

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

Decision No: [2013] NZIACDT 34

Reference No: IACDT 044/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

Between

OLL

Complainant

AND

NJK

Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: Mr S Laurent, Laurent Law, Auckland.

Date Issued: 30 May 2013

DECISION

Introduction

- [1] Ms OLL says she engaged Mr NJK to provide immigration advice shortly before her visa expired.
- [2] She says that Mr NJK did not provide her with appropriate advice regarding her immigration status, and that his response was careless or incompetent.
- [3] Ms OLL also states Mr NJK told her the fee for a course at a specific educational college was \$6,500; and she paid that sum of money to Mr NJK, for him to pay that same sum of money to the college. However, Ms OLL alleges pursuant to a secret arrangement he had with the college, Mr NJK paid \$5,000 to the college and retained \$1,500 for his own personal benefit to which he was not entitled.
- [4] The principal issue is whether the allegations are true.
- [5] In response to Ms OLL's allegations, Mr NJK has produced evidence to show that:
 - [5.1] Ms OLL dealt with the college directly;
 - [5.2] Mr NJK's only role was to negotiate a discounted fee with the college, which Ms OLL received;
 - [5.3] Ms OLL was fully aware of these facts as she made the payment to the college personally; and
 - [5.4] Mr NJK received no benefit, and had no role in handling the funds.
- [6] Ms OLL did not respond to the evidence Mr NJK produced in any satisfactory manner.
- [7] The complaint has been dismissed as none of the elements in it are supported by the facts as determined on the material before the Tribunal.

The complaint

- [8] Ms OLL's complaint was founded on the following claims.
- [9] Ms OLL came to New Zealand to study on 22 February 2010. The earthquakes in Christchurch affected her study. Following the second earthquake on 22 February 2011 she moved to Auckland to continue her study.
- [10] The earthquakes personally affected Ms OLL. She made good progress with her study prior to the earthquakes, but later her progress was impaired.
- [11] The college in Auckland suggested she extend her visa. On 13 May 2011 Ms OLL contacted Mr NJK, who is a licensed immigration adviser, to assist her. Her student visa was still current but was about to expire and she would be in New Zealand unlawfully when it expired.
- [12] When Ms OLL consulted Mr NJK, he advised her that:
 - [12.1] The college where she was studying in Auckland had a poor reputation, and he would look for an alternative.
 - [12.2] He would guarantee the renewal of Ms OLL's student visa if she followed his advice.
 - [12.3] There was no time pressure to apply for a new student visa, notwithstanding that her current visa was about to expire, as he would deal with all the issues.

- [12.4] In support of the lack of time pressure, Mr NJK produced a letter to Ms OLL regarding concessions to allow people affected by earthquakes to change where they were studying.
- [12.5] He could lodge the application on 16 May 2011, and it would result in the issue of an interim visa.
- [12.6] Ms OLL had support persons with her at the meeting with Mr NJK. They raised the question of whether it was true that an interim visa would not be issued if Ms OLL did not hold a current permit to be in New Zealand when her application was made. They were correct, as no interim visa would be issued in those circumstances. However, Mr NJK became rude and aggressive and required the support persons to leave his office.
- [12.7] He undertook to contact Immigration New Zealand and assured Ms OLL her application would proceed as a normal visa application, notwithstanding the fact she would not hold a current visa to be in New Zealand.
- [12.8] He recommended a particular alternative college, and said he would arrange an offer of a course of study.
- [13] Mr NJK, on Ms OLL's behalf, lodged an application for a student visa with Immigration New Zealand on 16 May 2011. The application was lodged without the documentation establishing proof of commitment to an available course of study.
- [14] The following day, 17 May 2011, Mr NJK advised Ms OLL to pay tuition fees of \$6,500 and a fee of \$600 for his services. Mr NJK presented Ms OLL with quotation from the recommended institution. Ms OLL has produced a copy of the quotation.
- [15] Ms OLL paid Mr NJK the money in cash. He told her he had paid \$6,500 to the institute, and made no deductions from the sum.
- [16] Ms OLL's employer approached her and said she had to produce evidence of a current visa. She approached Mr NJK and he said he had another interim visa, on which he would change the name and Ms OLL could use that to satisfy her employer.
- [17] Immigration New Zealand raised concerns regarding Ms OLL's application for a student visa. She asked her employer for assistance, and was requested to obtain a copy of the letter from Immigration New Zealand. Ms OLL approached Mr NJK, and he denied that Immigration New Zealand had raised any issues. Ms OLL later discovered that Mr NJK had provided a response to Immigration New Zealand without consulting her.
- [18] Immigration New Zealand refused to provide Ms OLL with a student visa and notified her of this in a letter dated 25 July 2011. Mr NJK's response was to say that the situation could not be changed and that Ms OLL should hide and continue to work unlawfully in New Zealand.
- [19] Ms OLL then sought to have the \$6,500 she had paid through Mr NJK refunded. The money had been lodged with the Public Trust; however only \$5,000 was held in trust. On making further inquiries with the institution, Ms OLL was informed that Mr NJK had requested that he be supplied with a quotation for the sum of \$6,500, which was \$5,000 for tuition fees, and \$1,500 for commission he was to be paid (but not disclosed). He later obtained an invoice for \$5,000 which was the tuition fee component.
- [20] Mr NJK received \$6,500 and deposited \$5,000, having deceived Ms OLL and kept \$1,500 to which he was not entitled.

