

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

Decision No: [2012] NZIACDT 42

Reference No: IACDT 029/11

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

Jonathan Mark Balich
Complainant

AND

Glen William Standing
Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 24 August 2012

DECISION

Introduction

- [1] Mr Balich engaged Mr Standing to provide immigration services. He complains Mr Standing failed to give him the advice he required to secure a permit. In addition an unlicensed person, at Mr Standing's instigation, unlawfully provided some of the professional services.
- [2] After the failure to provide the agreed services, Mr Balich says Mr Standing failed to refund the fees he had been paid. Mr Balich was put to the expense of making a new application after terminating Mr Standing's engagement.
- [3] Mr Balich provided evidence to support his claim, and despite the Tribunal requesting that Mr Standing provide his records and deal with the complaint, Mr Standing has not responded.
- [4] The Tribunal has found the material before it supports the complaint, and it has been upheld.

The Complaint and the Response

The complaint

- [5] On 16 July 2009 Mr Balich signed an agreement with Mr Standing for the provision of immigration services. Mr Standing was a licensed immigration adviser.
- [6] The professional fee for the services was £3,335, with further fees to be paid to third parties giving a total of £4,250. The agreement provided that half of the professional fee and some of the other fees would be paid initially, with the balance in a further instalment.
- [7] The agreement contained what it described as a "Performance Guarantee". The terms stated:

"If after the Principal Applicant has secured a suitable offer of full time employment, Golden Sands fails to achieve the Client's goal of Permanent Residency of New Zealand, Golden Sands will issue a full refund of its professional fees to the Client – less the cost of any Government fees, translation costs or disbursements paid."
- [8] There were various qualifications relating to the performance guarantee.
- [9] The immigration work involved arranging temporary visas for Mr Balich and his family, in addition to seeking residence.
- [10] Mr Balich's complaint has two elements:
 - [10.1] There were number of errors and mistakes in progressing Mr Balich's immigration applications.
 - [10.2] He was entitled to a refund of fees, and Mr Standing failed to honour that.
- [11] The complaints Mr Balich makes regarding incorrect advice are:
 - [11.1] He was told a work permit could be obtained after some 10 to 15 days, whereas the process would usually take four to six weeks. Mr Balich accordingly had difficulty meeting his commitment to commencing the position of employment he had been offered. He had made arrangements with the employer relying on Mr Standing's incorrect advice as to likely timing.
 - [11.2] Mr Standing advised Mr Balich his university degree would have to be assessed by the New Zealand Qualifications Authority, when in fact that was not correct, and points should have been claimed for it when the residence application was lodged.

- [11.3] A person named Maree Fleming in Mr Standing's office gave immigration advice regarding what was required in relation to Mr Balich's newborn daughter's immigration status.
- [12] In addition, Mr Standing lodged papers supporting a residence application with incorrect information, despite Mr Balich identifying the errors and asking for them to be corrected.
- [13] The residence application was accepted by Immigration New Zealand for consideration on 22 June 2010, but rejected as his employment did not qualify for the points claimed.
- [14] The difficulty was that he had a fixed-term position, and the position of employment would only meet immigration policy requirements if it was for an indefinite term.
- [15] Immigration New Zealand wrote on 17 August 2010 pointing out the difficulty.
- [16] Mr Standing replied on 13 September 2010, but only confirmed the ineligibility Immigration New Zealand had identified. Accordingly, on 30 September 2010 Immigration New Zealand declined the application.
- [17] Mr Balich held a work permit, so he and his family were able to remain in New Zealand on temporary permits.
- [18] On 7 July 2011 Mr Balich wrote to Mr Standing, cancelled the contract and sought a refund of the fees paid. He said he did so as Mr Standing had not responded to correspondence for a period of several weeks.
- [19] In an email dated 20 July 2011 Mr Standing provided the explanation that he had been out of New Zealand for three weeks, and he thought Ms Fleming would have completed the Expression of Interest to proceed with a further residence application. He said "My notes mention that you were going to forward [documentation relating to an offer of employment] in my absence to allow [Ms Fleming] to complete the EOI?"
- [20] Mr Balich seeks:
- [20.1] A refund of professional fees paid of £3,335.
- [20.2] Compensation for the cost of additional expenses in organising new temporary visas, and a new residence application when the first application failed – the amount being \$2,500.
- [20.3] Compensation of \$2,000 for stress caused to himself and his family.

The response

- [21] Mr Standing's response to the complaint was an email dated 30 September 2011, and a letter of the same date addressed to the Authority.
- [22] Mr Standing said that his licence had been cancelled by this Authority, and the company, Living New Zealand Ltd, had gone into liquidation.
- [23] Apparently as a result of these events he no longer held his file relating to Mr Balich, and could only respond on the basis of recollection.
- [24] Mr Standing's response to the complaint appeared to be:
- [24.1] He had communicated in a timely manner, allowing for some minor and explicable delay.
- [24.2] Mr Balich was responsible for securing suitable employment, and the position he relied on was temporary and did not qualify.

