

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

Decision No: [2012] NZIACDT 38

Reference No: IACDT 005/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

Peter Cavanagh

Complainant

AND

**Barbara Bernadette Nassiep (aka
Parker)**

Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 31 July 2012

DECISION

Introduction

- [1] This matter concerns a complaint that Ms Nassiep failed to lodge visa applications for Mr Cavanagh competently. The first, he says was late, and relied on the grounds that were bound to fail.
- [2] He also says that when Ms Nassiep became licensed, she did not go through the process for establishing a professional relationship, including having a written agreement.
- [3] Mr Cavanagh also complained Ms Nassiep did not provide the professional support and service delivery he was entitled to expect. She then ended her practice and failed to refund him fees, or provide appropriate ongoing professional support. Further, during the last part of the time she was undertaking work illegally, as her licence had expired.
- [4] The complicating feature of this complaint is that Ms Nassiep was not licensed during the whole time she was providing immigration services to Mr Cavanagh. This Tribunal can only deal with the conduct of licensed immigration advisers, and what formerly licensed people did when they were licensed.
- [5] Accordingly this Tribunal can only deal with the second of the two applications, how Ms Nassiep progressed it, failure to establish the professional relationship, and how she managed the termination of her practice and refund of fees when her licence lapsed. Beyond that, the issues are not for this Tribunal to determine.
- [6] Accordingly the issues are, did Ms Nassiep:
 - [6.1] Lodge the second application properly?
 - [6.2] Establish the professional relationship properly?
 - [6.3] Manage the second application properly?
 - [6.4] Have to refund fees, and if so, did she do so?
 - [6.5] Arrange appropriate representation and professional support for Mr Cavanagh when her licence lapsed?

The Complaint and the Response

Ms Nassiep was licensed only for part of the time to which the complaint relates

- [7] This complaint relates both to times when Ms Nassiep was a licensed immigration adviser, and when she was not.
- [8] As this Tribunal only deals with the conduct of licensed immigration advisers, it is important to be clear that Ms Nassiep was a licensed immigration adviser only during the year from 30 October 2009 to 29 October 2010.
- [9] The Authority produced correspondence showing Ms Nassiep had been notified her licence expired on 29 October 2010, and she acknowledged that.
- [10] The time at which the licensing regime under the Immigration Advisers Licensing Act 2007 ("the Act") commenced is also relevant.
- [11] The Act came into force one year after it received the Royal assent, which was on 4 May 2007, so it operated as from 5 May 2008.

- [12] There was a period of “grace” for a year after the Act came into force until it was compulsory for onshore advisers to hold a licence when providing immigration advice. Between 4 May 2008 and 4 May 2009, advisers could apply for licences.
- [13] The Licensed Immigration Advisers Code of Conduct 2008 (“the Code”) had been developed and was published on 6 March 2008 (refer sections 37 and 38 of the Act).

The complaint

- [14] The complaint raises an issue over an application for residence, which Ms Nassiep lodged for Mr Cavanagh in 2008. This was during the period when it was not compulsory to hold a licence, and Ms Nassiep did not hold a licence at that time.
- [15] On 1 August 2008 Mr Cavanagh engaged Ms Nassiep to act for him. He wished to apply for residence. The application was lodged under the Skilled Migrant category, but it was declined. That was because it was not lodged prior to Mr Cavanagh turning 56 years of age, which was necessary for the category of residence relied on.
- [16] The last day to make the application was 4 September 2008, and it was filed on 9 September 2008. Ms Nassiep failed to lodge the application on time, when that process was within her control.
- [17] However, as Ms Nassiep was not licensed at that time, her actions are not matters within the Tribunal’s jurisdiction.
- [18] A further application for residence was lodged on 7 May 2010. Ms Nassiep was acting for Mr Cavanagh in relation to this application also. This second application was lodged during the year when Ms Nassiep was a licensed immigration adviser.
- [19] In relation to the second application, Mr Cavanagh complains that Ms Nassiep:
 - [19.1] Was unethical, and failed to comply with the Code of Conduct.
 - [19.2] Failed to identify in writing what services she was to provide, and did not provide the services she was to provide.
 - [19.3] Did not inform Mr Cavanagh of information requests from Immigration New Zealand, and responded without discussing the issues with him.
 - [19.4] Failed to include “points” when making the application for Mr Cavanagh’s sister-in-law being a New Zealand resident.
 - [19.5] Ended her practice part-way through the engagement, and failed to make adequate arrangements to deal with the incomplete work.
 - [19.6] Sent personal documents to Mr Cavanagh’s niece, without authority. In doing so, she breached her confidentiality obligations, and also included confidential information relating to other clients in the material disclosed.
- [20] Mr Cavanagh provided documentation to support his complaint. Significant elements were:
 - [20.1] Records relating to payment of Ms Nassiep’s fees, which indicate:
 - [20.1.1] a total fee of \$7,505;
 - [20.1.2] the fee being invoiced on 15 October 2008; and
 - [20.1.3] payments made from October 2008 to 9 July 2009.
 - [20.2] On 10 November 2010, Ms Nassiep received notice of “potentially prejudicial information” from Immigration New Zealand concerning the second residence

