

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

Decision No: [2013] NZIACDT 31

Reference No: IACDT 022/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

Edwin Thomas (Ted) Midlane

Complainant

AND

Simona Emilia Marica (Woodberg)

Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: Mr P McPherson, Hesketh Henry, Lawyers, Auckland.

Date Issued: 27 May 2013

DECISION

Introduction

- [1] Ms Woodberg is a licensed immigration adviser, employed by a company providing immigration services.
- [2] Mr Midlane, a lawyer, engaged the company to provide immigration services for his client.
- [3] Initially another licensed immigration adviser provided the services, and Ms Woodberg took over.
- [4] This coincided with a period when Ms Woodberg had an illness that affected her ability to work for a period. There were difficulties with service delivery, however Mr Midlane accepted that Ms Woodberg had genuine difficulties, and instructed her to continue when she had recovered.
- [5] The relationship between Ms Woodberg and Mr Midlane broke down, the final stage involved Ms Woodberg making direct contact with Mr Midlane's client, he says contrary to her instructions. Then funds that had been paid to Ms Woodberg to pay fees due to Immigration New Zealand were refunded, and used by Ms Woodberg to pay outstanding fees.
- [6] This resulted in Mr Midlane complaining about Ms Woodberg's conduct, the complaint disclosed potential issues relating to:
 - [6.1] The client engagement process,
 - [6.2] The possible involvement of an unlicensed person giving immigration advice,
 - [6.3] Contacting Mr Midlane's client direct in breach of instructions,
 - [6.4] Withdrawing an application without instructions,
 - [6.5] Timeliness of service delivery, and
 - [6.6] Using money paid to meet Immigration New Zealand's costs for another purpose.
- [7] Counsel for Ms Woodberg obtained both Ms Woodberg and Mr Midlane's files, and presented affidavit evidence in support of Ms Woodberg's position.
- [8] The issues are primarily factual, and the material in the two files has substantially clarified the factual uncertainties.
- [9] The Tribunal has found that each of the issues has been resolved in Ms Woodberg's favour, except the use of funds paid to meet Immigration New Zealand's costs being used for another purpose.
- [10] The Tribunal has not found any dishonesty in the misuse of those funds, rather a failure to appreciate the obligations that apply to dealing with client funds. Accordingly, the complaint has been upheld in that respect only.

The Complaint

- [11] Mr Midlane has made a complaint on the following basis.
- [12] Ms Woodberg is a licensed immigration adviser. Her practice is with the company North Shore Immigration Service Ltd, (NSIS) in Auckland.
- [13] On 10 May 2010, Mr Midlane, a solicitor practising in Auckland, engaged Ms Laurie Anderson, who also practised as a licensed immigration adviser with NSIS. Ms Anderson was engaged to lodge an Expression of Interest for residence for Mr A, a Belgian national.