The response

- [21] Mr NJK responded to the complaint in a letter addressed to the Authority which was received on 5 December 2011.

- [22] Mr NJK said that the initiative to study at a different college was Ms OLL's and not the result of any comments or pressure from him.
- [23] In relation to the claim that he misappropriated money, Mr NJK stated:
- [23.1] The College quoted \$6,500.
- [23.2] Ms OLL responded saying she only had \$5,000 until further funds came to hand from overseas.
- [23.3] Ms OLL paid \$5,000, and that was what was deposited into the trust account operated by the Public Trust. Ms OLL signed the terms and conditions with the College and the Public Trust on that basis.
- [23.4] Mr NJK never received the \$6,500 and he is not liable for the \$1,500 difference.
- [24] In other respects, Mr NJK said Ms OLL submitted her application on 14 May 2011; and as his contract was signed on 18 May 2011, her complaints were unfounded.

The Tribunal's Minute

- [25] On 19 March 2013 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.
- [26] The key elements of the complaint, and the response identified in the Minute, were as outlined above.
- [27] 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.
- [28] 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.
- [29] The Minute related the potential factual findings to the professional standards required under the Code of Conduct. and the Act.
- [30] 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.

The response to the Minute

- [31] Through his counsel Mr NJK provided:
- [31.1] Submissions;
- [31.2] An affidavit from Mr NJK, and
- [31.3] An affidavit from Mr Singh.
- [32] Mr NJK presented a quite different narrative of the events from Ms OLL's complaint; it is discussed below.

- [33] Ms OLL responded to the Minute by emails dated 3 and 4 April 2013. That included producing a bank statement, which showed a withdrawal form for \$6,500 and it being drawn as a cheque; it appears it was a bank cheque. However, there was no evidence of who presented the bank cheque for payment.
- [34] Ms OLL also said someone who claimed they were connected with Mr NJK had asked her to withdraw the complaint and in return fees would be refunded. This has allegedly occurred, even though Ms OLL has not produced any evidence of paying fees to Mr NJK.
- [35] On 22 April 2013 by email Ms OLL responded to the case presented by Mr NJK, she said she did “not agree with all the statements” in Mr NJK and Mr Singh’s affidavits. However, she asserted her narrative was correct including that she first met with Mr NJK on 13 May 2011.