- [24.3] No refund was due, as the position of employment was not suitable, and that was Mr Balich's responsibility.
- [24.4] Mr Balich did later secure a permanent position, and Mr Standing would have completed the residence process without further cost, but Mr Balich refused.
- [24.5] He is not satisfied Mr Balich is correct in claiming Mr Standing told him the New Zealand Qualifications Authority had to assess his university degree.
- [24.6] The time for processing a work permit application was a guide only, and Mr Standing assisted with arranging an expedited process.

Request for Further Information from Mr Standing

- [25] The Tribunal issued a Minute dated 11 July 2012, which identified the grounds of complaint, response, and the issues arising; and indicated conclusions that may be reached on the basis of the information held at that point by the Tribunal.
- [26] The Minute made it clear to the parties they could provide further information, and that would be considered by the Tribunal.
- [27] The Minute also requested further information from Mr Standing.
- [28] The Minute noted:
 - [28.1] The Code (clause 3) required Mr Standing to maintain complete client records for seven years, and confirm in writing the details of material discussions with clients. Accordingly, he should have been in a position to present a fully documented record of the professional engagement which is subject to the complaint. He had not produced that material to the Authority or the Tribunal.
 - [28.2] Mr Standing had said he did not have the material, and referred to the liquidation of the company Living New Zealand Limited.
 - [28.3] The materials also referred to Ms Fleming, and noted Mr Standing's email of 20 July 2011 on its face suggested that he had instructed her to give "Immigration Advice", as it is defined in the Act. In fact, it appears he instructed her to evaluate Mr Balich's employment documentation and draft documents for the second residence process. It was the employment documentation that had caused difficulty for the first residence application.
 - [28.4] Mr Balich had said Ms Fleming also provided immigration advice in relation to his daughter.
 - [28.5] It is an offence under the Immigration Advisers Licensing Act 2007 to give immigration advice unless a person is either licensed, or exempt.
- [29] Accordingly, pursuant to section 49(4)(a) the Tribunal requested Mr Standing to:
 - [29.1] Explain the roles of Living New Zealand Ltd, and another company through which he formerly operated his practice, as they related to the complaint, and the availability of records.
 - [29.2] Provide a full and complete copy of his client records relating to his professional engagement with Mr Balich.
 - [29.3] Explain who "Maree" was (now identified by Mr Balich as Ms Fleming), and supply a full account of her role in relation to the subject matter of this complaint.

- [29.4] Provide evidence Ms Fleming was a licensed immigration adviser, or exempt; or explain the apparent evidence of her providing immigration advice, including his own role in allowing or causing that to occur.
- [29.5] Respond to each of the issues raised in Mr Balich's complaint, with reference to his client record.
- [30] The Tribunal also noted that Mr Standing had indicated he does not have client records, as they are in the hands of the liquidator of Living New Zealand Ltd.
- [31] Mr Standing was required by the Code of Conduct to maintain client records for seven years, and be in a position to make them available. The Code has the force of law (sections 37–39 and 44 of the Act). It was implausible that any responsible liquidator would impede Mr Standing from obtaining a copy of his client record to respond to a complaint, given the legal duties on Mr Standing.
- [32] Mr Standing had produced no evidence he had attempted to produce the record.
- [33] The Tribunal in its Minute accordingly gave Mr Standing notice that if any person was withholding his client record, he should notify the Tribunal of the circumstances and the Tribunal would consider issuing a summons to that person, to secure the production of the client record.
- [34] Mr Standing was further put on notice that unless he demonstrated he had taken the steps available to secure the production of his client record, the Tribunal would potentially take the view that he has chosen to withhold his record, and reach conclusions adverse to him on that basis.
- [35] Mr Standing has not responded to the Minute.
- [36] Mr Balich provided further information which identified "Maree" as Ms Fleming; he also provided a full copy of the agreement to provide immigration services and some particulars of the company conducting Mr Standing's practice.

The Issues to be Determined

- [37] Mr Standing was bound by the Immigration Advisers Licensing Act 2007. The Code of Conduct was established pursuant to that Act, and Mr Standing was required to meet its requirements.
- [38] Clause 1 of the Code of Conduct requires a licensed immigration adviser to act with professionalism. In doing so they must ensure that the terms of professional engagements are fair and appropriate.
- [39] Professionalism also required Mr Standing to honour agreements, such as refunding fees, where applicable.
- [40] Professionalism further required that Mr Standing was not a party to a person providing immigration advice, unless they were licensed or exempt.
- [41] Clause 1 of the Code requires that a licensed immigration adviser must discharge professional engagements with due care, diligence and respect. That required Mr Standing to ensure that his professional service delivery met proper standards.
- [42] Section 44 of the Act provides that breaches of the Code are grounds for complaint, and that negligence and incompetence are grounds for complaint.
- [43] Clause 8 of the Code prohibits a licensed immigration adviser setting a fee that is not "fair and reasonable".