- [14] The engagement is by way of a written agreement of that date, in the name of NSIS, and does not identify Ms Anderson or any other licensed immigration adviser.
- [15] Mr Midlane's original client was a company that Mr A had engaged to construct a house, and make all necessary arrangements for him to migrate to New Zealand. Mr Midlane had been instructed to act for Mr A through that company, in relation to immigration issues.
- [16] Mr A had insisted on a sole point of contact in New Zealand, which was the company he had engaged.
- [17] The importance of this instruction was made clear to Ms Anderson.
- [18] Ms Anderson advised on the appropriate investor category under which Mr A should apply and the information required to prepare and lodge an "Expression of Interest" form. Mr Midlane explained there may be some delay due to Mr A's commitments. Ms Anderson said the Expression of Interest could be lodged with copies of the relevant documents, rather than taking time to obtain originals.
- [19] Ms Anderson left North Shore Immigration Service Ltd, and on 2 June 2010 sent an email to Mr Midlane saying Ms Woodberg would be taking over the instruction.
- [20] Ms Woodberg did not at any time obtain a written authority from Mr Midlane to act for him in relation to the instruction.
- [21] Ms Woodberg made no contact with Mr Midlane during the period from 2 June 2010 until 7 July 2010. On 7 July 2010, Mr Peter Woodberg sent an email to Mr Midlane saying he was the managing director of North Shore Immigration Service Ltd, and Ms Woodberg would be the new adviser.
- [22] Mr Midlane attempted to contact Ms Woodberg, but could not do so.
- [23] Mr Midlane commenced preparing the Expression of Interest himself, gathering information from Mr A and his legal advisers in Belgium.
- [24] Toward the end of July 2010 Mr Peter Woodberg requested an appointment with Mr Midlane. Mr Woodberg was not a licensed immigration adviser. Mr Woodberg attended Mr Midlane's office on 28 July 2010 and proceeded to engage in a discussion in relation to the professional engagement. It was, however, evident to Mr Midlane that Mr Woodberg had little understanding of the instruction, and engaged in a discussion of technical requirements without understanding what they were. That included him confusing an Expression of Interest, which was the relevant process for Mr A at that point, with an application for a residence visa.
- [25] Mr Midlane informed Mr Woodberg he was wasting Mr Midlane's time.
- [26] Following the meeting with Mr Woodberg, Mr Midlane proceeded with preparing the Expression of Interest, as timeliness was important to Mr A. On 15 September 2010 Mr Midlane contacted Immigration New Zealand and obtained oral confirmation that the basis on which he had prepared the Expression of Interest was likely to meet the relevant requirements.
- [27] As Mr Midlane had no satisfactory response from Ms Woodberg, or anyone else at North Shore Immigration Service Ltd, he completed the Expression of Interest and it was posted to Mr A on 25 September 2010.
- [28] Mr Midlane's only communications in this period from North Shore Immigration Service Ltd were invoices for fees. On 7 October 2010 Mr Midlane wrote to North Shore Immigration Service Ltd by email, outlining the preceding course of events, and noting:

"Your fee was initially quoted at \$6,750 of which \$3,000 has already been paid. In return I have received little benefit if any at all and have now completed the Expression of Interest documents myself.

Please cease sending me invoices as I do not intend to pay them.

Instead I am contemplating whether I should seek the return of the money already paid to you for which I have received little benefit.”

- [29] On 18 October 2010, Ms Woodberg presented herself at Mr Midlane’s office, without making prior arrangements. Mr Midlane told Ms Woodberg he had already sent the Expression of Interest form to Mr A for signature. Ms Woodberg said that she wished to continue the instruction, and apologised for the performance to date.
- [30] Mr Midlane agreed to allow Ms Woodberg to:
- [30.1] Lodge the Expression of Interest when it was returned from Mr A, and
- [30.2] Prepare the application for residence.
- [31] Mr Midlane gave Ms Woodberg a copy of the Expression of Interest he had drafted, and made it clear he was waiting to receive the signed form from Mr A. Mr Midlane also made it clear to Ms Woodberg that he expected to receive value for the \$3,000 already paid, and to be invoiced with particulars of all work performed. At this meeting Mr Midlane also repeated that all communications must be through Mr Midlane, not with Mr A direct, and explained the reason for that.
- [32] Ms Woodberg took the draft Expression of Interest, reproduced it, and without Mr Midlane’s instructions deleted his contact details and inserted her own. On 28 October 2010 Ms Woodberg sent Mr Midlane an email requesting supporting documentation for the Expression of Interest. Mr Midlane informed her that the process did not involve supplying supporting information with the Expression of Interest; that would be lodged with the application for a visa.
- [33] On 9 November 2010, Mr Midlane contacted Ms Woodberg and asked her to confirm that the Expression of Interest had been lodged. Ms Woodberg confirmed she had lodged it on 4 November 2010. Ms Woodberg lodged the form she reproduced using the signature page Mr A had signed.
- [34] After responding to some queries raised by Immigration New Zealand, Ms Woodberg was informed by Immigration New Zealand on 29 November 2010 that Mr A had been invited to apply for a residence visa.
- [35] Ms Woodberg failed to lodge an application for a visa, and the time for doing so expired. On 23 February 2011, Ms Woodberg told Mr Midlane the deadline had expired. She had not previously informed him either that there was a deadline, or when it expired. Ms Woodberg proposed that she should file a *pro forma* application and would pay the application fee herself. Mr Midlane immediately arranged for Ms Woodberg to be reimbursed for this fee.
- [36] North Shore Immigration Service Ltd continued to send accounts to Mr Midlane, and on 1 March 2011 he requested details of the services provided and also requested a copy of all correspondence with Immigration New Zealand. The request was repeated on 3 March 2011. Ms Woodberg did not comply, and on 15 March 2011 Mr Midlane terminated Ms Woodberg’s instructions.
- [37] In breach of the instructions she had received regarding channels of communication, Ms Woodberg contacted Mr A using *Skype* on 8 and 15 March 2011, and in direct contravention of Mr Midlane terminating her instructions, she did so again on 24 March 2011. She told Mr A she was in dispute with Mr Midlane. Mr A complained to Mr Midlane regarding this intrusion, which he had made clear should not occur, and which he resented.
- [38] In contravention of the instructions she received Ms Woodberg also wrote to Mr A in a letter dated 11 March 2011. This letter criticised Mr Midlane.
- [39] Mr Midlane made inquiries with Immigration New Zealand and ascertained:

[39.1] Ms Woodberg withdrew the *pro forma* application.

[39.2] Ms Woodberg received a refund of the fees paid to lodge the application.

[40] Mr Midlane requested that Ms Woodberg refund the fee Immigration New Zealand returned. Ms Woodberg has neither accounted for the fee that was returned, nor justified the payments she has received.

The response

[41] Ms Woodberg responded to the complaint by letter dated 20 July 2011 addressed to the Authority. The key elements of her response were as follows.

[42] This letter has a good deal of personal observations, questioned Mr Midlane's professional practices, claimed he has misrepresented his instructions, and complained that Mr A did not provide the information Ms Woodberg expected.

[43] Ms Woodberg also produced a letter dated 19 July 2011 from Ms Anderson that states:

"In all my communications with Mr Midlane I do not recall ever receiving an instruction that I was never to contact the applicant directly.

I do recall Mr Midlane requesting that contact with the applicant should be done through him/his office but do not believe I was ever given a directive to never contact the applicant."

[44] Ms Anderson did not explain why a request from Mr Midlane for all contact to be done through him/his office is required to be expressed as an "instruction" of it to be binding on her.

[45] Ms Woodberg's response appeared not to engage fully with critical issues raised by the complaint.

The Tribunal's Minute

[46] On 30 October 2012 the Tribunal issued a Minute which explained that the Tribunal had conducted a review of the material then before the Tribunal. The Minute identified apparent issues, potential factual findings, and emphasised that the parties would have the opportunity to respond, and that the Tribunal had reached no conclusions at that point.

[47] The key elements of the complaint, and the response identified in the Minute, were as outlined above.

[48] The Authority and the complainant do not lay charges, and are not responsible to prove them. The Tribunal is an expert inquisitorial body, which receives complaints, and determines whether the proof before it is adequate to uphold the complaint, and if so in what respects. Accordingly, the Minute identified issues and potential conclusions on the material presented before the Tribunal in order to give the parties the opportunity to consider their positions and provide submissions and further proof if they wished.

[49] The Minute emphasised its purpose was to identify potential findings on the basis of material presently before it, and quite different conclusions may follow if further information was presented, or submissions made as to the effect of the material presently held.

[50] The Minute related the potential factual findings to the professional standards required under the Code, and the Act.

[51] The Minute identified potential conclusions on the papers before the Tribunal at the time, with a view to giving the parties the opportunity to respond.

[52] There were various applications to extend time for the responses to the Minute.

The response to the Minute from Ms Woodberg

[53] Through her counsel, Ms Woodberg provided:

[53.1] Submissions,

[53.2] Ms Woodberg's affidavit,

[53.3] Mr Woodberg's affidavit,

[53.4] A copy of Ms Woodberg's file, and

[53.5] A copy of Mr Midlane's file.

[54] A memorandum of counsel followed that material.

Submissions

[55] The submissions indicated that Ms Woodberg accepted that the service agreement failed to name Ms Woodberg, and erroneously described NSIS as the provider of immigration advice.

[56] Further the submissions indicated that Ms Woodberg should have warned Mr Midlane that she was about to contact Mr A.

