BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2013] NZIACDT 4

Reference No: IACDT 018/11

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**Immigration Advisers Authority**
	Authority
Between	**ETS**
	Complainant
AND	**WKE**
	Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 5 February 2013

DECISION

Introduction

[1] Mr ETS had difficulties obtaining a work permit, as Immigration New Zealand found the position of employment he was relying on did not appear to meet policy requirements.

[2] He engaged Mr WKE, who unsuccessfully sought to persuade Immigration New Zealand that the position of employment was suitable. The complaint is that the endeavour was either hopeless, or had such little prospect of success that he should have taken some care to warn Mr ETS of that.

[3] There was a second instruction after the first endeavour failed, and the complaint is that Mr WKE overcharged for this instruction, which did not progress past the initial stages.

[4] The Tribunal has found Mr WKE has justified his approach to the first instruction. He had direct experience of other occasions when Immigration New Zealand had taken a more liberal stance than applied in the present case.

[5] In relation to the second complaint, the Tribunal has determined that on the information available the fee was excessive, but will dismiss the complaint if Mr WKE either refunds the fee or justifies any portion retained. Otherwise, the complaint will be upheld in respect of overcharging.

The Complaint

[6] Mr ETS applied for a work permit in August 2010. On 11 August 2010 Immigration New Zealand wrote a letter explaining that a preliminary assessment had been undertaken and there were difficulties with the application, as:

[6.1] Mr ETS had completed a course of study, and he applied for a work permit under a special category where the employment provided practical experience relevant to the study.

[6.2] The position relied on was low skill, and did not require the training Mr ETS had undertaken. Accordingly, it did not meet the criteria of providing practical experience relevant to the qualification.

[7] Mr ETS engaged Mr WKE to assist him. On 16 August 2010 Mr ETS signed an agreement for the provision of services, which were stated to be to prepare a reply to the 11 August 2010 letter. The agreement referred to the letter, and then had the words: "(Student Permit)" immediately following.

[8] The fee for the service was identified as $595 prior to commencing, and a further $473 on submission to Mr WKE's office. That was a total of $1,068 which Mr ETS paid.

[9] Mr ETS says that Mr WKE told him a large amount of work was required to respond, and that accounted for the cost.

[10] Mr WKE drafted a response to Immigration New Zealand, dated 8 September 2010. The letter essentially asserted that the position Immigration New Zealand had said did not meet the criteria, did in fact meet the criteria. The letter described the basic duties of a retail assistant and said they were relevant to Mr ETS's management study, rather than providing a response that engaged with the reasoning contained in Immigration New Zealand's 11 August 2010 letter.

[11] Mr WKE's letter did go on to say that Mr ETS's circumstances were the same as other clients who had been granted permits in comparable circumstances, and raised an issue of inconsistent treatment.

[12] Mr WKE's letter of 8 September 2010 invited Immigration New Zealand to process the application Mr ETS had lodged, and the result was that the application was declined. Immigration New Zealand gave notice of the decline in a letter dated 5 October 2010.

[13] The grounds for declining the application were substantially the same as the indication given in the 11 August 2010 letter from Immigration New Zealand explaining the likely result. The letter pointed out that Mr ETS had undertaken a NZIM Diploma in Management and the position of employment relied on was one in which he had been employed since November 2007, and he had not progressed to an Managerial/Supervisory role. Immigration New Zealand acknowledged he would train new employees, but that was considered usual for any experienced employee. The letter noted Mr ETS appeared to have worked more than the 20 hours per week authorised by his Student Permit. He was granted a short-term visitor's permit, and the relevant immigration policy was drawn to his attention.

[14] In early November 2010 Mr ETS personally drafted an application for a further visitor's permit. On 22 November 2010 Immigration New Zealand wrote to Mr ETS and indicated there were concerns in relation to his application. In essence, he had held temporary permits and there were no adequate grounds for the further temporary permits that had been requested.

[15] Following this letter, Mr ETS approached Mr WKE again and agreed on a fee of $1,144.25. It was to be paid in two instalments, and Mr ETS paid $600 as the first instalment. Mr WKE then sent him a checklist, which appeared to seek the information necessary to apply for a student permit. It sought information such as a letter of acceptance from a new educational institution, though the checklist was headed "Checklist Visitors Visa".

