

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

Decision No: [2012] NZIACDT 45

Reference No: IACDT 027/12

IN THE MATTER

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

BY

Immigration Advisers Authority
Authority

BETWEEN

Marina Kavyu-Munalula
Complainant

AND

Glen William Standing
Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 24 August 2012

DECISION

Introduction

- [1] Ms Kavyu-Munalula engaged Mr Standing to provide immigration services.
- [2] Her complaint arose when his engagement terminated. He did not repay money he had been paid in advance.
- [3] Some of the money was paid to him to hold and subsequently pay to Immigration New Zealand, and the balance was fees paid in advance.
- [4] The money to be held for payment to Immigration New Zealand were “client funds”, and had to be treated as money held on trust, and banked separately. There is no discretion in relation to client funds, if not held properly and accounted for, the obvious explanation is misappropriation.
- [5] Mr Standing has neither accounted for, nor explained to Ms Kavyu-Munalula where the client funds have gone; and has not accounted to her for fees paid in advance that he has not earned.
- [6] Mr Standing was notified by the Tribunal that the evidence in support of the complaint could justify the complaint being upheld. He was asked under the Tribunal's statutory powers to provide information from his files and answer questions. He did not do so, and has not been compelled to do so as the information before the Tribunal is sufficient to uphold the complaint without further evidence.
- [7] The Tribunal has upheld the complaint.

The Complaint and the Response

The complaint

- [8] In August 2009 Ms Kavyu-Munalula engaged Golden Sands Migration (NZ) Ltd (Golden Sands) to assist with seeking residence in New Zealand.
- [9] Mr Standing was a director and shareholder of Golden Sands, and apparently conducted his immigration practice through the company.
- [10] There were two licensed immigration advisers who provided immigration services through Golden Sands:
 - [10.1] Mr Standing, who became a licensed immigration adviser on 24 November 2008, and held a licence until it was cancelled by this Tribunal with effect from 15 August 2011.
 - [10.2] Ms Leanne Climo, who held a licence between 10 March 2009 and 9 March 2010. She was not a shareholder or director of the company.
- [11] Ms Kavyu-Munalula was dealing with Ms Climo when she first dealt with Golden Sands. Ms Climo signed the written agreement between Ms Kavyu-Munalula and Golden Sands on 3 August 2009. Only part of the agreement is among the papers presently before the Tribunal.
- [12] On 5 August 2009 Ms Kavyu-Munalula paid \$5,000 for professional services (the payment was remitted from the United Kingdom by Ms Kavyu-Munalula's sister).
- [13] Ms Climo ceased working for Golden Sands on 7 October 2009, and Mr Standing took over Ms Kavyu-Munalula's immigration affairs from that point. He was assisted by Ms Maree Fleming, who was not a licensed immigration adviser.

- [14] At the time Ms Climo left Golden Sands, only preliminary work had been completed. On 14 December 2009 Ms Kavyu-Munalula made inquiries, and Mr Standing said she needed to sign an agreement and make the first payment. Ms Kavyu-Munalula explained she had done so.
- [15] An expression of interest was lodged with Immigration New Zealand on 12 January 2010.
- [16] Ms Kavyu-Munalula wished to ensure that she had made the necessary payments when they were due, and accordingly paid a further \$2,475 on 25 January 2010, and received an invoice after making the payment. The payment was not due at that time.
- [17] In August 2010, Ms Kavyu-Munalula requested that Mr Standing return her documents and refund the money she had paid. He returned the documents, but neither refunded fees nor explained why he would not do so.
- [18] Ms Kavyu-Munalula made a further inquiry on 22 August 2010. Mr Standing replied by email, claiming the agreement provided that if Ms Kavyu-Munalula cancelled the engagement, it precluded her from making any claim for a refund of professional fees. However, he said unpaid Government fees would be refunded, and thought that may amount to \$1,400, and he would make inquiries. No refund was made and no explanation was given, despite further inquiries by Ms Kavyu-Munalula.
- [19] Due to the lack of information supplied, Ms Kavyu-Munalula does not know how much she is owed. However, she believes that it is more than the \$1,400 Mr Standing suggested, and did not pay.

The response

- [20] The Authority put Ms Kavyu-Munalula's allegations to Mr Standing, to give him the opportunity to respond, but he did not respond.