[57] In other respects Ms Woodberg sought to justify her conduct in relation to the instructions.

Error of law

[58] The first issue addressed by the submissions is a claim that the Tribunal's Minute expressed the view that Ms Woodberg's response to the complaint was an element of the present complaint, which it could uphold as part of the present complaint.

[59] Ms Woodberg's initial response had included an explanation that she doubted the authenticity of responses from Mr Midlane's office. The Minute pointed out appropriate and professional steps she might have taken to such concerns.

[60] The Minute gave notice that this justification for making direct contact with Mr A may not, on its own, be found to be a genuine explanation or justification.

[61] The Minute did not suggest this was a part of the complaint before the Tribunal, and it was not.

[62] Ms Woodberg has now provided an explanation of the events that do explain her actions, and in respect of which concern at responses from Mr Midlane's office are a minor part.

[63] It is not necessary to consider this matter further, as the Tribunal will only make findings under section 50 in relation to the complaint before it.

Written agreement

[64] Ms Woodberg's position is that she did not need to be a party to a written agreement with Mr Midlane, it was sufficient that NSIS had an agreement.

[65] In support of that, the submissions referred to the Authority's policy manual, which provides:

"In situations where an adviser works in a multi adviser company, it may not be appropriate for the employee adviser to accept the written agreement on behalf of their company."

[66] This approach was said to make it inappropriate for Ms Woodberg to be obliged to be a party to written agreements.

Written authority to act

- [67] The submission acknowledges that clause 2(d) of the Code required Ms Woodberg to have written authority to act. The submission was that email correspondence made it clear that Ms Woodberg had taken over the instruction, and Mr Midlane had expressly asked that Ms Woodberg put her name on an application to be submitted to Immigration New Zealand. That was sufficient compliance.

Unlicensed person providing immigration advice

- [68] The submission noted that if Mr Woodberg's conduct in relation to providing immigration advice while not a licensed immigration adviser was to be addressed it was as a criminal offence.
- [69] That is plainly correct, however the Minute had raised the potential issue of Ms Woodberg being a party to unlawful conduct which is a professional conduct issue.
- [70] In relation to that issue the submission contended that if Ms Woodberg was a party to criminal offending, then that was exclusively a matter for the criminal jurisdiction of the District Court. She was effectively immune from liability in the professional disciplinary regime if she could be held accountable in a criminal context.
- [71] In relation to the substance of this issue, Ms Woodberg's counsel referred to the standard of proof with reference to *Z v Dental Complaints Assessment Committee* [2008] NZSC 55. The standard being balance of probabilities, with the regard to the gravity of the finding.
- [72] The submissions traversed the evidence, and made the following key points:

- [72.1] At the meeting of 28 July 2010 Mr Midlane complained that Mr Woodberg was lacking knowledge of the file, rather than him providing advice;
- [72.2] Mr Woodberg was dealing with the situation as Ms Woodberg was away ill. Mr Woodberg advised Mr Midlane he was not a licensed immigration adviser, and he was only involved in a role of collecting documentation.
- [72.3] This fell outside of the scope of "immigration advice" as defined in the Act.

Contact between Ms Woodberg and Mr A

- [73] In relation to contact with Mr A, the first point raised was that the agreement was in the name of Mr A, and Mr Midlane was only Mr A's agent.
- [74] In relation to instructions that Ms Woodberg was not to make direct contact with Mr A, the response was:
- [74.1] Any "employer" could be contacted pursuant to clause 5(c) of the agreement;
- [74.2] As an employer could be contacted, it was evidence that contact was not confined to Mr Midlane.
- [74.3] There was no express clause that Mr A was not to be contacted.
- [74.4] Ms Woodberg denies that she was given instructions not to contact Mr A, and had she done so she would have reconsidered the instructions.
- [74.5] Ms Anderson was not given any unequivocal instructions not to contact Mr A, just that "Mr Midlane made it clear he was to be the point of contact for [Mr A]".
- [74.6] Mr Midlane had a professional responsibility to make the instructions clear if it was important to his client, and he did not do so.

[74.7] The circumstances when Ms Woodberg contacted Mr A were such that she had her own professional obligations to her clients:

[74.7.1] Mr A was a client, and she reached the point where it was necessary and appropriate to make direct contact.