application. It notified concerns as to whether Mr Cavanagh met the requirements to be a qualified diesel mechanic, which was necessary for the application to succeed. The letter gave a period of three weeks, until 1 December 2010, to respond.

- [20.3] Ms Nassiep sent a letter to Immigration New Zealand dated 17 November 2010 in response to the 10 November 2010 letter. It was a substantive response to the letter, and argued that the material submitted was sufficient for a favourable decision. She did this without Mr Cavanagh's knowledge or instructions.
- [20.4] In a letter dated 20 November 2010 to Mr Cavanagh, Ms Nassiep said she intended to close her practice. The letter suggested Mr Cavanagh simply needed to wait for Immigration New Zealand to process his application. The letter also had handwritten notes saying points had not been awarded for Mr Cavanagh being a diesel mechanic, and he should appeal. However, Ms Nassiep could not assist as she was not in New Zealand.
- [20.5] Ms Nassiep sent an email to Immigration New Zealand dated 24 November 2010. It referred to Mr Cavanagh's qualifications, and said she was leaving New Zealand two days later. It suggested Immigration New Zealand should liaise with Mr Cavanagh after that.
- [20.6] An email from Immigration New Zealand also dated 24 November 2010 replied to Ms Nassiep's email. The email said there were fundamental difficulties with Mr Cavanagh being awarded points for the employment relied on.
- [20.7] An email from Ms Nassiep to Immigration New Zealand, dated 25 November 2010, further discussed the employment issues.
- [20.8] On 19 December 2010, Mr Cavanagh's niece received documents which showed that Immigration New Zealand had declined his application for residence on 1 December 2010.

The response

- [21] Ms Nassiep failed to respond to the complaint, despite the Authority giving her notice.
- [22] It appears Ms Nassiep did not provide a forwarding address, and simply told the Authority she was relocating to Australia. It is possible she has not received the material the Authority forwarded to her for comment; however the Authority did leave a telephone message on her cell phone. The Authority also sent the material by post and email to the last known addresses.
- [23] It was part of Ms Nassiep's professional obligations to ensure she met obligations to her clients, and that necessarily required her to ensure contact could be maintained to address outstanding issues when she closed her practice. She could have easily achieved that through an email address she could access internationally. If Ms Nassiep has not received notice of the complaint, it is a direct consequence of her failing to provide updated contact information to the Authority.
- [24] Mr Cavanagh complains that Ms Nassiep "absconded", having taken fees, and failed to deliver services in accordance with her professional obligations. Her failure to be contactable is an element of his complaint.
- [25] Section 93 of the Act provides that any notice or other document required to be served on any person under the Act may be served in various forms. The responsibility to provide an effective address for service was hers.
- [26] On 27 June 2012, the Tribunal issued a Minute to give the parties notice of the issues apparently raised by the complaint, and potential conclusions on the information held. The Minute invited the parties to respond. The Minute was served in the manner provided by section 93. There has been no response.

Jurisdiction

Issues in and outside of the Tribunal's jurisdiction

- [27] This Tribunal's jurisdiction applies only to licensed immigration advisers. Accordingly, work performed and fees expended for work prior to Ms Nassiep becoming licensed are not within the Tribunal's jurisdiction. That work includes the initial application for residence, which was apparently filed late. Whether Ms Nassiep was at fault or not is outside the Tribunal's jurisdiction as she was not a licensed immigration adviser in September 2008 when the application was filed.
- [28] The complaint, as it relates to the time when Ms Nassiep was a licensed immigration adviser, is professional failings when she continued the process of seeking residence and filed a further application. Mr Cavanagh complains that during the course of that work she failed to meet her professional obligations, and when she ceased to be licensed she failed to end the professional relationship properly in relation to fees and service delivery.
- [29] There is evidence presented with the complaint that Ms Nassiep acted unlawfully, as she continued to provide immigration advice after her licence expired. This would appear potentially to amount to an offence under section 63 of the Act. However, again, the Tribunal has no jurisdiction in relation to this.

