

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

Decision No: [2013] NZIACDT 68

Reference No: IACDT 057/12

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

GU

Complainant

AND

Hakaoro Hakaoro

Adviser

THE COMPLAINANT'S NAME IS NOT TO BE PUBLISHED

Hearing: 27 September 2013

DECISION

REPRESENTATION:

Authority: Ms T Thompson, Ministry of Business, Innovation and Employment, Auckland.

Complainant: In person.

Adviser: Mr R Rao on instructions from Sinisa Law Ltd, Auckland.

Date Issued: 9 October 2013

DECISION

Introduction

- [1] This is a complaint where the complainant and her sister-in-law approached Mr Hakaoro. The complainant was seeking advice regarding her husband's immigration status.
- [2] She paid Mr Hakaoro \$50, then \$400. Mr Hakaoro said he would assist for a reduced fee that required a further payment of \$600.
- [3] Mr Hakaoro did not comply with the Code of Conduct in relation to either the complainant or her sister-in-law. Accordingly there was no written agreement, process for setting out the fees in writing, or the other disclosure requirements.
- [4] The complainant says that after the initial consultation when \$450 had been paid, the complainant wanted her money back. Mr Hakaoro refused to give the money back. He said there was a contract, demanded the further \$600, and threatened to report the complainant's husband to Immigration New Zealand as he had overstayed his visa. On a later occasion Mr Hakaoro said he had done some work on the matter and could not make a refund.
- [5] Mr Hakaoro claimed he was confused as to who the client was, and would have refunded the money if he knew the complainant who had paid the money was entitled to it.
- [6] The Tribunal has concluded Mr Hakaoro took the money and did not comply with the Code of Conduct; he used dishonest excuses and threats to avoid repaying the money which he knew he was not entitled to keep.
- [7] The complaint has been upheld.

The complaint

- [8] The complainant lodged her complaint on the following basis.
- [9] On 4 May 2012, the complainant and her sister-in-law went to see Mr Hakaoro as her husband was in New Zealand unlawfully and she wished to have his immigration status put in order.
- [10] Mr Hakaoro's wife demanded \$50 for the complainant to be allowed to see Mr Hakaoro. That money was paid. The complainant then saw Mr Hakaoro, and he told her he would provide the services for a reduced fee of \$1,000. She agreed and paid \$400, leaving a balance of \$600 to pay.
- [11] On 8 May 2012, the complainant returned with an associate, and sought the refund of her money.
- [12] She reported Mr Hakaoro's response was:
 - [12.1] He refused to refund the money saying "a contract is a contract".
 - [12.2] He demanded the balance of \$600 of the fee.
 - [12.3] He threatened to report the complainant's husband to Immigration New Zealand, and said he would "be on the plane back" to his country of origin.
- [13] On 10 May 2012, the complainant returned to see Mr Hakaoro with an associate. She again asked for a refund, and pointed out she had not signed a contract. Mr Hakaoro said it did not matter, as he had started work on the application. The complainant asked to see the work, and Mr Hakaoro said she was not allowed to see it, refused to refund the money, and said: "Don't ever come back here small lady".

Mr Hakaoro's response

- [14] Mr Hakaoro responded to the complaint in correspondence dated 9 October 2012 addressed to the Authority.
- [15] He produced articles he had written. One of them was contemptuous of persons of the complainant's nationality. The articles are not relevant to the complaint, except to the extent that they raised a concern regarding Mr Hakaoro's attitude to persons of the complainant's nationality.
- [16] The email containing the response was openly racist, where he identified the complainant's nationality and said persons of that nationality have a "corrupt and dishonest disposition". He complained that persons of that nationality lodging complaints placed "unnecessary stress on Advisers".
- [17] In the letter addressing the complaint, Mr Hakaoro stated:
- [17.1] The complainant had not prepared the complaint.
- [17.2] It was significant that the complainant had a particular nationality, and that it was unfortunate that the Authority has "either limited or no knowledge at all in respect of [the] behaviour and conduct" of persons of that nationality.
- [17.3] The Authority was deliberately encouraging persons of that nationality to file "what are clearly trivial and damaging allegations on one's reputation, by accepting their allegations as complaints".
- [17.4] The Authority should reject this and similar complaints as trivial.
- [17.5] The complaint is not a complaint under the Immigration Advisers Licensing Act 2007 (the Act), for various reasons.
- [18] Mr Hakaoro sent a further email of 6 November 2012. It contained additional analysis contending that the complaint was not a complaint in terms of the Act. This email addressed the facts. Mr Hakaoro accepted the initial part of the complainant's narrative, to the point where he agreed to provide immigration services for \$1,000.
- [19] Mr Hakaoro did not comment on the absence of a written agreement or indicate that he complied with the Code in relation to establishing a professional relationship.
- [20] Mr Hakaoro also agreed that the complainant had sought a refund of fees; however he claimed that the complainant was not his client, it was her sister-in-law, and further that she could not have a refund due to changing her mind. He said the complainant was abusive.
- [21] He also agreed there was a second visit, and the result was the same as the previous visit, with Mr Hakaoro and his wife threatening to call the police.
- [22] Mr Hakaoro did not comment on the claim that he had sought the balance of the fees or that he threatened to report the complainant's husband to Immigration New Zealand.