- [44] The issue for the Tribunal to determine is whether it is satisfied Mr Standing breached any of these professional standards. The Tribunal is required to determine the complaint on the balance of probabilities; however the test must be applied with regard to the gravity of the finding (*Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1).

Decision

- [45] The regime in the Act is one where individuals are licensed as immigration advisers, and it is not possible for a corporate entity or a practice to be licensed. It follows that individual licensed immigration advisers are the subject of complaints, and personally face disciplinary sanctions and orders for compensation.
- [46] Mr Standing was personally responsible for professional service delivery in relation to this complaint.

Lack of care, negligence and incompetence

- [47] I am satisfied there was ongoing sub-standard service delivery.
- [48] Mr Standing failed to give adequate advice regarding the time required to obtain a work permit, provided incorrect advice relating to Mr Balich's qualifications, and his daughter's immigration requirements. Further, he incorrectly recorded and submitted (even after correction) the details in Mr Balich's residence application.
- [49] However, the most significant shortcoming was Mr Standing's failure to identify that Mr Balich's employment was not an adequate basis to proceed with an application for residence.
- [50] While in isolation, each of the incidents (excluding the failure to evaluate adequately the position of employment) may not reach the threshold for professional disciplinary action, the series of events creates a concerning picture. There was a sustained failure to meet minimum standards of care and competence.
- [51] The failure to evaluate the position of employment, with the application being rejected by Immigration New Zealand as a result, was a significant error.
- [52] Mr Standing later refused to refund fees under the service delivery agreement, saying the position of employment was not suitable, and that was Mr Balich's responsibility. Mr Standing was the licensed immigration adviser; it was his responsibility to determine that the position was suitable. Further, it was an elementary obligation to evaluate the position against immigration policy requirements.
- [53] Mr Standing has had the opportunity to answer or explain these conclusions that are supported by the evidence before the Tribunal, but he has not done so. Indeed, he has elected not to answer questions put to him by the Tribunal. He has not been compelled to do so, as the material lodged with the complaint is sufficient to support it.
- [54] I am satisfied Mr Standing failed to meet his obligations under clause 1 of the Code due to lack of care and professionalism; and he was negligent.

Demanding and retaining excess fees

- [55] I am satisfied that Mr Standing did not provide any professional service that was of value, and he demanded and retained fees paid by Mr Balich.
- [56] Clause 8 of the Code obliged Mr Standing to set fees that were fair and reasonable.
- [57] The fee was not fair and reasonable when his engagement terminated, as he had provided no professional service of value.
- [58] Clause 3(d) of the Code required Mr Standing to provide a refund of fees payable when his engagement ceased.

[59] Accordingly I am satisfied:

[59.1] The fees were wholly repayable as they were not fair or reasonable.

[59.2] Mr Standing breached the Code by failing to refund fees.

[60] I am also satisfied Mr Standing was obliged by the terms of his agreement for the delivery of professional services to refund the fees to Mr Balich. Mr Standing's claim that the position of employment was unsuitable cannot be relied on, as Mr Standing was responsible for ensuring the position was suitable, and commenced the residence process with Immigration New Zealand asserting it was suitable. He was negligent to do so, and the time and fees involved were wasted. This ground of the complaint is also upheld.

[61] Mr Balich was entitled to terminate the professional engagement due to the substandard delivery of professional services, and had no obligation to accept Mr Standing continuing to provide further services.

Party to unlawfully providing immigration advice

[62] The complaint evidences that Mr Standing was a party to Ms Fleming providing immigration advice, in contravention of the Act. She was not a licensed immigration adviser, and Mr Standing delegated his professional responsibilities to her.

[63] She in fact provided immigration advice in relation to Mr Balich's daughter, and Mr Standing attempted to have her assist Mr Balich to prepare a second process to seek residence. This delegation of the duties of a licensed immigration adviser was unlawful, as the Act provides it is a criminal offence for an unlicensed person to provide immigration advice (section 63 of the Act). "Immigration Advice" is defined broadly under the Act.

[64] Mr Standing's role in this was in breach of the Code, being unprofessional conduct (clause 1).

[65] This conclusion reflects the material presented in support of the complaint, and Mr Standing has not provided any explanation despite being requested to do so.

Summary

[66] I am satisfied Mr Standing breached clause 1 of the Code, and was also negligent.