[74.7.2] Mr Midlane had not provided the information Ms Woodberg required to discharge her responsibilities.

[74.7.3] Mr Midlane's files indicated that he had not responded adequately to information request in the period from 15 December 2010 to the time when she made contact with Mr A.

[74.7.4] Ms Woodberg accepts that ideally she should have signalled to Mr Midlane she was contemplating taking this step.

[75] The submission also referred to the principle that there is a threshold for making an adverse disciplinary finding, and submitted that if there was a lapse, that threshold was not reached in this case.

Withdrawing the application

[76] Ms Woodberg says she had instructions from Mr A to withdraw the application, and it was his application.

General issue

[77] Ms Woodberg accepts that after Ms Anderson left NSIS, that event coupled with her own illness led to the standard of service delivery being "not up to the required standard". However, after 18 October 2010 the issues were resolved, and Mr Midlane accepted Ms Woodberg's explanation of the circumstances that had led to difficulty.

[78] From 18 October 2010, Ms Woodberg was in regular contact with Mr Midlane, and responded in a timely and appropriate manner.

Specific issues

[79] The submission contends that Mr Midlane was aware of the deadline for the residency visa application, and Ms Woodberg took active steps to get the necessary information to pursue the application.

[80] Ms Woodberg had legitimate concerns that communications were not reaching Mr Midlane.

Failure to account for services provided

[81] In the submissions Ms Woodberg has provided an explanation of the work she did, together with a full copy of her file. It suffices to note there is a clear picture of the work undertaken.

Fees and client funds

[82] Ms Woodberg explained in the submission that a fixed fee of \$6,000 plus GST was charged, and it was fair and appropriate.

[83] In relation to the payment of \$3,500 paid to Immigration New Zealand to lodge the application which was refunded, she said that the money was properly used to pay outstanding fees of \$3,450.

Affidavits

[84] Ms Woodberg and Mr Woodberg provided affidavits, which provided a factual foundation for the submissions discussed.

Mr Midlane's lack of response to Ms Woodberg's submissions and affidavits in support

- [85] Mr Midlane was not required to respond to Ms Woodberg's case, and did not do so.
- [86] Ms Woodberg through her counsel submitted that the result was that I should prefer the sworn contents of Ms Woodberg and Mr Woodberg's affidavits to Mr Midlane's unsworn complaint. I do not accept that submission. Mr Midlane is subject to severe professional consequences if he sought to mislead the Authority. It is a matter of weight, not a matter of absolute preference.
- [87] However, a substantial contemporaneous written record backs the affidavits provided in support of Ms Woodberg's case, the affidavits and that record are consistent.
- [88] Where there is room for different perspectives of discussions and the like, where Mr Midlane has not challenged what Ms Woodberg and Mr Woodberg say, it is appropriate to approach their account on the basis it is unchallenged.

The issues to be determined

- [89] Broadly, the issues to determine are the application of the Code of Conduct, and section 44 of the Act to the facts. Section 44 provides that breaches of the code, and misleading or dishonest conduct are grounds for complaint.
- [90] In particular, the issues discussed in Ms Woodberg's submission appropriately identify the issues, namely:
- [90.1] Whether there is a proper written agreement, and authority for Ms Woodberg.
- [90.2] The potential that Ms Woodberg was a party to an unlicensed person providing immigration advice.
- [90.3] The propriety of Ms Woodberg making direct contact with Mr A.
- [90.4] Withdrawing the application – whether Ms Woodberg had instructions.
- [90.5] Timeliness issues.
- [90.6] Accounting for the services provided.
- [90.7] Fees and client funds.

Discussion

Whether there is a proper written agreement, and authority for Ms Woodberg.