The Tribunal's Minute

Purpose of Minute

- [23] On 26 November 2012, the Tribunal issued a Minute, which explained the Tribunal had conducted a review of the material then before the Tribunal. The Minute identified apparent issues, potential factual findings, emphasised that the parties would have the opportunity to respond, and that the Tribunal had reached no conclusions at that point.

Potential Conclusions

[24] The Minute reviewed the potential conclusions that may be reached on the material then before the Tribunal. They were as follows.

Whether the complainant was Mr Hakaoro's client

[25] Mr Hakaoro suggested that the complaint should be dismissed due to "privity of contract". The Minute indicated the view was open that this assertion had no merit, as Mr Hakaoro was obliged to act professionally in relation to all parties related to the immigration services that he was to provide.

[26] Further, in the absence of a written agreement and client relationship established in accordance with the Code, it was not clear who was Mr Hakaoro's client in relation to entitlement to fees.

[27] Accordingly, Mr Hakaoro was obliged to ascertain to whom he should have refunded the fees he had taken without complying with the Code.

Failure to establish a professional relationship

[28] Mr Hakaoro was obliged to:

[28.1] establish the professional relationship by entering into a written agreement, and undertaking the disclosure process mandated by the Code; and

[28.2] bank the fees he received as client funds in relation to services he had not provided.

[29] The Minute indicated the view may be open that Mr Hakaoro failed to undertake these processes and did so with a view to exploiting the complainant, and his subsequent conduct was evidence of that intention.

Unprofessional and dishonest conduct at the meeting of 8 May 2012

[30] The Minute indicated the view was open on the material then before the Tribunal, which Mr Hakaoro had not answered, that Mr Hakaoro acted unprofessionally and dishonestly at his meeting with the complainant.

[31] The material indicated Mr Hakaoro demanded further fees, knowing he was not entitled to them. He had failed to undertake the disclosure process, failed to have a written agreement, and effected a pretence that he was entitled to retain the fees he had received, and demand the balance of the fees.

[32] The Minute put him on notice the Tribunal could find he did this dishonestly, with the intention that the complainant would be misled as to her rights and Mr Hakaoro's professional responsibilities, and he did so knowing that the complainant was a vulnerable migrant.

[33] Further, he threatened to report the complainant's husband to Immigration New Zealand, dishonestly and unprofessionally exploiting both the complainant and her husband's vulnerability.

Unprofessional and dishonest conduct at the meeting of 10 May 2012

[34] The Minute also indicated the view was open on the material then before the Tribunal, which Mr Hakaoro had not answered, that Mr Hakaoro acted unprofessionally at his meeting with the complainant.

[35] In particular, he continued the pretence he was entitled to the fees he received, and created a further pretence that he had undertaken work, knowing that was false and intending to deceive his client.

- [36] He was dismissive and disrespectful to the complainant, and that was motivated in part by his racist attitude to persons of her nationality.

Failure to account for client funds

- [37] The Minute also gave notice the view was open on the material then before the Tribunal that Mr Hakaoro had neither banked the money he received as fees, nor accounted for money when required to do so.

Unprofessional conduct in responding to the complaint

- [38] This Minute identified unprofessional conduct in relation to Mr Hakaoro's response to the complaint, in particular by disparaging persons of the complainant's nationality.
- [39] The Minute indicated that conduct would not be treated as a ground of the present complaint but that the view was open that the demeaning and contemptuous conduct that was alleged was motivated by Mr Hakaoro's views of persons of the complainant's nationality.
- [40] Though the terms of Mr Hakaoro's response to the Authority may well be grounds for a complaint, it would be a separate complaint and the Tribunal does not initiate complaints.
- [41] However, the Tribunal could have regard to this conduct in assessing the veracity of the evidence. Further, that if the complaint was upheld it may well have a bearing on the nature of the sanctions imposed.
- [42] Mr Hakaoro was put on notice that he may wish to consider this aspect of his response, and was told he would have the opportunity to make any further comments on it to the Tribunal.