Professional obligations at the time Ms Nassiep became licensed

- [30] From the point at which Ms Nassiep became a licensed immigration adviser, regardless of what had occurred prior, she was obliged to conduct her professional relationships in accordance with the Code.
- [31] The Code contains the conventional contemporary obligations on a professional person providing services to the public. Clause 3 of the Code requires all licensed immigration advisers to maintain professional business practices relating to finances, records, documents, and contracts.
- [32] Clauses 1 and 8 of the Code require client relationships to be documented in writing, which includes setting fees and identifying the services to be provided.
- [33] When a person enters into the professional standing of being a licensed immigration adviser, they are obliged to put their professional relationships in order, and be in full compliance with the Code from that point.
- [34] The Code is unambiguous, and a licensed immigration adviser is required to maintain a separate bank account for holding all clients' funds paid in advance for fees and/or disbursements, and use the funds only for the purpose for which they were paid to the adviser (Code, clause 4).
- [35] Accordingly, on entering into the licensing regime, the newly-licensed adviser must place any fees clients have paid and to which they are not entitled, into a separate bank account. The adviser may only disburse the funds in accordance with their professional obligations.
- [36] It would follow that from the time at which Ms Nassiep became a licensed immigration adviser, this Tribunal had jurisdiction to deal with a complaint relating to how she dealt with and accounted for any unearned fees, documented the professional relationship, and discharged her professional obligations.

The Issues

[37] The issues to resolve are:

Fees

[37.1] At the point in time when Ms Nassiep became a licensed immigration adviser (30 October 2009), what fees had she received from Mr Cavanagh which were unearned and accordingly were outstanding as fees paid in advance?

[37.2] To what extent has Ms Nassiep earned those fees, and accounted for them in accordance with her professional obligations?

Establishing a proper professional relationship

[37.3] Did Ms Nassiep enter into a written agreement and otherwise comply with the Code in relation to the services to be provided, and fees to be paid?

Competent preparation of second application for residence

[37.4] Did Ms Nassiep competently advise Mr Cavanagh in relation to the second application, and file an appropriate application? That includes the identification of the “points” to be claimed, and the employment relied on.

Professional communications

[37.5] Did Ms Nassiep take proper instructions when she received queries from Immigration New Zealand? If not, is it a matter within the Tribunal’s jurisdiction?

Professional obligations on closing practice

[37.6] Did Ms Nassiep properly conclude her professional engagement with Mr Cavanagh when she ceased to hold a licence? That includes the obligation to deal properly with personal information.

Decision

Fees

[38] I am satisfied Ms Nassiep did not earn any of the fee of \$7,505 she received.

[39] The material indicates that Ms Nassiep failed to lodge the first residence application on time, and accordingly wholly failed to deliver the service to which the fee related.

[40] It appears Ms Nassiep had instructions to continue with the residence application on a different basis, and did not advance that process until the second application was prepared and then lodged on 7 May 2010.

[41] The second residence application failed to meet Immigration New Zealand’s requirements.

[42] There could be explanations for lodging an application that had a reasonable prospect of success, which nonetheless failed. However, in the absence of an explanation, I am satisfied on the balance of probabilities that Immigration New Zealand’s assessment that the application could not succeed ought to have been clear to Ms Nassiep.

[43] The record indicates that Ms Nassiep had access to the same information that caused Immigration New Zealand to conclude the application could not succeed.

[44] The view that Ms Nassiep failed to evaluate properly the grounds for the second application is furthered by the fact Mr Cavanagh appears not to have been advised of potential difficulties

prior to lodging the application. Ms Nassiep should have advised him of any foreseeable and reasonably likely difficulties.

- [45] I am satisfied the second application was ill-founded, and as with the first application, could not justify charging a professional fee.
- [46] Accordingly, on 30 October 2009 when she became licensed, Ms Nassiep was holding \$7,505 paid to her as fees for a service she had not delivered. She was obliged to treat that money as client funds at that point.
- [47] Ms Nassiep did not earn any of the fee after she became a licensed adviser because:
 - [47.1] She failed to comply with the Code in relation to setting fees (clause 8) and identifying the services to be provided in a written agreement (clause 1).
 - [47.2] She did not provide Mr Cavanagh with accurate and effective advice regarding the prospects of the second application.
 - [47.3] She advanced an application for residence that did not meet Immigration New Zealand's policy.
 - [47.4] These failures amount to a disregard for her professional obligations imposed by the Code (clauses 1, 3, 4, 8 and 9).
- [48] When her licence expired on 29 October 2010, Ms Nassiep held client funds of \$7,505 due to Mr Cavanagh, and she has failed to account for them. She was required to do so pursuant to clauses 4 and 3(d) of the Code.
- [49] Accordingly this aspect of the complaint is upheld.

