

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

Decision No: [2012] NZIACDT 61

Reference No: IACDT 031/10

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

Irma Cutaran-Tanggaan

Complainant

AND

Inocencia Tiri (Witta) Earnshaw

Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 28 September 2012

DECISION

Introduction

- [1] This complaint concerns a fee paid by Ms Cutaran-Tanggaán for immigration services Ms Earnshaw did not deliver. Ms Earnshaw was late in lodging an application, and it was beyond her expertise to deal with the application.
- [2] She agreed to repay the fees, but did not do so.
- [3] The complicating factor is that the fees were paid and the failure to deliver services occurred before Ms Earnshaw was a licensed immigration adviser. It was during the transitional period when the Immigration Advisers Licensing Act 2007 was coming into effect. This Tribunal deals with the conduct of people who are licensed immigration advisers, so cannot deal with misconduct prior to a licence being issued.
- [4] It is necessary to determine what obligations arise when a person with existing client relationships becomes a licensed immigration adviser.
- [5] The conclusion is that when Ms Earnshaw became a licensed immigration adviser, she was obliged to bring all existing client relationships under the Act and meet her professional obligations.
- [6] The complaint has been upheld, as after Ms Earnshaw was licensed, she failed to treat the fees she received as trust funds, failed to repay the fees, and dishonestly said she would repay the fees when she was not going to do so, in fact paying nothing at all to meet her promise of repayment.

The Complaint and the Response

The complaint

- [7] Ms Cutaran-Tanggaán lives in the Philippines. She is a nurse and engaged Ms Earnshaw's services to assist her to obtain a work permit. She wished to work in New Zealand.
- [8] Ms Earnshaw became a licensed immigration adviser on 5 October 2009 and her practice is in New Zealand.
- [9] The professional relationship between Ms Cutaran-Tanggaán and Ms Earnshaw commenced prior to Ms Earnshaw becoming a licensed immigration adviser.
- [10] Ms Cutaran-Tanggaán paid Ms Earnshaw approximately PHP320,000 for her professional services, in a series of payments. The payments were made in the period from 1 March 2008 to 23 September 2008.
- [11] The Tribunal notes that PHP320,000 has been identified in the papers as being approximately NZ\$15,000. However, it appears that the conversion at the time of payment would be approximately NZ\$9,500, and the Tribunal proceeds using this figure.
- [12] Ms Earnshaw provided limited professional services, and eventually told Ms Cutaran-Tanggaán she could do little to assist her, due to "the recession, and illnesses in the family". She undertook to return the professional fees paid by Ms Cutaran-Tanggaán. However, she has not done so.
- [13] Ms Cutaran-Tanggaán produced emails evidencing promises by Ms Earnshaw to refund fees, which included the following emails from Ms Earnshaw to Ms Cutaran-Tanggaán:
 - [13.1] **14 July 2009** — Ms Earnshaw said she had "put forward your request for a refund less of course the charges. At the moment, refunds are still suspended ...".

- [13.2] **22 August 2009** — Ms Earnshaw said “... you will be the first to be refunded”.
- [13.3] **29 August 2009** — Ms Earnshaw said “once the situation changes and the AIP progresses, you will be the priority to be refunded”.
- [13.4] **9 July 2010** — Ms Earnshaw said Ms Cutaran-Tanggaans case “supersede[d] my ability and effort in supplying the documents required”.
- [13.5] **15 July 2010** — Ms Earnshaw said she would “start to settle with you once I can see a bit of way to get through with the crisis. ... Your overdue wait will be compensated in my own humble way eventually”.
- [14] Ms Cutaran-Tanggaans had extensive communication with Ms Earnshaw by email. Ms Earnshaw’s emails promising payment were in response to those endeavours to obtain repayment of fees.
- [15] Due to the unsatisfactory response, Ms Cutaran-Tanggaans asked a relative living in New Zealand to try and pursue the issue with Ms Earnshaw. The relative was Ms Voss, and she made telephone calls to Ms Earnshaw, but had to leave messages on voicemail. Ms Earnshaw failed to respond to the messages.
- [16] In July or August 2010 Ms Voss went to visit Ms Earnshaw in person. Ms Earnshaw said she had difficulty in paying, that she had had heart surgery, her husband had died, and she was depressed. She said that if Ms Cutaran-Tanggaans was in a position to work, she would “make her top priority”. She agreed to refund the fees when Ms Voss said that was what Ms Cutaran-Tanggaans wanted, rather than further work.
- [17] Ms Cutaran-Tanggaans, through her counsel, complained that Ms Earnshaw’s conduct has breached her duties under clause 1.1 of the Licensed Immigration Advisers Code of Conduct (developed pursuant to section 37 of the Immigration Advisers Licensing Act 2007; see www.iaa.govt.nz), which requires due care, diligence, respect and professionalism; and further, that she was negligent, lacked capacity, was incompetent, dishonest, and misleading. Each of these is a basis for upholding a complaint under section 44 of the Act.
- [18] In addition, her counsel submitted there were breaches of statutory obligations under other consumer protection legislation.