Potential outcome

- [43] The Minute indicated that, on the material then before the Tribunal, it would potentially conclude:
- [43.1] The facts alleged in the complaint would be found to be correct.
- [43.2] Mr Hakaoro breached clause 1 of the Code, as his conduct was unprofessional, and he ignored the requirements that apply to a professional engagement.
- [43.3] He also breached clause 1 of the Code as his conduct was disrespectful to his client.
- [43.4] He also breached clause 1 of the Code, as his conduct at the meetings of 8 and 10 May 2012 was unprofessional.
- [43.5] He failed to account for client funds he received in breach of clause 4 of the Code.
- [43.6] He engaged in dishonest and misleading behaviour in failing to account for funds, attempting to solicit further funds through misrepresentations, and he misled the complainant as to her entitlement to a refund of fees in breach of section 44(2)(d) of the Act.
- [43.7] The complaint will be upheld pursuant to section 44(2)(d) and (e) of the Act.

Oral hearing

- [44] In the course of a series of interlocutory steps (with the parties filing affidavits and other documents), the Tribunal determined that there should be an oral hearing, which is not usual. The interlocutory process is recorded in minutes, and it is not necessary to detail the steps. In essence the purpose of the oral hearing was to allow Mr Hakaoro to respond fully to the written material by allowing cross-examination, and the oral presentation of his evidence.
- [45] At the hearing, the Authority and Mr Hakaoro were represented by counsel.

- [46] The complainant appeared in person, as she received no funds to allow her to be represented.
- [47] The complainant gave evidence and affirmed the complaint, which has been outlined previously.
- [48] Mr Hakaoro also gave evidence.
- [49] As the Tribunal is an expert tribunal, it is appropriate where necessary to ensure that parties are aware of the Tribunal's understanding of professional regulation, practice, and professional standards. The evidence is evaluated against that background. Accordingly, the Tribunal put its concern to Mr Hakaoro in evidence, that his account was not consistent with what the Tribunal understood to be minimum standards of professional practice.

Discussion

Mr Hakaoro's defence

- [50] In his oral evidence Mr Hakaoro sought to justify himself on the basis he thought his client was the complainant's sister-in-law. He said he reasonably believed he should not refund fees to the complainant, despite having received fees from her.
- [51] Mr Hakaoro admitted he did not have a written agreement with either the complainant or her sister-in-law, and had not otherwise complied with the requirements of the Code of Conduct.
- [52] Accordingly, his counsel's position was that while Mr Hakaoro may have failed to comply, his actions were the product of mistaken assumptions rather than the misleading and dishonest behaviour alleged against him. He would have refunded the money if he knew to whom he should have made the refund.

Onus and standard of proof

- [53] 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 at [113]-[118]).
- [54] Any finding of dishonesty is at the most serious end of the scale, and disputed issues of fact must be determined on that basis by the Tribunal.

Whether the complainant was Mr Hakaoro's client

- [55] Mr Hakaoro claims he was confused as to who his client was. Giving him the benefit of the doubt in that respect leads immediately to a difficulty. He would not have been in any doubt if he had complied with the Code of Conduct.
- [56] The Code of Conduct required him to enter into a written agreement, negotiate and set out fees, evaluate immigration prospects to identify what services were required, and to set out the fees and disbursements involved.
- [57] He did none of that, for either the complainant or her sister-in-law.
- [58] He gave evidence he was entitled to take fees without meeting those requirements. I do not accept his claim. He was required to demonstrate an understanding of the Code of Conduct before being licensed; he complied with none of the requirements.
- [59] This was not a mistake around some aspect of the Code of Conduct. The Code of Conduct was ignored entirely at the commencement of the professional engagement where there is a clear and prescriptive process. It is well known to every licensed immigration adviser, as it is impossible to commence a client relationship without going through the steps around a written agreement and disclosure.

[60] Mr Hakaoro was necessarily fully aware he had taken fees from the complainant, and knew he was not entitled to accept or hold the money as he had no client relationship with either the complainant or her sister-in-law that complied with the Code of Conduct.

Failure to establish a professional relationship

[61] Mr Hakaoro was obliged to:

[61.1] establish the professional relationship by entering into a written agreement, and undertaking the disclosure process mandated by the Code (clauses 1.4, 1.5 and 6-8); and

[61.2] bank the fees he received as client funds in relation to services he had not provided (clause 3).

[62] He admitted to having failed to meet those requirements. As he failed to do these things for both of the potential clients he identified, I am satisfied that it was deliberate and wilful non-compliance.

Unprofessional and dishonest conduct at the meeting of 8 May 2012

[63] I accept the complainant's evidence Mr Hakaoro demanded further fees of \$600, knowing he was not entitled to them for the reasons discussed. There was no effective challenge to this evidence.

[64] I am satisfied Mr Hakaoro took those fees dishonestly, intending to take money to which he had no entitlement. As a licensed immigration adviser he was aware he was not entitled to take fees without complying with the Code of Conduct.