Discussion

Issues

- [36] The Tribunal’s Minute identified three issues that needed to be resolved by the Tribunal on the basis of the material then before the Tribunal:
- [36.1] Whether Mr NJK had dishonestly taken a secret commission through misrepresenting the situation to his client;
- [36.2] Did Mr NJK fail to act competently, in particular whether:
- [36.2.1] He gave appropriate advice regarding Ms OLL’s visa expiring; and
- [36.2.2] Whether he acted effectively to address Ms OLL’s circumstances.
- [36.3] Whether Mr NJK encouraged Ms OLL to breach New Zealand’s immigration laws.
- [37] Mr NJK, through his counsel, has responded on the basis those are the issues to be determined, and addressed each of them in his submissions. Ms OLL and the Authority have not taken issue with the issues as identified in the Tribunal’s minute.
- [38] Accordingly, Mr NJK has faced allegations that are at the most serious end of the scale of professional offending, namely dishonesty in relation to procuring money from a client.
- [39] The case presented by his counsel has reflected the gravity of the allegations, and provided evidence as far as it is available to address each of the issues.
- [40] The Tribunal is required to determine facts 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). This is a case where the allegations of dishonesty and encouragement not to comply with New Zealand immigration laws are very serious allegations.
- [41] The nature of the allegations, combined with the quite different narrative that Mr NJK claims was in fact the truth, has put him in the position where he has had to take the position the complaint is not genuine and in fact improperly motivated.
- [42] Through his counsel, Mr NJK undertook a process of gathering independent evidence (documentary and by affidavit from a witness) and presented it to the Tribunal with a sworn account of the events from himself.
- [43] Neither Ms OLL nor the Authority has answered the case presented by Mr NJK; and they were not required to do so. However, Ms OLL has maintained she is correct, and said there is evidence available from persons which support her allegations. However, those persons have not given evidence in reply. Neither the Authority nor Ms OLL has sought an oral hearing.

The Narrative

- [44] As noted, Mr NJK has presented a narrative of events that is substantially different from Ms OLL.
- [45] First, Mr NJK denies that he met with Ms OLL on 13 May 2011, or that he had communications of the kind alleged.
- [46] What did occur, he says, was that Ms OLL completed her own documents on that date (13 May 2011). This is evidenced by the fact Mr NJK did not sign the “adviser section”, and there was a declaration by Ms ML of Computer Power Institute saying she was the person assisting Ms OLL.
- [47] Ms OLL has produced a police report showing Ms OLL’s handbag was stolen on 13 May 2011 at 7:00 pm, and her passport was in the handbag. That evidences that Ms OLL had decided not to lodge the visa application that day as the passport would have been lodged with the application. That was also consistent with Ms OLL’s statement to Mr NJK that she was deciding which college to enrol at.
- [48] Ms OLL lodged her application by courier on Saturday 14 May 2011, and Immigration New Zealand records show it was received on Monday 16 May 2011. The submission included a letter explaining the loss of Ms OLL’s passport when her handbag was stolen.
- [49] Mr NJK says that such documents are consistent with his account of the facts that the first contact between them occurred on 18 May 2011; and he became involved when he submitted six or more documents on 23 May 2011. By that time Ms OLL was in New Zealand unlawfully, and her application had been lodged without his assistance.
- [50] Mr NJK provided evidence he had good relations with the two colleges Ms OLL was considering; contrary to Ms OLL’s claim he disparaged one of them. He says Ms OLL had arrangements to attend one college, and decided to pursue study at a different one on her own initiative.
- [51] Ms OLL has claimed Mr NJK gave her a quote for \$6,500 for the course fee at the second college, and only \$5,000 was paid. Mr NJK says Ms OLL obtained the quote for \$6,500 by going to the college herself on 17 May 2011.
- [52] Ms OLL has produced evidence of withdrawing \$6,500 from her bank, but not proved it was paid to Mr NJK. Mr NJK denies he received any of the money, and has produced bank statements that show no deposit of the kind being received.
- [53] Mr Singh has provided an affidavit, the key evidence being:
- [53.1] He was the Marketing Manager of the college involved, the college has now closed and Mr Singh does not have access to the records;
- [53.2] He personally dealt with Ms OLL when she enrolled;
- [53.3] The standard fee for the course was \$6,500, and the college would have been willing to pay Mr NJK a commission;
- [53.4] Mr NJK approached the college and offered to forgo any commission, if Ms OLL could be offered the course for \$5,000. Mr Singh gained the approval of the Director of the Academy for this arrangement;
- [53.5] On 23 May 2011, Ms OLL paid \$5,000 into the Public Trust Account, and Mr Singh signed the application form which Ms OLL also signed. Accordingly, he had personal knowledge that at the time the payment was made Ms OLL made the payment personally, and she knew that it was \$5,000;
- [53.6] Neither Mr NJK nor his firm sent any money to the college, and they did not get any money from the college; and