The response

- [19] Ms Earnshaw responded to the complaint by letter dated 10 December 2010 addressed to the Authority. The letter stated:
- [19.1] Ms Cutaran-Tanggaans had been referred by an agent, and her agreement was with the agent.
- [19.2] There was a “Placement and Service agreement”, which provided for fees to be paid (PHP320,000).
- [19.3] The payment included the agent’s commission.
- [19.4] Ms Cutaran-Tanggaans was one of 10 nurses who had been placed to work in the same facility in New Zealand. Accordingly “all documents and paperwork was identical with the others”.
- [19.5] Ms Cutaran-Tanggaans’s lodgement was delayed, and as there was a notice of a cut-off date for lodging the application, and it was missed. There were consequently difficulties in Ms Cutaran-Tanggaans gaining a visa.
- [19.6] Fees were paid in three instalments: PHP120,000 as an “Acceptance Fee”; PHP100,000 “Upon Issue of Job Offer and Visa Application”; and PHP100,000 “Upon Issue of Visa”.

[19.7] Ms Earnshaw had agreed and previously indicated that the final payment of PHP100,000 should be refunded, but not the first two instalments. Ms Earnshaw would pay PHP100,000 within 60 days of her letter.

Jurisdiction

- [20] The Tribunal issued a Minute dated 31 May 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.
- [21] There has been no substantive response to the Minute.
- [22] One of the issues raised in the Minute was the question of jurisdiction.
- [23] This Tribunal's jurisdiction applies only to licensed immigration advisers. Accordingly, work performed and fees expended for that work prior to Ms Earnshaw becoming licensed are not within the Tribunal's jurisdiction.
- [24] However, Ms Earnshaw was obliged to put her dealings with her clients on a proper professional basis when she did become licensed.
- [25] The complaint, as it relates to the time when Ms Earnshaw was a licensed immigration adviser, is that she did not account for fees she held as client funds in accordance with the Code.
- [26] From the point at which Ms Earnshaw became a licensed immigration adviser, regardless of what had occurred prior, she was obliged to conduct her professional relationships in accordance with the Code.
- [27] 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.
- [28] 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.
- [29] To draw an analogy, if a person becomes a lawyer and they are holding funds for a person who is their client, then those funds must be put into a trust account.
- [30] 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).
- [31] Ms Earnshaw accepts she held fees that Ms Cutaran-Tanggaa had paid and which she was obliged to return to her.
- [32] On entering into the licensing regime, any fees held to which the adviser is not entitled to take personally, and any money paid to meet disbursements, must be paid into a separate bank account and disbursed in accordance with the adviser's professional obligations.
- [33] Those are the requirements placed on licensed immigration advisers by the Code, and it must apply to all client relationships at the time a person becomes licensed.
- [34] Ms Earnshaw became a licensed immigration adviser only after satisfying the Authority she was familiar with the Code and was agreeing to comply with it, and all the obligations arising from her professional standing.

- [35] From the point in time at which Ms Earnshaw became a licensed immigration adviser, this Tribunal has jurisdiction to deal with a complaint relating to how she dealt with, and accounted for, unearned fees.
- [36] Ms Cutaran-Tangga'an's counsel has referred to general consumer protection legislation. This Tribunal does not have jurisdiction in relation to statutory obligations outside of the Immigration Advisers Licensing Act 2007. However, in the present case it seems unnecessary to look beyond the Act and the Code, as they address the relevant professional obligations. Compliance with the Act and the Code would have fully discharged other consumer protection obligations.

The Issues

- [37] The issues to resolve are:

- [37.1] At the point in time at which Ms Earnshaw became a licensed immigration adviser (5 October 2009), what fees had she received from Ms Cutaran-Tangga'an which were unearned and accordingly still outstanding as fees paid in advance?
- [37.2] Did Ms Earnshaw put those fees into a separate bank account?
- [37.3] Did Ms Earnshaw deal with those fees in accordance with her professional obligations?

