

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

Decision No: [2012] NZIACDT 34

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

IMPOSITION OF DISCIPLINARY SANCTIONS AND LIMITATION ON PUBLICATION

REPRESENTATION:

Adviser: S Laurent, Laurent Law, Auckland

Complainant: In person

Date Issued: 29 June 2012

DECISION

The Decision on the Complaint

- [1] In a decision dated 25 May 2012, the Tribunal upheld a complaint in this matter.
- [2] The facts and background are set out in the earlier decision. The essential narrative of the complaint is:
 - [2.1] 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.
 - [2.2] 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.
 - [2.3] The Tribunal found:
 - [2.3.1] Ms KFTO failed to provide Ms CBC with a basic understanding of the immigration requirements and process. She also failed to set out the services required in the service delivery agreement. That amounted to breaches of clause 1.5(a) and (b) of the Code.
 - [2.3.2] When the professional engagement ended, Ms KFTO set a fee for her work which was excessive, and refused to refund fees paid. That amounted to a breach of clause 8 of the Code.
- [3] The sanctions which are potentially open are prescribed by section 51.

Submissions on Disciplinary Sanctions

Ms CBC

- [4] Ms CBC emphasised the trust she placed in Ms KFTO, and the significance of migrating. She found the issues giving rise to the complaint affected her significantly.
- [5] Ms CBC has consistently sought a refund of the fees she paid, including bank charges for making the payment. That amounts to \$2,500.

Ms KFTO

- [6] Mr Laurent presented submissions for Ms KFTO, the submissions were supported by extensive testimonials from a range of people who had professional dealings with Ms KFTO. They consistently speak of Ms KFTO having high standards of professional service delivery.
- [7] Material relating to Ms KFTO's licence renewal process was produced, and it supports the view Ms KFTO maintains high standards in her practice.
- [8] A medical report from a consultant physician was also produced.
- [9] Mr Laurent submitted the material supporting his submission demonstrated the circumstances do not required sanctions aimed at causing Ms KFTO to remediate her practices, as the complaint was an isolated lapse. He particularly emphasised the material relating to the renewal process; and that was supported by client testimonials.
- [10] Mr Laurent reiterated Ms KFTO is willing to refund all fees immediately, and is only deferring until this decision is issued. He said the fee was reasonable as a fee for the work contemplated; the contentious element only arose when Ms KFTO relied on the contract to refuse a refund when the engagement was terminated.

- [11] Mr Laurent submitted Ms KFTO's name and identifying details should not be published. He accepted the usual course is that when a complaint is upheld it will be published, however he raised a number of issues which weigh in favour of name suppression in this particular case. The factors were:
- [11.1] The case was not one where a practitioner had shown "flagrant disregard of the relevant rules" (*Clark v Director of Proceedings* (22 February 2010, HC Auckland per Courtney J)).
- [11.2] The complaint was a "one off" lapse, not reflective of disregard for professional standards.
- [11.3] There would be a disproportionate effect on Ms KFTO, which largely flowed from the significant contribution she has made to her profession.
- [11.4] Ms KFTO has developed a medical condition, and the consequences of this complaint have contributed to it.

Decision

Penalty

- [12] I am very conscious of the vulnerability and trust Ms CBC has emphasised.
- [13] The Act is, to a significant degree, premised on the vulnerability of migrants dealing with a system they are not familiar with, and having to place trust in professionals they have little ability to evaluate. Ms CBC has compellingly expressed how that applies to her.
- [14] However, I am satisfied the complaint was an isolated incident.
- [15] There were two steps in the lapse from professional standards.
- [16] The first a failure to adequately communicate in relation to the immigration process, and set out the services contracted for.
- [17] There are some significant professional challenges dealing with clients and potential clients where "face to face" communication is not possible. High quality written communication and record keeping is a critical element of good service delivery for clients, and professional protection for practitioners.
- [18] I am satisfied Ms KFTO did not intentionally mislead Ms CBC, however she did fail to have adequate regard to her client's needs, and entitlement.
- [19] I accept Mr Laurent's submission Ms KFTO does not require any penalty or directions either to appreciate she was in error, or instruction to avoid repeating the error.
- [20] The second element related to retaining a fee in reliance on what amounted to a penalty clause in an agreement. A practitioner is required to act professionally under the Code, and set fees that are fair and reasonable. It follows, that a practitioner can never simply rely on a term of a contract to demand or retain fees that are excessive for the work undertaken.
- [21] As noted in the decision upholding the complaint, circumstances such as the loss of opportunity to take other work, and the like, may be factors in what is reasonable in a given case.
- [22] In this case it was an error of judgment not to refund all, or a significant portion, of the fee paid, in mitigation I accept Ms KFTO did reflect and has been willing to refund the fee for some time.
- [23] While regarding the two factors as a "one off" lapse, I cannot accept Mr Laurent's submission that no penalty is required. Ms KFTO failed to have adequate regard to her client's interests, perspective and entitlement. I consider the appropriate penalty to reflect the lapse is censure, and a penalty of \$1,000.

Publication

- [24] I am satisfied, by a fine margin, that publication of the names and identification of the parties should be prohibited.
- [25] In making that decision it is critically important I am satisfied the complaint is at the low end of the scale, and Ms KFTO has established the lapse does not reflect her usual standards of professional practice.
- [26] In addition, I accept publication would weigh heavily on Ms KFTO. Ms KFTO has made a significant contribution to her profession, and takes pride in a reputation for a high standard of professional service. It appears the incongruity of that background, against the present lapse, has led to stress, pressure and embarrassment, which publicity will magnify.
- [27] The medical condition is concerning to Ms KFTO, but not life threatening. The medical report does indicate the symptoms will be affected by stress of this kind.
- [28] I am satisfied that in these circumstances there is real benefit in allowing Ms KFTO to treat this matter as concluded, rather than face the consequences of publication. Further, that is not inconsistent with the public interest; given the extensive and compelling evidence of Ms KFTO's usual professional standards.

Compensation

- [29] For the reasons identified in the decision upholding the complaint, Ms CBC received no benefit for the fee she paid. She is entitled to have the entire fee refunded, and be compensated for the bank charges associated with making the payment.
- [30] Accordingly, an order will be made for the refund of fees, and compensation amounting in total to the sum of \$2,500.

Orders

- [31] The Adviser is censured.
- [32] The Adviser is ordered to pay a penalty of \$1,000.
- [33] The Adviser is ordered to refund fees, and compensate the complainant for bank fees in making the payment, being in total \$2,500.
- [34] This decision and the decision upholding the complaint will be published, with the names of the parties, and identifying information, removed.
- [35] There has been no application for an order for payment of the costs and expenses of the inquiry, so no order is made.

DATED at WELLINGTON this 29th day of June 2012

G D Pearson
Chair