- [53.7] Ms OLL's claim that Mr Singh told Ms OLL that Mr NJK had \$1,500 of her money is untrue.
- [54] Mr NJK identified that Ms OLL has produced evidence of a withdrawal of \$6,500 from her bank, but it was a cheque, apparently a bank cheque, as there is also a withdrawal form produced. It was not cash as Ms OLL claimed. Through his counsel, Mr NJK essentially asserts the position:
- [54.1] He has taken proof as far as he can that he did not receive money from Ms OLL and she was dealing directly with the college;
- [54.2] He has produced an independent witness to say he did not make any payments to the college, and accordingly had no opportunity to withhold \$1,500 from a receipt of \$6,500;
- [54.3] Ms OLL has produced evidence of a traceable withdrawal in the form of a cheque. That is at least likely to be traceable to the extent of proving who the cheque was payable to, and very likely traceable to the account to which it was ultimately deposited; and
- [54.4] Tracing the cheque is information that is not available to Mr NJK. Ms OLL is in a position to get that information.
- [55] Mr NJK says he first met with Ms OLL on 18 May 2011, and that is consistent with an agreement of the same date apparently signed by both Mr NJK and Ms OLL. He completed the appropriate documentation to record he was the adviser on 20 May 2011. He has produced a copy of the document in the form it was submitted to Immigration New Zealand.
- [56] Mr NJK says Ms OLL has not made any payment to him or the company he works with.
- [57] Ms OLL claimed that Immigration New Zealand had issued a Potentially Prejudicial Information letter, whereas Mr NJK has produced a record from Immigration New Zealand showing that did not occur. He says this part of the complaint is based on events that did not occur.
- [58] Mr NJK says Ms OLL's claim he advised her to falsify a visa to satisfy her employer is false. Further, the correspondence shows Ms OLL's employer was, after that point, seeking a visa and was not in receipt of a forged visa.

Ms OLL and the Authority's response to Mr NJK's case

- [59] Ms OLL and the Authority were not required to respond to Mr NJK's case. The Authority has not responded, and Ms OLL has responded only at the level of reasserting claims.
- [60] Ms OLL's complaint has been met with a thoroughly documented account of Mr NJK's actions, and on the basis of the information before the Tribunal there is a compelling body of evidence that demonstrates:
- [60.1] Mr NJK did not handle the sum of \$6,500 as Ms OLL was personally dealing directly with the college; therefore, Mr NJK had no opportunity to misappropriate \$1,500. The extent of Mr NJK's role was to negotiate a discount on fees, which accrued entirely to Ms OLL. That is not consistent with the factual claims made in the complaint.
- [60.2] Mr NJK acted competently, in particular he was only engaged after Ms OLL's visa expired, at which point he promptly provided the information that was required by Immigration New Zealand.
- [60.3] Mr NJK provided proper and appropriate advice.
- [61] Ms OLL's response to the documented history is inconsistent with the documentation. For example, Ms OLL says she signed no documents, but has not attempted to explain why there is an agreement that appears to have her signature on it. Both an independent witness and documentation appear to present a compelling case that Ms OLL's claim that she paid \$6,500

to Mr NJK is false; and she dealt direct with Mr Singh and paid \$5,000 to the college's trust fund. She has provided no explanation.

Weighing the evidence

- [62] I am satisfied that in all respects where Mr NJK and Ms OLL's accounts differ, I must accept Mr NJK's account. The most serious element of the complaint is that Mr NJK misappropriated \$6,500. Mr NJK has provided strong evidence that the claim is false, and Ms OLL paid no money to him. He has produced evidence from a third party who dealt with Ms OLL. This is not a matter where there is room for confusion on Ms OLL's part. If she paid \$5,000 to the college, she cannot have been under the impression she paid \$6,500 to Mr NJK.
- [63] It follows that I accept Mr NJK's evidence that he gave proper and appropriate advice; the only evidence to the contrary is Ms OLL's unsupported claims of oral statements Mr NJK made. I must reject Ms OLL's evidence.
- [64] There is no evidence of any incompetent advice; on the contrary the documented history is consistent with Mr NJK acting promptly and appropriately.
- [65] Accordingly, I dismiss the complaint as it is wholly lacking a factual foundation.

Decision

- [66] Pursuant to section 50 of the Act, the complaint is dismissed.

DATED at WELLINGTON this 30th day of May 2013

G D Pearson
Chairperson