Decision

The fees paid were not earned

- [38] Ms Earnshaw identifies Ms Cutaran-Tangga'an as one of a group of 10 people in substantially identical circumstances, and Ms Cutaran-Tangga'an personally paid approximately \$9,500.
- [39] Ms Earnshaw has suggested that there was another agent involved, however Ms Earnshaw is the only licensed person identified in the materials before the Tribunal. Only individuals may be licensed, and accordingly it is a personal obligation to deliver professional services and account for fees. I am satisfied Ms Earnshaw must take professional responsibility for all financial consequences of her failure to deliver the services Ms Cutaran-Tangga'an paid for, and was entitled to expect.
- [40] The quantum of the fee is such that it raises a concern it was excessive; potentially grossly so. However, given the fee was agreed and paid prior to Ms Earnshaw being a licensed immigration adviser, no question regarding the fee being excessive, or set unprofessionally, arises.
- [41] The material before the Tribunal satisfies me none of the fees paid were earned. Ms Earnshaw has admitted Ms Cutaran-Tangga'an's visa application was not filed on time, and apparently accepted liability for this. She has also admitted she did not have the skills to undertake the work she was engaged to complete.
- [42] Ms Earnshaw has claimed in her response to the Authority that only the final instalment of PHP100,000 was refundable. However, her email of 14 July 2009 appears inconsistent with that claim, as she said the fees were refundable "less of course the charges". It is not apparent how a partial refund could be reconciled with the apparent admission of lacking the competence to complete the work and negligently failing to meet a critical deadline. I reject that contention.
- [43] Accordingly, I am satisfied Ms Earnshaw lacked the ability to perform the work she accepted instructions for, negligently failed to lodge an application on time, earned none of the fees, and was obliged to refund the total of \$9,500.
- [44] I am also satisfied Ms Earnshaw failed to deposit the unearned fee of \$9,500 into a separate bank account maintained for the purpose in accordance with the Code, at the point in time at which she became a licensed immigration adviser.

- [45] Further, Ms Earnshaw repeatedly misled Ms Cutaran-Tanggaan by telling her the fees would be refunded.
- [46] It follows that the complaint must be upheld on the following grounds.

Failure to account for client funds

- [47] Where trust funds are held by a professional and not banked into the appropriate account and accounted for, there is a breach of trust.
- [48] It is not an available option for a person to become a licensed immigration adviser if they are not in a position to meet their professional obligations in relation to dealing with the trust funds they hold on behalf of clients. There can be no justification or excuse as it appears likely that Ms Earnshaw had already taken the money for her own purposes; she had an obligation of trust and was required to honour it.
- [49] Ms Earnshaw appears to claim she does not have the money available to repay Ms Cutaran-Tanggaan.
- [50] I do accept it is likely Ms Earnshaw took the money prior to becoming a licensed immigration adviser, so I cannot find she misappropriated the money at any point where the Act, and consequently this Tribunal's jurisdiction, applied.
- [51] Nonetheless, she was required to account for the money as trust funds from the point she was licensed, and she failed to bank the appropriate sum of money as the Code requires.
- [52] I am accordingly satisfied this aspect of the complaint must be upheld as a breach of the Code (clause 4). Section 44(2)(e) of the Act provides a breach of the Code is grounds for complaint.

Retaining fees

- [53] In relation to the obligation to refund fees:
- [53.1] Clause 8 of the Code obliged Ms Earnshaw to set fees that were fair and reasonable.
- [53.2] The sum of \$9,500 was not fair and reasonable, as no services of value had been provided.
- [53.3] Clause 3(d) of the Code required Ms Earnshaw to provide a refund of fees payable to complete the contract for services.
- [53.4] Ms Earnshaw breached the Code by failing to refund fees.
- [54] I uphold the complaint in this respect also. Ms Earnshaw's breach of the Code (clauses 8 and 3(d)) are grounds for complaint under section 44(2)(e) of the Act.

Dishonest misrepresentation

- [55] Ms Earnshaw repeatedly promised to repay the fees to Ms Cutaran-Tanggaan. She has paid nothing at all. I am satisfied Ms Earnshaw's conduct was dishonest. It is evident she did not intend to repay the money, given the failure to pay anything over a period of time.
- [56] It appears Ms Earnshaw's intention was to use a misrepresentation to discourage Ms Cutaran-Tanggaan from taking further action. Ms Earnshaw also had clear instructions regarding the fees, and she failed to act on them and refund them.
- [57] I am accordingly satisfied Ms Earnshaw was misleading in making the promises, and dishonest as they were made with no intention of fulfilling them and no attempt was made to fulfil them (section 44(2)(d) of the Act).

Submissions on Sanctions

[58] 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.”

[59] The Authority and Ms Cutaran-Tanggaon 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, Ms Earnshaw is entitled to make submissions and respond to any submissions from the other parties.

[60] 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.

[61] The Tribunal will make any decision on the refund of fees based on the amount of fees identified in this decision, namely \$9,500, subject to any submissions from the parties.

Timetable

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

[62.1] The Authority and Ms Cutaran-Tanggaon are to make any submissions within 10 working days of the issue of this decision.

[62.2] Ms Earnshaw is to make any further submissions (whether or not the Authority or Ms Cutaran-Tanggaon make submissions) within 15 working days of the issue of this decision.

[63] 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 28th day of September 2012.

G D Pearson
Chair