

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

Decision No: [2013] NZIACDT 9

Reference No: IACDT 019/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

BB

Complainant

AND

HD

Adviser

DECISION

REPRESENTATION:

Complainant: In person.

Adviser: In person.

Date Issued: 28 February 2013

DECISION

Introduction

- [1] Mr BB engaged Ms HD to assist him and his wife to come to New Zealand to pursue advanced study.
- [2] There were difficulties with eligibility for the course Mr BB wanted to pursue, and Ms HD arranged an alternative.
- [3] Mr BB came to New Zealand with his wife, and encountered difficulties, and left without pursuing the course he had intended to complete.
- [4] Mr BB was concerned Ms HD's advice was unsatisfactory, and complained about the service provided.
- [5] When the complaint was made the information available to Mr BB was limited. The Tribunal pointed out to Ms HD the necessity of her responding to the allegations fully. She did so.
- [6] The Tribunal has been satisfied after considering all the information now available that Ms HD's service and advice was appropriate, and accordingly has dismissed the complaint.

The Complaint

Background

- [7] Ms HD is a licensed immigration adviser whose practice has offices in Sri Lanka and a branch in Auckland. Mr BB dealt with Ms HD's Sri Lankan office in Colombo.
- [8] Mr BB has complained regarding the professional services provided to him and his wife Ms EE by Ms HD.
- [9] Mr BB engaged the company Ms HD works for, CM, to get advice regarding educational opportunities in New Zealand. Mr BB and Ms EE met with Mr JK in 2010. He is CM's Director of Recruitment and Business in Sri Lanka. Mr JK is Ms HD's husband.
- [10] Mr BB had intended to enrol with UNITEC, which is a substantial educational facility in New Zealand with some 23,000 students. In July 2010 Mr JK made an inquiry with UNITEC regarding Mr BB pursuing postgraduate study. By email dated 22 July 2010 UNITEC informed Mr JK that Mr BB's qualifications with the University of Greenwich did not meet the entry qualifications, as the University of Greenwich was not recognised.
- [11] Mr BB was told by Mr JK that if he enrolled in a course with AIS St Helens, a private educational facility in New Zealand, Ms EE would automatically receive a work permit. AIS St Helens is a New Zealand educational facility primarily catering for international students. It is recognised by the New Zealand Qualifications Authority as being qualified to confer degrees.
- [12] Mr BB enrolled with AIS St Helens on Mr JK's advice.
- [13] He then engaged CM to get a student visa for himself and a work permit for Ms EE.
- [14] Mr BB paid LKR25,000 (approximately \$285) for services relating to the student visa.
- [15] On 26 July 2010 Mr BB paid a further LKR25,000 (\$285) for services relating to the work visa.
- [16] Mr BB also paid \$180 for accommodation in New Zealand.
- [17] On 26 August 2010, AIS St Helens indicated that Mr BB was not eligible for the course he proposed, and he decided to pursue a different course.

[18] At this point Ms HD reviewed the visa applications. They were submitted to Immigration New Zealand on 7 December 2010 under cover of a letter from Ms HD, who indicated on the relevant forms that she was acting as the licensed immigration adviser on behalf of Mr BB and Ms EE. In this letter Ms HD discussed the relevant documentation and said that Ms EE:

“has access to clear funds for [Mr BB’s] education. Through these funds they both will have sufficient financial ability to support their stay during [Mr BB’s] studies. His father has provided evidence of their business and has shown the intent to transfer assets to him upon his return to Sri Lanka.

Further to his accommodation and living costs, in the event AIS cannot guarantee him a placement, we will arrange this privately and he has provided proof as to the availability of funds for these costs. His pick-up from the airport and transport to his accommodation provider will be arranged by us.

[19] The letter went on discuss a visitor’s permit for Ms EE.

[20] On 16 February 2011 Immigration New Zealand issued a student visa for Mr BB, and a visitor’s visa for Ms EE. They only realised Ms EE had received a visitor’s visa rather than a work visa when their passports were returned with the visas attached to them.

[21] Mr JK had represented to Mr BB and Ms EE that:

[21.1] it was necessary to show that they had sponsorship money to get visas;

[21.2] they would need about \$2,500 to settled; then

[21.3] they would not need further money.

[22] On 4 March 2011 Mr BB and Ms EE paid a further LK90,000 (approximately \$1,038) for services relating to the work visa.

[23] Mr BB and Ms EE travelled to New Zealand arriving here on 9 March 2011.