- [91] Ms Woodberg in her submissions has pointed out the Authority permits companies, which are not entitled to provide professional immigration services, to enter into service agreements. However, individuals who are licensed immigration advisers must provide the services.
- [92] The Authority has not challenged this submission. I accept that under the standards promulgated by the Authority, it is permissible for a company to enter into an agreement to provide immigration services.
- [93] However, it is inescapable that the individuals who are licensed immigration advisers remain responsible for compliance with the Code and the Act. If a complaint is made and it comes before this Tribunal, individuals who are licensed carry potentially liability for compensation, the refund of fees, and other sanctions, when a complaint is upheld.
- [94] It follows the requirement in clause 2(h) of the Code is pivotal. It requires that a licensed immigration adviser "must, at all times ... hold written authority from clients to act on their behalf".

- [95] That is essential to ensure that there is clarity regarding who is responsible for professional service delivery and accountable to the client.
- [96] Ms Woodberg points to email correspondence to give her authority. Neither Mr Midlane nor the Authority challenged the view that email correspondence meets the requirement that that authority be in writing. That is consistent with the authorities regarding the contemporary meaning of "writing".
- [97] Ms Woodberg's contention is:
- [97.1] In an email of 14 June 2010 Mr Midlane was informed that Ms Woodberg would be acting.
- [97.2] This was clear in subsequent emails in October 2010.
- [97.3] On 28 October 2010 Mr Midlane expressly instructed Ms Woodberg to inform Immigration New Zealand that she was dealing with the matter, and they should report to her.
- [98] The written record supports this. The view is open that between 14 June 2010 and 28 October 2010 Ms Woodberg did not have written authority. However, I am satisfied there was a clear written record that she was acting, and Mr Midlane acquiesced in that.
- [99] In the circumstances, including the fact Mr Midlane is a professional who understood the relevant issues, I do not consider that any lapse reaches the threshold for an adverse disciplinary finding.
- [100] Accordingly, this ground of complaint will be dismissed.

The potential that Ms Woodberg was a party to an unlicensed person providing immigration advice.

- [101] Ms Woodberg has provided three responses to the potential finding she was a party to Mr Woodberg providing immigration advice unlawfully:
- [101.1] It is not possible for this Tribunal to make a finding, as such conduct would be a criminal offence, and that is the exclusive jurisdiction for such a finding.
- [101.2] Mr Woodberg did not provide any immigration advice.
- [101.3] Ms Woodberg was not a party to what Mr Woodberg did.
- [102] I do not consider the first submission has merit. There is a large part of professional disciplinary offending where the conduct may amount to a criminal offence. It is true that it is not uncommon for professional disciplinary tribunals to defer hearing professional disciplinary charges until pending criminal charges have been determined.
- [103] However, the concept of criminal jurisdiction ousting professional disciplinary jurisdiction is without foundation, and no authority was cited in support of it. It is common place for civil and various statutory consequences to be coincident with criminal liability.
- [104] It is often important that suspension applications and the like are addressed while criminal proceedings progress. Ultimately, the different standard of proof, and the wider range of sanctions that focus on protection of the public will lead to different or further consequences than the outcome of criminal proceedings.
- [105] The other aspects of the response are however compelling.
- [106] Mr Woodberg said in his affidavit he did not provide any immigration advice unlawfully, he was gathering documentation. Further, he said that the occasion to meet with Mr Midlane was triggered by Ms Woodberg being unavailable due to illness. Mr Midlane has not responded to this evidence; however it is corroborated by Mr Midlane's complaint being that Mr Woodberg lacked knowledge of the file.

- [107] I cannot be satisfied that Mr Woodberg did unlawfully provide immigration advice.
- [108] Further, the evidence from Ms Woodberg and Mr Woodberg is that prior to the meeting Ms Woodberg was not aware of the meeting between Mr Woodberg and Mr Midlane. If so, Ms Woodberg cannot be a party to what Mr Woodberg did at that meeting. While Ms Woodberg would be expected to manage Mr Woodberg's involvement with clients, she was ill at the time. I find she was not a party to what took place at the meeting.
- [109] It follows this aspect of the complaint will be dismissed.

The propriety of Ms Woodberg making direct contact with Mr A.