Establishing a proper professional relationship

- [50] Ms Nassiep did not enter into a written agreement and complete the other steps required by the Code, which is an essential foundation for a professional relationship with a client (clauses 1, 8 and 9).
- [51] Mr Cavanagh said: "There was never a contract signed by either party it was solely based on trust and business ethics and a Code of Conduct".
- [52] This aspect of the complaint is upheld.

Competent preparation and advancement of second application for residence, and professional communications

- [53] Ms Nassiep has not provided the Authority or the Tribunal with a copy of her file, or a statement from her regarding her evaluation of the basis for the second application for residence.
- [54] The Tribunal does have evidence that Immigration New Zealand concluded the application could not succeed, and Mr Cavanagh was not informed of the issues and risks associated with his application.
- [55] The Code (clause 3) requires the details of material discussions with clients to be confirmed in writing. Accordingly, if Ms Nassiep had complied with the Code, she should have had a record of the advice given, showing a competent evaluation of the merits of the application.
- [56] Mr Cavanagh complains that Ms Nassiep failed to seek points on the basis of his sister-in-law being resident in New Zealand. Ms Nassiep has not answered that allegation. It is not essential to determine the merits of that point. Ms Nassiep filed an application that could not succeed. Whether the application could have been lodged differently and successfully is, for present purposes, of limited significance.

- [57] On receiving the letter from Immigration New Zealand dated 10 November 2010, giving notice of “potentially prejudicial information”, Ms Nassiep had an obligation to inform Mr Cavanagh (clause 3) and obtain instructions.
- [58] Mr Cavanagh was in contact with Ms Nassiep about that time, and she failed to inform him of the letter. She instead told him the application was going well. Further, she did not inform him when the application was declined. However, these matters occurred after Ms Nassiep’s licence had lapsed. Accordingly, the inappropriate communication is not within the Tribunal’s jurisdiction.
- [59] However, what is within the Tribunal’s jurisdiction is Ms Nassiep’s failure to arrange proper representation for her client at the point her licence expired on 29 October 2010. That is addressed in the following section.
- [60] This aspect of the complaint is upheld to the extent that Ms Nassiep failed to give Mr Cavanagh advice, lodge the second application with care, and obtain her client’s informed consent as to its prospects of succeeding. That is a breach of clause 1 of the Code, and grounds for complaint under section 44(2)(a) and (e) of the Act.
- [61] In other respects, the management of the application is outside the Tribunal’s jurisdiction.

Steps on closing practice

- [62] When Ms Nassiep ceased to be licensed, she was obliged to account to Mr Cavanagh for client funds she held, which for the reasons identified, are \$7,505, as already noted.
- [63] She was also obliged to tell Mr Cavanagh her licence had lapsed, arrange representation and a refund of fees. Instead, she misrepresented she was still a licensed immigration adviser. In her email to Mr Cavanagh dated 25 November 2010, for example, she included a statement regarding immigration advisers having to be licensed, and included her licence number. The deception occurred after her licence expired, so this is not within the Tribunal’s jurisdiction.
- [64] Ms Nassiep was also obliged to deal properly with personal documents. She sent personal documents to Mr Cavanagh’s niece, which breached his privacy, and sent copies of other client’s material to his niece with those papers. The papers relating to other clients were sent accidentally. However, those events also occurred after her licence lapsed.
- [65] Accordingly, in relation to this aspect of the complaint, it is:
- [65.1] upheld in respect of failing to refund fees (already addressed above);
- [65.2] upheld in respect of failing to ensure that Mr Cavanagh had the opportunity to get professional support when her licence lapsed (clause 1 of the Code); and
- [65.3] in other respects the grounds fall outside the Tribunal’s jurisdiction.

Conclusion

- [66] The Tribunal upholds the complaint in the respects identified. Each ground involves breaches of the Code. Section 44(2)(e) provides that a breach of the Code is grounds for upholding a complaint, and in addition section 44(2)(a) is a ground for upholding the complaint concerning negligent filing of the second application.

Submissions on Sanctions

- [67] Given the findings, section 50 allows the Tribunal to impose one or more of the disciplinary sanctions under section 51 of the Act.
- [68] The parties have the opportunity to present submissions.

[69] The timetable for submissions will be as follows:

[69.1] Mr Cavanagh and the Authority are to make any submissions within 10 working days of the issue of this decision.

[69.2] Ms Nassiep is to make any submissions (whether or not Mr Cavanagh or the Authority makes any submissions) within 15 working days of the issue of this decision.

[70] The parties are notified that 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 31st day of July 2012

G D Pearson
Chair