Request for Further Information from Mr Standing

- [21] The Tribunal issued a Minute dated 31 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.
- [22] The Minute made it clear to the parties that they could provide further information, and this would be considered by the Tribunal.
- [23] The Minute also requested further information from Mr Standing.
- [24] The Minute noted:
 - [24.1] 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.
 - [24.2] Pursuant to section 49(4)(a) the Tribunal requested Mr Standing to:
 - [24.2.1] Provide a full and complete copy of his client records relating to his professional engagement with Ms Kavyu-Munalula.
 - [24.2.2] Explain and document how he dealt with the fees paid to him, and how he took into account his apparent obligation to deal with the receipts in whole or in part as client funds held on trust, and keep them in a separate bank account in accordance with clause 4 of the Code.

[24.2.3] Respond to each of the issues raised by this complaint, with reference to his client record.

[24.3] Mr Standing had indicated to the Tribunal previously that he holds no client records, as they are in the hands of the liquidator of Living New Zealand Ltd. This was the company through which Mr Standing apparently conducted his practice when his licence was cancelled (Mr Standing has not explained the respective roles of Golden Sands and this company).

[24.4] Mr Standing was required to maintain client records for seven years, and be in a position to make them available. The Code has the force of law (see sections 37–39 and 44 of the Act). It is 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.

[24.5] The Tribunal 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.

[24.6] Mr Standing was further put on notice that unless he demonstrated that he had taken the steps available to secure the production of his client record, the Tribunal would potentially take the view that he had chosen to withhold his record, and reach conclusions adverse to him on that basis.

[25] Mr Standing did not respond to the Minute.

The Issues to be Determined

[26] Mr Standing is bound by the Immigration Advisers Licensing Act 2007, and the Licensed Immigration Advisers Code of Conduct.

[27] Clause 1 of the Code of Conduct requires:

[27.1] A licensed immigration adviser to act with professionalism. In doing so, they must ensure that the terms of professional engagements are fair and appropriate.

[27.2] That a licensed immigration adviser discharge professional engagements with due care, diligence and respect. That requires them to ensure that their professional service delivery meets proper standards.

[28] Clause 4 of the Code treats receipts, to the extent that they are held on behalf of clients, as trust funds, and a licensed immigration adviser must bank them separately.

[29] Clause 8 of the Code prohibits a licensed immigration adviser setting a fee that is not “fair and reasonable”, and clause 3(d) requires refunds of fees to be made.

[30] Section 44 of the Act provides breaches of the Code, negligence, incompetence, dishonesty and misleading behaviour are all grounds for complaint.

[31] 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

[32] 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.

[33] Ms Climo initially dealt with the relationship and was apparently responsible for it. However, in the absence of Mr Standing's record, there is no evidence of what supervision or direction he gave to Ms Climo. As it appears from the material presently held:

[33.1] Ms Climo initiated the relationship in a regular way.

[33.2] Funds were received.

[33.3] Ms Climo undertook some preliminary work, but left the practice before the principal work was undertaken.

[33.4] Mr Standing took over the engagement and received further payments.

[34] Mr Standing was personally responsible for professional service delivery in relation to this complaint, after he took over from Ms Climo.

[35] I am satisfied that the evidence supporting the complaint should be relied on. Each of the grounds of complaint is supported by the record, and the evidence from Ms Kavyu-Munalula. That record has been put to Mr Standing by the Tribunal, and the implications from it drawn to his attention; he has been asked questions and given the opportunity to respond. He has not responded, and in these circumstances I am satisfied I must rely on the material before the Tribunal and reach the conclusions it demands.

Failure to account for client funds

[36] Some of the money paid to Mr Standing was in respect of fees to be paid to Immigration New Zealand.

[37] Short of misappropriation of funds, it is very difficult to understand why Mr Standing would not know how much he held in respect of funds to be paid on behalf of his client. Those funds were trust funds; they had to be held in a separate bank account and he had to keep records of the transactions.

[38] When Mr Standing was asked for a refund, he should have immediately been able to identify those funds and withdraw them from the bank account to pay Ms Kavyu-Munalula.

[39] The fact he did not do so required an explanation, and in the absence of an explanation the inevitable inference is that he failed to deal with the funds as trust funds and has failed to account for them. That inference has been put to Mr Standing pursuant to the Tribunal's statutory process for making inquiries, and he has not responded.

[40] The invoices before the Tribunal indicate that:

[40.1] \$400 had been paid for the fees on lodging an expression of interest. As that was lodged, it appears to have been accounted for.

[40.2] A balance of \$2,600 remains unaccounted for, being \$1,400 (residence application fee) and \$1,200 (migrant levy).