- [110] When a professional receives instructions from another professional to provide specialist services to a client there is inevitably some delicacy. The referring professional does not wish to disrupt the relationship with their client, and it will be important to understand the agreed boundaries. Client contact is central to that issue.
- [111] There are two aspects of Ms Woodberg's response:
- [111.1] The instruction to avoid client contact was not clear; and
- [111.2] Ms Woodberg ultimately had professional obligations that made contact appropriate in the particular circumstances.
- [112] Ms Woodberg has claimed that Mr Midlane failed to establish the proper boundaries. The submission is not strong. In part it relies on the service agreement allowing for contact with an employer. That had no relevance to the instruction. Ms Anderson had said Mr Midlane made it clear he was to be the only point of contact, and Ms Woodberg contends that falls short of an instruction not to contact Mr A.
- [113] I am satisfied that Ms Woodberg should have been aware that her instructions were that she should deal direct with Mr Midlane, not Mr A.
- [114] However, what Ms Woodberg says regarding the circumstances in which she did ultimately contact Mr A does provide a significant reason for her taking that step.
- [115] She says that the critical events developed in this way:
- [115.1] Mr A had a three month time period to lodge an application for a visa.
- [115.2] Ms Woodberg promptly requested the information she needed to prepare and lodge the application, and sent it to Mr Midlane on 15 December 2010.
- [115.3] Mr Midlane already knew of the information that was required before Ms Woodberg sent out this request.
- [115.4] On 14 February 2011 when there was no response Ms Woodberg took the initiative of contacting Mr Midlane to follow up.
- [115.5] By the first week of March 2011 there was still no response.
- [115.6] At this point Ms Woodberg had concerns that Mr Midlane was not responding appropriately, including a suspicion that Mr Midlane was not personally receiving all correspondence.
- [115.7] At this point Ms Woodberg decided to contact Mr A.
- [116] What Ms Woodberg now knows from examining Mr Midlane's file is that her request for information made on 15 December 2010 was not forwarded to Mr A until some two and a half months later, on 24 February 2011.

- [117] I give limited weight to the delay in Mr Midlane forwarding information to Mr A, as that was not known to Ms Woodberg at the time. It may justify the concerns she had regarding communication with Mr Midlane. He has not replied to that claim.
- [118] I accept that Ms Woodberg had professional obligations to Mr A, he was the person who was personally lodging an application with Immigration New Zealand. Ms Woodberg has put this in terms of the service agreement, however the issue is more fundamental.
- [119] When a licensed immigration adviser is providing a service for an individual, they must owe a professional obligation to them, and must have the ability to communicate concerns.
- [120] Ms Woodberg was satisfied that she faced a situation that had become critical, as an important time limit was passing. She herself responsibly recognises that ideally she should have first given Mr Midlane notice before direct contact with Mr A; she could also have usefully documented her concerns earlier. However, there is an element of hindsight in that perspective.
- [121] I am satisfied that Ms Woodberg genuinely considered she had a professional obligation to Mr A, and acted for that reason. I am satisfied that the circumstances justified concern, and I am not satisfied that any lack of perfect management of the situation amounts to a lapse that reaches the threshold for adverse disciplinary findings.
- [122] Accordingly, this aspect of the complaint will be dismissed.

Timeliness

- [123] Ms Woodberg accepts that after Ms Anderson left NSIS, that event, coupled with her own illness, led to the standard of service delivery being “not up to the required standard”.
- [124] Mr Midlane accepted Ms Woodberg’s explanation of the circumstances that had led to difficulty. Consistent with that, I do not consider the lapses in that period reach the threshold for reaching an adverse disciplinary finding.
- [125] From 18 October 2010, Ms Woodberg was in regular contact with Mr Midlane, and responded in a timely and appropriate manner. Ms Woodberg has provided documentation to support that, and Mr Midlane has not challenged it.
- [126] I am satisfied this aspect of the complaint must be dismissed.

Failure to account for services provided

- [127] The minute expressed concern Ms Woodberg’s initial response did not show what work she had done.
- [128] That is now clear, and no issue remains in relation to that matter.

Fees and client funds

- [129] The remaining issue is fees and client funds.
- [130] Ms Woodberg had charged a fixed fee of \$6,000 plus GST. I have not been satisfied:
- [130.1] That fee was inappropriate for the work contemplated,
- [130.2] That Ms Woodberg failed to seek to complete the instructions, and
- [130.3] Did so to the extent her instructions allowed.
- [131] Accordingly, I will deal with this issue on the basis Ms Woodberg was entitled to the fees agreed. Ms Woodberg’s position is that a balance of \$3,450 was properly due. Mr Midlane has not disputed that after receiving the documentation and submissions on the issue.

