the complaint must be upheld.
- [27] The Code is clear; when a licensed immigration adviser charges a fee, they must invariably set out the fees and disbursement to be charged in writing.
- [28] Clause 8(b) of the Code is unequivocal; the adviser must: “before commencing work incurring costs, set out the fees and disbursements ... to be charged”.
- [29] Ms Chase-Seymour contends that she did so orally, and that was adequate compliance.
- [30] However, clause 8(d) requires that the adviser must “ensure that fees, disbursements and payment terms and conditions are provided to clients in writing prior to the signing of any written agreement”. Further, clause 1.5 of the Code requires a written agreement be entered into with clients, and it is to set out the services to be provided and other terms.
- [31] Ms Chase-Seymour’s claim that Mr Saraswat was not a client has no merit. He was a person receiving immigration advice, and she could only give the advice lawfully as she was a licensed immigration adviser (section 6 of the Act). She was receiving fees for providing that service. There is no sensible basis to conclude Mr Saraswat was not a client receiving professional services.
- [32] The Code has a bright-line test; when a licensed immigration adviser is being paid for services, then they are obliged to set out the fees, and enter into a written agreement. They are also required to provide that client with a copy of the Code, and their internal complaints procedure.
- [33] The Code is mandatory as it is established under section 37 of the Act, subject to Ministerial approval, and notified in the *Gazette* (section 38).
- [34] The Tribunal does not accept the Code is difficult or onerous in relation to initial consultations of the kind that occurred in the present case. This initial consultation involved a specific, fixed fee service. An agreement to cover that need only be simple, signed by both parties, and accompanied by the Code and internal complaints procedure.
- [35] The value of this simple compliance procedure is amply demonstrated by the facts of the present case. It has degenerated into a conflict, where each party is attacking the integrity of the other in relation to a matter where there should be little or no room for misunderstanding.

Conclusion

- [36] I am satisfied Ms Chase-Seymour breached the Code, as she failed to comply with it for the reasons discussed. A breach of the code is grounds for upholding a complaint pursuant to section 44(2)(e), and it follows the complaint is upheld.
- [37] I make no finding on what was said by Mr Saraswat and Ms Chase-Seymour regarding fees at the time of the consultation, as it is not necessary to do so.
- [38] The Tribunal notes that a licensed immigration adviser may well engage in unprofessional conduct if they seek to recover a fee when they have not gone through the correct procedure for charging a fee. In the present case, the recovery action Ms Chase-Seymour undertook was a result of misunderstanding. Accordingly, the recovery action she undertook when not entitled to claim the fee does not add to the complaint in the present case. The fee is not recoverable.

Submissions on Sanctions

- [39] Given the findings, section 50 allows the Tribunal to take no further action, or impose one or more of the disciplinary sanctions under section 51 of the Act.
- [40] The Tribunal will consider the possibility of taking no further action.
- [41] The parties will have the opportunity to present submissions.
- [42] The timetable for submissions will be as follows:
- [42.1] The Authority and Mr Saraswat are to make any submissions within 10 working days of the issue of this decision.
- [42.2] Ms Chase-Seymour is to make any submissions (whether or not the Authority, or Mr Saraswat, make submissions) within 15 working days of the issue of this decision.
- [43] Normally decisions are published, with the names of the parties, after five working days. However, the view may be open the breach in the present case involved a relatively minor lapse, which arose not due to a wilful refusal to comply with the Code, but a failure to apply it correctly in a specific circumstance. Further, that circumstance may be one where there has been some degree of misunderstanding in the profession, and this decision will create an opportunity to ensure the requirements are fully understood.
- [44] The Tribunal will accordingly consider not publishing the names of the parties in this case.

DATED at WELLINGTON this 29th day of May 2012

G D Pearson
Chair