[67] Section 44(2)(e) provides that a breach of the Code is a ground for complaint, and section 44(2)(a) provides that negligence is also a ground for complaint. The complaint is upheld.

Submissions on Sanctions

Issues

[68] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions. The section provides:

"Disciplinary sanctions

- (1) The sanctions that the Tribunal may impose are —
 - (a) caution or censure:
 - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
 - (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
 - (d) cancellation of licence:

- (e) an order preventing the person from reapplying for a licence for a period not exceeding two years or until the person meets specified conditions:
- (f) an order for the payment of a penalty not exceeding \$10,000:
- (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
- (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
- (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person."

[69] The Authority and Mr Balich have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees, and compensation. Whether they do so or not, Mr Standing is entitled to make submissions, and respond to any submissions from the Authority and Mr Balich.

[70] 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.

[71] Mr Balich has indicated he seeks:

[71.1] A refund of fees paid of £3,335.

[71.2] Compensation for additional expenses of \$2,500.

[71.3] Compensation for stress of \$2,000.

[72] It appears that the appropriate approach, if there is an order for the refund of fees, is that the amount paid should be converted to New Zealand Dollars at the rate for the day it was paid, and an order made of a refund of that amount of New Zealand dollars.

[73] That would be on the basis that the payment was intended to be for services in New Zealand and could be expected to be converted when paid. The parties may contend for some other basis.

[74] Mr Balich may wish to consider providing further information to support his claim for the additional expenses he met of \$2,500. In addition, he may wish to explain why he has not claimed the full amount of the professional fee of £4,250 (if he in fact paid that amount).

[75] Mr Balich may also wish to consider whether the claim for "stress" involved any expenditure, or loss, or only the emotional harm. He should not assume that the Tribunal will make an award of compensation for "stress", and may wish to address this issue.

Mr Standing's circumstances

[76] This Tribunal is an inquisitorial body and is required to pursue issues raised by complaints, where necessary requesting further information and requiring persons with information to appear before the Tribunal.

[77] This Tribunal is currently dealing with other complaints against Mr Standing, and has previously dealt with complaints against Mr Standing.

[78] Mr Standing is not presently a licensed immigration adviser; his licence was cancelled by this Tribunal, and limitations placed on him seeking another licence.

- [79] Mr Standing had also informed the Tribunal that the company through which he most recently conducted his practice had gone into liquidation (Living New Zealand Limited – now struck off, as liquidation has been completed).
- [80] In this and other complaints Mr Standing is alleged to have failed to meet financial obligations to clients. The Tribunal is aware of the liquidator's reports, and draws Mr Standing's attention to those reports which state:
- [80.1] Mr Standing has been referred to the National Enforcement Unit in relation to suspected criminal offences, which apparently relate to Mr Standing's conduct and the absence of funds to pay creditors.
- [80.2] The company had assets that could be realised of \$8,078, and liabilities and liquidation expenses of \$497,422. Creditors received no distribution from the liquidation.
- [80.3] Overseas clients had paid \$635,769.49 in deposits for work that had not been completed.
- [81] The Tribunal is aware this company did not operate all the time Mr Standing was operating his practice, and the fees received relate only to clients where work was incomplete. Accordingly, the fees received from overseas clients of \$635,769.49 are less than the total fees Mr Standing received.
- [82] Mr Standing is facing complaints before this Tribunal that he procured the payment of fees and failed to perform work; in many cases those fees were deposited into offshore bank accounts.
- [83] This information is sufficient to raise a concern that Mr Standing has received a substantial body of fees which have not been accounted for.
- [84] Accordingly, the Tribunal puts Mr Standing on notice that if he claims he does not have the means to pay penalties, and compensation:
- [84.1] He is expected to explain to the Tribunal the circumstances identified in the liquidator's reports.
- [84.2] He should consider making arrangements for a chartered accountant to prepare a source and application of funds statement in relation to his practice, and producing that to the Tribunal.
- [84.3] He will be expected to fully explain his personal financial circumstances, including providing a statement of assets and liabilities.
- If Mr Standing does not respond, the Tribunal may proceed on the basis that Mr Standing has the means to meet a financial penalty that fully reflects the findings against him, and doing so will not adversely affect his ability to pay any compensation that may be ordered.
- [85] The timetable for submissions will be as follows:
- [85.1] The Authority and Mr Balich are to make any submissions within 10 working days of the issue of this decision.
- [85.2] Mr Standing is to make any further submissions (whether or not the Authority or Mr Balich makes submissions) within 15 working days of the issue of this decision.
- [86] Any party may apply to extend the timetable. If Mr Standing seeks to have time to have the assistance of a chartered accountant, he should provide a written statement from that person identifying the work they are undertaking, and the likely time required to complete it.

- [87] 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 24th day of August 2012.

G D Pearson
Chair