[16] At this point Mr ETS withdrew from the professional relationship with Mr WKE, and sought a refund of the $600 he had paid for the second instruction.

[17] Mr ETS complains Mr WKE did not provide services to the standard to which he was entitled to expect, and overcharged him. Mr ETS also raised some issues relating to delay in returning personal documents, and reporting. It does not appear that they are central to the issues on which the complaint is founded.

The Response

[18] Mr WKE set out his response to the complaint in a letter dated 6 June 2011 addressed to the Authority.

[19] The key elements of Mr WKE's response were as follows:

[19.1] Mr ETS tried to mislead or lie to the Authority regarding the prompt report of an extension of time to reply to Immigration New Zealand's letter dated 11 August 2010. This was in response to Mr ETS saying in his complaint that he was not informed of an extension of time.

[19.2] Mr WKE did not hold personal documents. This was in response to Mr ETS saying there had been delays in returning personal documents.

[19.3] After the decline of the work permit application (the second instruction), the only option available to Mr ETS was a student or visitor's permit. That is supported by the information contained in an assessment form.

[19.4] Immigration New Zealand in other cases granted work permits to applicants for basic level employment as relevant work experience following management training courses. Mr WKE said he submitted examples; however there were no papers before the Tribunal supporting this claim.

[19.5] Mr ETS was adequately informed of the risk that he would not be granted a permit.

[19.6] Mr ETS was working unlawfully in excess of the hours permitted, and this too was a potential reason for him not getting a permit.

[19.7] Mr WKE, in relation to the first instruction:

[19.7.1] Counselled Mr ETS.

[19.7.2] Researched issues relating to his employment qualifying (2 hours).

[19.7.3] Researched the NZQA website, and provided information (2 hours).

[19.7.4] Emphasised to Immigration New Zealand that the permit should be granted on the grounds of consistency.

[19.7.5] The letter to Immigration New Zealand was the product of experience and skill (Mr WKE had eight years' experience).

[19.8] In relation to the second instruction, Mr WKE provided a checklist, so does not consider Mr ETS is entitled to any refund.

[19.9] Mr ETS worked in excess of the hours permitted by his permit, and that affects his credibility.

The Issues to be Determined

[20] The Licensed Immigration Advisers Code of Conduct has been established pursuant to sections 37–39 of the Immigration Advisers Licensing Act 2007.

[21] Clause 1 of the Code requires:

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

[21.2] They are required to act on lawful informed instructions.

[22] Clause 2.2 of the Code provides that if a proposed application has no hope of success, or is otherwise grossly unfounded, the adviser must encourage the client not to lodge it, and advise the client in writing.

[23] Clause 3 of the Code requires written records and communications, which ensure both that clients are fully informed and that there is a record of the professional engagement and how it was discharged. It also requires that any refunds of fees are paid on the termination of an engagement.

[24] Clause 8 of the Code prohibits a licensed immigration adviser setting a fee that is not "fair and reasonable". The fees must be set out, including the terms and conditions.

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

[26] The issue for the Tribunal to determine is whether it is satisfied Mr WKE breached any of these professional standards. The questions will be primarily determined by factual findings.

The Tribunal's Minute

[27] The Tribunal issued a Minute dated 18 October 2012, which set out the complaint, response and issues as outlined above. It also identified potential conclusions.

[28] Mr WKE responded with a submission and further information, and Mr ETS replied.

Decision

The first instruction

[29] Mr WKE was faced with a client in respect of whom Immigration New Zealand had, for compelling reasons, indicated was not entitled to a work permit based on the position of employment then available.

[30] The situation is different from the position where Immigration New Zealand has not made an evaluation. Mr WKE accepted an instruction to respond to reasoned and informed concerns Immigration New Zealand had notified.

[31] In its Minute, the Tribunal expressed concern that limited weight may be placed on knowledge of other applicants who had succeeded in gaining permits in reliance on low-level employment. Any licensed immigration adviser would be expected to know Immigration New Zealand does not operate on a system of precedent, and factual evaluations among the large volume of applications it processes can never achieve perfect consistency.