[41] Client funds are treated by the Code (clause 4) as trust funds, and must be banked in a separate bank account. It appears that \$2,600 was client funds, and should have been banked in a separate bank account, and all or some of that should still be held on trust. This money has not been located or refunded.

[42] When Mr Standing took over the instructions from Ms Climo, he was obliged to ensure he complied with the Code in respect of client funds then held, or received later.

[43] Where trust funds are received by a professional and they are not banked into the appropriate account, and then are not accounted for, the probable reason involves misappropriation of the funds. There is no discretion in relation to dealing with client funds.

[44] I am satisfied Mr Standing dishonestly misappropriated client funds. Given the fruitless and repeated efforts to have Mr Standing account for this money, which he was obliged to hold in a designated bank account, I am satisfied he took his client's money for his own purposes.

[45] I am satisfied this aspect of the complaint must be upheld, as a breach of the Code (clause 4), and it also involved a dishonest failure to deal with, and account for funds. Section 44(2)(d) and (e) provide these circumstances are grounds for complaint.

Demanding and retaining excess fees

[46] I am satisfied Mr Standing did not provide professional services that reflected the fees he demanded and retained.

[47] Mr Standing was put on notice that:

[47.1] Clause 8 of the Code obliged him to set fees that were fair and reasonable.

[47.2] The fee was not fair and reasonable, either at inception, or when his engagement terminated.

[47.3] Clause 3(d) of the Code required him to provide a refund of fees payable when his engagement ceased.

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

[47.5] He breached the Code by failing to refund fees.

[48] Further, the Tribunal notified Mr Standing he should not assume he could rely on the written agreement to avoid refunding fees. That was because the Code's requirement that fees are fair and reasonable overrides any arrangements to the contrary. There may be situations where a "non-refundable" fee is fair and reasonable, particularly when a practitioner loses the opportunity of other work by accepting an engagement. However, the client would need to be fully informed, and agree to that.

[49] Mr Standing was given the opportunity to advance a case to answer the evidence, which indicated he should have refunded fees. He has not done so.

[50] He was also put on notice that, without an explanation, the material before the Tribunal may lead to the view that one-third of the work had been completed, based on the instructions having got to the point of lodging an expression of interest. On that basis, the refund of fees would have been calculated on the following basis:

[50.1] The total paid by Ms Kavyu-Munalula was \$7,475, of which \$3,000 was for Government fees (refer para [40] above); accordingly the professional fees component was \$4,475.

[50.2] Two thirds of \$4,475 is \$2,983.33, and should have been refunded, in addition to the client funds referred to previously.

[51] I am satisfied the material before the Tribunal requires me to determine that in failing to refund fees of \$2,983.33, Mr Standing failed to comply with the Code (clauses 8 and 3(d)).

[52] I uphold the complaint in this respect also. Mr Standing's breach of the Code (clauses 8 and 3(d)) is a ground for complaint under section 44(2)(e) of the Act.

Submissions on Sanctions

Issues

[53] 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.”

- [54] The Authority and Ms Kavyu-Munalula 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 Ms Kavyu-Munalula.
- [55] 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.
- [56] The Tribunal will make any decision on the refund of fees based on the amount of fees identified in this decision, subject to any submissions from the parties.

Mr Standing’s circumstances

- [57] 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.
- [58] This Tribunal is currently dealing with other complaints against Mr Standing, and has previously dealt with complaints against Mr Standing.
- [59] Mr Standing is not presently a licensed immigration adviser, as his licence was cancelled by this Tribunal, and limitations placed on him seeking another licence.
- [60] 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).
- [61] 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:
- [61.1] 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.

- [61.2] 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.
- [61.3] Overseas clients had paid \$635,769.49 in deposits for work that had not been completed.
- [62] 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 \$635,769.49 are less than the total fees Mr Standing received.
- [63] 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.
- [64] This information is sufficient to raise a concern that Mr Standing has received a substantial body of fees which have not been accounted for.
- [65] Accordingly, the Tribunal puts Mr Standing on notice that if he claims he does not have the means to pay penalties, and compensation:
- [65.1] He is expected to explain to the Tribunal the circumstances identified in the liquidator's reports.
- [65.2] 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.
- [65.3] 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.
- [66] The timetable for submissions will be as follows:
- [66.1] The Authority and Ms Kavyu-Munalula are to make any submissions within 10 working days of the issue of this decision; and
- [66.2] Mr Standing is to make any further submissions (whether or not the Authority or Ms Kavyu-Munalula make submissions) within 15 working days of the issue of this decision.
- [67] 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.
- [68] 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