- [132] The issue that requires consideration is money paid for the lodgement fee charged by Immigration New Zealand. This fee was \$3,500. Ms Woodberg says that the following transpired:
- [132.1] The fee of \$3,500 was paid by NSIS giving credit card details to Immigration New Zealand on 25 February 2011, and the fee was debited to the card on 2 March 2011.
- [132.2] Mr Midlane reimbursed the fee on 28 February 2011, with a payment to NSIS.
- [132.3] The fee was refunded by Immigration New Zealand to NSIS on 24 March 2011, by crediting the credit card.
- [132.4] Mr Woodberg decided he would take the refund and apply it to paying fees (the same amount less \$50).
- [133] First, I do not consider Mr Woodberg's role is important. Ms Woodberg is the licensed immigration adviser, and she is responsible for dealing with funds received from clients. She may delegate those duties, but will be personally responsible for the funds, and for maintaining proper and adequate oversight and direction of unlicensed persons.
- [134] The issue that causes difficulty is funds of \$3,500 were received for one purpose, and without authority used for another purpose.
- [135] The payment was made for the purpose of meeting a liability for a disbursement; and used to pay outstanding fees.
- [136] A trust is created when a person has property or rights which he or she is bound to exercise for or on behalf of another person, or to achieve some particular purpose. The person holding the property or right in that way is the trustee.
- [137] Client funds are an example. Funds are received from a client, held by the adviser for a particular purpose, the adviser is required to keep the funds separate from her or his own property.
- [138] An essential consequence of funds being held on trust is that the funds are not property which the trustee holds and may deal with as their own property. The trustee must deal with the funds in accordance with the terms of the trust.
- [139] It follows that receipt of trust funds is not the same as receiving payment, and simply having a debt to be repaid which might be set off against a different claim.
- [140] If a trustee deals with funds other than in accordance with the terms of a trust, that is a breach of trust. The trustee cannot simply make good the liability later and claim to have avoided breaching the trust.
- [141] For example, if a trustee invests funds in a finance company deposit, unless that is in accordance with the terms of the trust, or is authorised by statute, there is a breach of trust. It is no answer to say the funds were in fact safe, and the trustee recovered the investment.
- [142] This background is material, the fact there is a trust created adds some dimension and perspective to the requirements in the Code.
- [143] Clause 4 of the Code provides:
- "A licensed immigration adviser must:
- ...
- c) use funds held on behalf of clients only for the purpose for which they were paid to the adviser."
- [144] Ms Woodberg received \$3,500 to reimburse the payment of a fee to Immigration New Zealand, she used it for another purpose.

- [145] It would be appropriate to get the authority of a client to use surplus funds paid for disbursements to pay fees. That was not the case here.
- [146] I am satisfied the complaint must be upheld in this respect.
- [147] I expressly note this aspect of the complaint has not been upheld on the basis of dishonesty. I accept Ms Woodberg honestly failed to appreciate the obligations upon her.

Decision

- [148] Pursuant to section 50 of the Act, the complaint is upheld. Ms Woodberg has breached the Code in the respect identified. She has used a payment of \$3,500 for a purpose other than for the purpose for which it was paid to her, in breach of Clause 4(c) of the Code, which is a ground for complaint pursuant to section 44(2)(e) of the Act.
- [149] In other respects, the complaint is dismissed.

Submissions on sanctions

- [150] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions.
- [151] The Authority and Mr Midlane have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, and compensation. Whether they do so or not, Ms Woodberg is entitled to make submissions and respond to any submissions from the other parties.
- [152] 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.

Timetable

- [153] The timetable for submissions will be as follows:
- [153.1] The Authority and Mr Midlane are to make any submissions within 10 working days of the issue of this decision.
- [153.2] Ms Woodberg is to make any further submissions (whether or not the Authority or Mr Midlane make submissions) within 15 working days of the issue of this decision.
- [154] 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 27th day of May 2013

G D Pearson
Chairperson