[65] I am also satisfied he intended to use his status as a licensed immigration adviser to influence the complainant. He did so using a threat to report the complainant's husband to Immigration New Zealand, and thereby dishonestly and unprofessionally exploiting both the complainant and her husband's vulnerability.

Unprofessional and dishonest conduct at the meeting of 10 May 2012

[66] I accept the complainant's evidence that at the meeting of 10 May 2012, Mr Hakaoro continued the pretence he was entitled to the fees he received, and effected a further pretence that he had undertaken work, knowing that was false and intended to deceive his client.

[67] Further, that he was dismissive and disrespectful to the complainant.

[68] The complainant's evidence was not challenged in any significant respect.

[69] I explored very directly with Mr Hakaoro, when giving evidence, his ethical obligations.

[70] The apparent reality was that Mr Hakaoro had taken what was for his clients a significant amount of money they could ill afford. He had no right to take the money initially and was obliged to repay it. However, Mr Hakaoro sought to justify his conduct. He appeared to be wholly uncomprehending that he owed duties to people dealing with him as a licensed immigration adviser.

[71] I have been left in no doubt Mr Hakaoro has a sense of entitlement, and accepts no responsibility or duty to his client. His attitude is consistent with the disparaging material he provided when first responding to the complaint.

Failure to account for client funds

[72] Mr Hakaoro admitted he neither banked the money he received as fees, nor accounted for money when required to do so.

Unprofessional conduct in responding to the complaint

- [73] This Minute identified unprofessional conduct in relation to Mr Hakaoro's response to the complaint, in particular by disparaging persons of the complainant's nationality.
- [74] He neither apologised, nor expressed regret, despite being put on notice that he may wish to consider this aspect of his response.
- [75] This is not part of the complaint, but has potential relevance to penalty.

Conclusion

- [76] I am satisfied:
- [76.1] The facts alleged in the complaint are correct.
- [76.2] Mr Hakaoro breached clause 1 of the Code, as his conduct was unprofessional, and he ignored the requirements that apply to a professional engagement.
- [76.3] He also breached clause 1 of the Code as his conduct was disrespectful to his client.
- [76.4] He also breached clause 1 of the Code, as his conduct at the meetings of 8 and 10 May 2012 was unprofessional.
- [76.5] He failed to account for client funds he received in breach of clause 4 of the Code.
- [76.6] He engaged in dishonest and misleading behaviour in failing to account for funds, attempting to solicit further funds through misrepresentations, and he misled the complainant as to her entitlement to a refund of fees in breach of section 44(2)(d) of the Act.
- [76.7] The complaint will be upheld pursuant to section 44(2)(d) and (e) of the Act.

Decision

- [77] Pursuant to section 50 of the Act, the complaint is upheld, as Mr Hakaoro has breached the Code of Conduct in the respects identified, which are grounds for complaint pursuant to section 44(2)(e) of the Act, and engaged in dishonest and misleading behaviour which is a ground for complaint pursuant to section 44(2)(d).

Submissions on sanctions

- [78] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions.
- [79] The Authority and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees, and compensation. Whether they do so or not, Mr Hakaoro is entitled to make submissions and respond to any submissions from the other parties.
- [80] 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.
- [81] If Mr Hakaoro claims his financial circumstances are relevant to the appropriate sanctions, he is expected to provide a statement of assets and liabilities, and his income, both verified on oath; a similarly verified full disclosure of any interest as a beneficiary or potential beneficiary in any trust is also expected. He should also provide submissions in support of his position.
- [82] The Tribunal notes Mr Hakaoro is in receipt of legal aid. The parties are invited to address the relationship between section 51(1)(g) of the Act, and section 45 of the Legal Services Act 2011 if the parties seek an order under section 51(1)(g).

[83] The Tribunal notes that in relation to other complaints Mr Hakaoro has provided information relating to his financial circumstances. Mr Hakaoro may provide a copy of the same information with updates if that is easier.

Timetable

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

[84.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.

[84.2] Mr Hakaoro is to make any further submissions (whether or not the Authority or the complainant make submissions) within 15 working days of the issue of this decision.

[84.3] The Authority and the complainant may reply to any submissions made by Mr Hakaoro within 5 working days of him filing and serving those submissions.

[85] The parties are notified that this decision will be published with the names of the parties (apart from the name of the complainant; see paragraph [86] below) after five working days, unless any party applies for orders not to publish any aspect.

Suppression of name

[86] The names, and other information that identifies the complainant or the witnesses she called are not to be published at anytime in relation to this complaint.

DATED at WELLINGTON this 9th day of October 2013

G D Pearson
Chairperson