[32] Mr ETS was employed in an entry level retail assistant's position, which he held on a part-time basis while he studied. He attempted to use that position to meet the criteria for a position where he would gain practical training after gaining his managerial qualifications.

[33] Virtually any retail or office work would relate in some way to managerial skills. However, the view is open that no sensible challenge could be presented to the reasoning raised by Immigration New Zealand.

[34] Mr WKE responded to that concern with details of 11 cases where relatively low level positions of employment had been accepted by Immigration New Zealand as acceptable for persons in similar situations to Mr ETS. Mr ETS raised some criticism of the positions and their particular attributes.

[35] However, I am satisfied Mr WKE has demonstrated that he reasonably believed that Immigration New Zealand had in an number of instances accepted a liberal interpretation of the requirement that employment would offer "practical experience relevant to the applicant's course or qualification".

[36] It may well be that Immigration New Zealand's 11 August 2010 letter was more representative of their usual approach; certainly the more restrictive approach would potentially be justified. However, where matters are a legitimate issue for professional judgment, differing views are not a basis for complaint.

[37] I cannot be satisfied Mr WKE had to engage with clause 2.2 of the Code, in relation to vexatious applications. It imposes a positive duty to warn a client in writing. On the evidence presented, I am satisfied Mr WKE reasonably advanced Mr ETS's case in accordance with Immigration New Zealand's current policy as he reasonably understood it.

[38] Accordingly, I do not uphold the complaint in relation to the first instruction.

The second instruction

[39] Initially the Tribunal did not receive a copy of the written agreement regarding the second instruction. Mr WKE supplied it in response to the Tribunal's Minute.

[40] Mr ETS's complaint comprises:

[40.1] him not being advised of his options, and giving informed instructions for a recommended course of action; and

[40.2] that Mr WKE charged a fee of $600 for a standard, and inadequate, checklist.

[41] Mr WKE, in his reply to the Tribunal's Minute, explained that the fee was routine:

[41.1] Being two instalments ($595 on receiving the instructions, and $498 when the documents are submitted); and

[41.2] Identified in the agreement as "non-refundable".

[42] Mr WKE accepted that if the "non-refundable" fee was not acceptable, he would willingly change his practice. He disputed that the checklist was simply a standard checklist, rather it was the product of identifying the specific information required.

[43] Mr WKE accepts that he should have engaged in a process of obtaining written consent and ensured his client more fully appreciated the circumstances. In this regard, he asked that some consideration be given to the fact that at the time, the regime imposed by the Act and the Code were relatively new.

[44] Mr ETS identified his main concern was in relation to the non-refundability of the fee. He expressed the view that the checklist involved a minimal amount of work and said he considered it was only a standard checklist.

Threshold

[45] Mr WKE correctly recognises his process of getting informed instructions from his client for the second instruction was not ideal. Further, that he may have to change his practices in relation to non-refundable fees. Nonetheless that does not necessarily mean the complaint will be upheld. It is necessary for a lapse from proper standards to be sufficient to justify an adverse disciplinary finding.

[46] The jurisprudence from various authorities dealing with other professional disciplinary contexts is appropriately applied to understand the threshold, while being mindful that it is necessary to consider the statutory context in each respective situation; they can be quite different.

[47] In a decision of the Health Practitioners Disciplinary Tribunal (HPDT), *Re Tolland* (Decision No 325/Mid10/146P, 9 September 2010) at para [39], the HPDT observed:

> "Negligence, in the professional disciplinary context, does not require the prosecution to prove that there has been a breach of a duty of care and damage arising out of this as would be required in a civil claim. Rather, it requires an analysis as to whether the conduct complained of amounts to a breach of duty in a professional setting by the practitioner. The test is whether or not the acts or omissions complained of fall short of the conduct to be expected of a [practitioner] in the same circumstances[.] This is a question of analysis of an objective standard measured against the standards of the responsible body of a practitioner's peers."

[48] The professional setting is varied, but duties of competence, application of skill, honesty, disclosure and propriety are shared by a wide range of professionals. Immigration advisers have much in common with other professionals. Section 3 of the Act affirms it is intended to protect the interests of consumers receiving immigration advice, which corresponds to the duties other professionals have to the public engaging their services. The issue is properly understood under the Act as whether there has been a breach of duty in a professional setting.