[24] Mr BB and Ms EE found they could not pursue their goals in New Zealand, as:

[24.1] they had no support, and found it difficult to locate and travel to AIS St Helens;

[24.2] they had difficulty with transport;

[24.3] they could not find work; and

[24.4] the cost of living in New Zealand was beyond their means.

[25] Mr BB un-enrolled from his course, and he and Ms EE returned to Sri Lanka on 24 March 2011. Mr BB sought a refund of the fees paid for seeking a work visa, and was told that would not occur as Mr JK had received a commission from AIS St Helens, and it was lost when Mr BB did not pursue the course of study.

[26] Half of the bond money paid for accommodation while in New Zealand was forfeited.

The Response

[27] Ms HD responded to the complaint in a letter dated 27 June 2011 addressed to the Authority.

[28] The key points made by Ms HD were:

[28.1] Mr BB contacted CM independent of Ms HD’s connection with the company, which is her husband’s company.

- [28.2] Mr BB wanted to study at UNITEC, but did not meet the entry criteria. The initial evaluation was undertaken by a staff member who dealt with that issue, and not immigration issues.
- [28.3] When the position relating to Mr BB's qualifications became evident, he was given the opportunity of having all fees refunded and alternatives were fully and professionally explored.
- [28.4] An email of 31 August 2010 informed Mr BB that Ms EE could not obtain a work visa if he was studying the Graduate Diploma in International Business course, but she could apply for a student visa.
- [28.5] The fees charged were "sign on" fees, and there had been a minor overpayment for accommodation.
- [28.6] Mr BB was informed from an early point that Ms EE did not qualify for a work permit. Accordingly, they did not discover that only when they received their passports with visas entered into them.
- [28.7] Mr BB was fully informed of the cost of living in New Zealand, and Ms HD addressed issues of financial support professionally. In the initial stages Mr BB and Ms EE had intended to stay with family, and only at the end of the process was CM requested to assist with accommodation.
- [28.8] CM consistently provided as much assistance as practicable for Mr BB and Ms EE.
- [28.9] Written communications were supplemented by oral communication in Sinhala (Mr BB's first language).
- [29] Ms HD said in her 27 June 2011 letter:
- "... I have become used to a large portion of the Sri Lankans' being in the habit of gossiping and complaining about facts not always true. You can provide 100% perfect service, find them a job and tomorrow they will complain how terrible your service was – it is part of their culture it seems.
- I am very disappointed in the result from this application as it has wasted a lot of my time and hope this matter can be seen in the light of a client not facing the fact that he did not follow the advice given to him and then turning around blaming the agent for his failures. He was in the country for a very short period and gave up very quickly – within 9 days he decided to return."

The Tribunal's Minute

- [30] On 30 October 2012 the Tribunal issued a Minute. The Minute explained it followed a review of the material then before the Tribunal, and identified apparent issues, potential factual findings, and emphasised that the parties would have the opportunity to respond, and the Tribunal had reached no conclusions at that point.
- [31] The key elements of the complaint, and the response identified in the Minute were as outlined above.
- [32] 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.
- [33] The Authority and the complainant do not lay charges and prove them.
- [34] Accordingly, the Minute identifies issues and potential conclusions on the material presented to give the parties the opportunity to consider their positions, and provide submissions and further proof if they wish.

The issues identified in the Tribunal's Minute

- [35] The Licensed Immigration Advisers Code of Conduct has been established pursuant to sections 37–39 of the Immigration Advisers Licensing Act 2007.
- [36] Clause 1 of the Code requires:
- [36.1] A licensed immigration adviser is 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.
- [36.2] They are required to act on lawful informed instructions.
- [36.3] That a client engagement is to be established with an agreement that is in writing and accepted in writing, and the client must be made aware of all significant matters relating to the agreement; and a copy of the Code must be supplied to the client.
- [37] 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.
- [38] Clause 6 of the Code prohibits a licensed immigration adviser representing a client where the adviser has a potential conflict of interest, unless disclosed and agreed.
- [39] 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.
- [40] Section 44 of the Act provides breaches of the Code are grounds for complaint, as are negligence, incompetence and misleading behaviour.
- [41] The issue for the Tribunal to determine is whether it is satisfied Ms HD breached any of these professional standards. The questions will be primarily determined by factual findings.

Potential conclusions identified in the Minute

- [42] The Tribunal's Minute went on to identify potential findings on the basis of material then before the Tribunal, and indicated quite different conclusions may follow if further information was presented, or submissions made as to the effect of the material then held.
- [43] In particular, how Ms HD had addressed:
- [43.1] Mr BB's qualifications with the University of Greenwich, and other qualifications for study in New Zealand.
- [43.2] Whether she was placing responsibility on CM, or accepting personal responsibility for the professional service delivery.
- [43.3] The question of whether she had properly advised her clients, and ensured they had an adequate understanding of the issues that would arise in travelling to, living, and studying in New Zealand.
- [43.4] Whether there had been any undisclosed commission paid, to Ms HD's benefit, by the institute offering study.
- [43.5] The apparent inappropriateness of Ms HD's characterisation of Sri Lankan people in her letter of 27 June 2011 (para [29] above).