[49] I find it is a necessary element of the test to determine whether any lapse is sufficiently serious to warrant the complaint being upheld as a professional disciplinary matter.

[50] Section 50 contemplates a complaint being upheld without necessarily imposing a sanction. It follows that it is not necessary to find that a disciplinary sanction should be imposed to uphold a complaint. It is important to recognise that not every lapse or manifestation of human frailty should result in an adverse professional disciplinary finding. There will be occasions when advisers are responsible for a lapse from acceptable standards, but that still does not justify upholding a disciplinary complaint.

[51] It is a reality that many errors and mistakes are too trivial to warrant an adverse disciplinary finding, and the Act recognises that. Section 45(1) of the Act provides that the Authority may

treat a complaint as trivial or inconsequential and need not be pursued, or treated as a matter that is best settled between the parties.

[52] It is necessary and appropriate for this Tribunal to be mindful that there is a threshold before a complaint of negligence or want of care and diligence is established. Though the statutory context is quite different, there is a discussion of the underlying policy issues in *Orlov v New Zealand Law Society (No 8)* [2012] NZHC 2154.

[53] The Act does not attempt to further prescribe where the boundary lies, and any attempt by this Tribunal to do so is unlikely to be successful. It is necessary to consider the facts of each complaint.

[54] I now apply those principles to the present facts.

Findings on second instructions

[55] I am satisfied that while the process of taking instructions and informing Mr ETS of the risks was not ideal, it was not sufficient to find a lack of care or professionalism, negligence or misleading behaviour.

[56] Including a non-refundable fee clause in an agreement at that point in time does not justify an adverse disciplinary finding. At that time it was a common practice; subsequently the Tribunal has identified that treating fees paid in advance as non-refundable is not consistent with clauses 8 and 3(d) of the Code of Conduct. Accordingly, a licensed adviser who uses such a clause more recently should not rely on that finding as any indication the action would not result in a complaint being upheld.

[57] However, Mr WKE has treated the fee as non-refundable after his engagement terminated, and that is a separate matter. At that time he had to have regard to clause 8 of the Code of Conduct. He must set fees that are fair and reasonable, and when his engagement terminated he was required to provide any refunds payable.

[58] Based on the checklist being the main element of the professional work, I am satisfied the work was limited and a refund should have been made.

[59] It may be that Mr WKE can justify the fee; however to do so he would need to deal with the evidence that the work he undertook was providing a checklist, which appears to have required minimal work and could not justify a fee of $595. However, if he did provide a justification of an hourly rate, and demonstrate that time to justify that fee was properly expended, then the Tribunal would be satisfied the fee was fair and reasonable.

[60] The Tribunal appreciates that when the complaint was made Mr WKE was in a difficult position, as he may have apprehended that making the refund in the face of the complaint amounted to an admission, or alternatively that it could be perceived as “buying off” the complainant.

[61] In these circumstances, the Tribunal will give Mr WKE the opportunity to consider whether he should refund the fee, or justify the fee in whole or part. If Mr WKE refunds the fee in whole the complaint will not be upheld; the same will apply if he justifies the part of the fee he retains.

Orders

[62] The complaint is not upheld, except in relation to the second instruction.

[63] In relation to the second instruction:

[63.1] If Mr WKE refunds the sum of $595 to Mr ETS within 10 working days, the complaint will not be upheld in relation to the second instruction; alternatively

[63.2] If Mr WKE justifies the fee, to the extent it is not refunded, as fair and reasonable in the circumstances, the complaint will not be upheld.

[64] If Mr WKE neither refunds the sum of $595 to Mr ETS, nor justifies the fee retained, the complaint will be upheld on the basis of a breach of clauses 8 and 3(d) of the Code of Conduct and section 44(2)(e) of the Act.

[65] Mr WKE is required to provide evidence of the refund or justification of the fee retained within 10 working days, and Mr ETS will have to opportunity of responding within a further five working days in the case of a justification of part or all of the fee.

[66] If Mr WKE does not provide evidence of the refund or justification of the fee, the Tribunal will uphold the complaint in the respect identified in paragraph [64] above, without further notice.

DATED at WELLINGTON this 5th day of February 2013

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G D Pearson
Chair