Response to the Minute – Ms HD

[44] After the Minute was issued Ms HD addressed the issues raised in the Tribunal's Minute. The key elements of her response were as follows.

University of Greenwich

[45] Ms HD provided information to indicate that she had evaluated Mr BB's qualifications appropriately, and proceeded on the basis they were genuine. There were other factors that limited his educational options in New Zealand. She identified documentation to support her claim.

Scope of Instructions

[46] Ms HD took responsibility for the instructions and professional service delivery.

Standard of professional service

[47] Ms HD was in some difficulty in providing a comprehensive record of her engagement due to the loss of data through a theft, which she documented.

[48] However, she provided a record that supported the view that she engaged with Mr BB, and in the context of his instructions provided appropriate advice.

Disclosure of commission

[49] Ms HD affirmed that there was no commission received, and no incentives paid in relation to placing Mr BB.

Unprofessional response to the complaint

[50] Ms HD said her negative comments about Sri Lankan people was not directed to the Sinhalese section of the population, and she did not intend to make more than a social commentary that reflected a view Sri Lankan people held of their own society.

[51] Ms HD produced a testimonial, and other information to support the view that she had a respect for, and commitment to Sri Lanka and the values of the society in Sri Lanka.

Response from Mr BB and the Authority

[52] Neither Mr BB nor the Authority responded to the Tribunal's Minute, or Ms HD's response to it.

Discussion

University of Greenwich and educational opportunities

[53] I am satisfied the information Ms HD provided demonstrates she evaluated Mr BB's qualifications. She had sound reasons for recommending the opportunities he had, and implemented an appropriate strategy.

[54] Mr BB has not challenged the evidence Ms HD provided in relation to this issue.

Standard of professional service

[55] The record Ms HD provided, together with her statement, answers the claims that she failed to provide adequate and appropriate advice to Mr BB regarding circumstances in New Zealand. The information is plausible; it is consistent with the documentary record provided to the extent there is a record, and any gaps in that record have been explained.

- [56] There has been some scope for misunderstanding in the communications between Ms HD and Mr BB. One of those was the difference between a work visa and a student visa. The latter allows the holder to engage in paid work for a limited number of hours per week while pursuing study. It appears this was an area of some confusion.
- [57] The evidence points to Ms HD having adequately informed Mr BB of issues such as the cost of living in New Zealand, and the arrangements he would need to make while in New Zealand.
- [58] Mr BB has not challenged the evidence.
- [59] Accordingly, I accept Ms HD's account and am satisfied that her professional service delivery was appropriate and satisfactory. I am not in a position to find any miscommunication was the result of a professional failing on Ms HD's part.

Disclosure of commission

- [60] There is no evidence that is inconsistent with Ms HD's affirmation there was no commission received, and no incentives paid in relation to placing Mr BB.
- [61] I accept her statement; it is a significant element in the evaluation. Given the absence of any undisclosed financial motive, Ms HD's evidence regarding her evaluation of the circumstances is strong.

Unprofessional response to the complaint

- [62] Ms HD's negative comments about Sri Lankan people are unfortunate. High standards are expected from licensed immigration advisers. It is simply unacceptable to include a negative stereotype of a nationality in professional correspondence.
- [63] However, I regard the matter as an error of judgement that does not reflect antipathy to the community where she had made her home. I have taken account of the reference she provided, and her explanation of her full commitment to Sri Lankan society.
- [64] Importantly, I have taken the approach that I should accept Ms HD's assertion that her comments were not directed to the ethnic group to which Mr BB, belongs. Rather, as Ms HD asserts, she was making a comment on Sri Lankan society as a whole. If I were satisfied the comments attached to an ethnic identity, I would take a very serious view indeed of the issue.
- [65] Accordingly, I do not regard it as a matter that reaches the threshold for an adverse disciplinary finding. I simply observe Ms HD must ensure that she does not ever express herself in the way she did in her letter of 27 June 2011, which is calculated to create an impression she holds views that support negative national stereotypes.

Decision

- [66] The Tribunal dismisses the complaint pursuant to section 50 of the Act,

DATED at WELLINGTON this 28th day of February 2013

G D Pearson
Chair