

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

Decision No: [2014] NZIACDT 119

Reference No: IACDT 012/13

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Navneel Nitesh Chand

Complainant

AND

Madhur (Maddox) Ahuja

Adviser

DECISION

REPRESENTATION:

Registrar: Mr A Dumbleton, Lawyer, MBIE, Auckland.

Complainant: No appearance at hearing

Adviser: Mr R Chambers, Lawyer, Vulcan Chambers, Auckland

Date Issued: 19 December 2014

DECISION

Introduction

- [1] Mr Chand's father engaged Mr Ahuja to provide immigration services. Mr Ahuja was employed in a practice which Global Immigration Consultants Ltd. (Global) owned. He was the sole licensed immigration adviser in the practice.
- [2] Mr Chand's father paid fees for his initial consultation with Mr Ahuja. One of Global's personnel told Mr Chand an offer of employment was available for his father. Accordingly, he should pay further fees for his immigration to progress. Mr Ahuja was not aware of these developments at the time. Mr Chand paid the fees requested on his father's behalf.
- [3] There was no employment offer, which would have been necessary for the immigration work to proceed. Mr Chand wanted repayment of the instalment of fees he paid after he believed his father's immigration could proceed. Mr Ahuja was willing to refund the fee for the consultation where he was engaged; but thought Global was responsible for the money Mr Chand paid. He says the balance of the fees was for job search services, and he was not personally involved with Mr Chand only his father.
- [4] The Tribunal has found the fees were procured for immigration services. As the sole licensed immigration adviser in the practice, and the person engaged in the particular instructions, Mr Ahuja was responsible for refunding the fees in full; notwithstanding other people in the practice induced Mr Chand to pay the money.
- [5] The Tribunal has upheld the complaint on the basis Mr Ahuja failed to refund the fees in full, when the Licensed Immigration Advisers Code of Conduct 2010 required him to do so.

Background

- [6] The Registrar filed a statement of complaint, and identified one ground of complaint that was potentially supported by the information she held. Both the complainant and the adviser have had the opportunity of responding to the statement of complaint. While the original complaint was on wider grounds, the only ground pursued is the ground the Registrar identified. It is not necessary to examine the wider grounds in this decision.
- [7] The ground of complaint for the Tribunal to determine is whether Mr Ahuja failed to refund unearned fees after his engagement ended. The relevant provision in the Code of Conduct is clause 3(d), which provides:

A licensed immigration adviser must maintain professional business practices relating to finances, records, documents, contracts and staff management, including:

...

- d) providing any refunds payable upon completing or ceasing a contract for services;

- [8] Mr Ahuja was employed by Global, but he was not a shareholder or director. Officers of the company worked in the practice. Mr Chand's father engaged Mr Ahuja to assist him with an immigration process, and an agreement dated 30 June 2012 recorded the terms. The agreement identified Mr Ahuja as the licensed immigration adviser. He signed the agreement.
- [9] Mr Chand's father paid \$300.00 for the initial advice. Global agreed to assist with finding an offer of employment to support the visa application. The next instalment of fees according to the contract was \$1,990 (excluding GST) payable after Mr Chand's father had a job offer. On 7 September Mr Chand's father returned to Fiji. On 29 August 2012 an officer of Global telephoned Mr Chand and said he had a job offer for his father, and he should pay the next instalment of fees. Mr Chand paid \$2,288.50 to Global. He received a receipt with Mr Ahuja's name and licence number on it, but was not dealing with Mr Ahuja, rather Global's officer. In fact no offer of employment eventuated and no immigration application proceeded.

- [10] Mr Ahuja endeavoured to refund the initial instalment of fees, but did not think he could locate Mr Chand to do so.

Oral hearing

- [11] The Tribunal convened an oral hearing to allow Mr Ahuja to present his case. Neither Mr Chand nor the Registrar sought to produce evidence. Mr Chand did not attend the oral hearing.

Discussion

Mr Ahuja's reasons for not refunding all the fees

- [12] Mr Ahuja accepted he was the only licensed immigration adviser in the practice. He explained he took employment in the practice and over time became increasingly concerned regarding the conduct of the directors of Global. He provided evidence two persons connected with Global had left New Zealand and arrest warrants had been issued from the District Court. He requested that the Tribunal evaluate his conduct against that background, particularly that he was potentially deliberately not told of matters occurring within the practice.
- [13] Mr Ahuja said his role was solely that of an immigration adviser, and Global also undertook employment search work. His arrangement with Global was that he received 30% of the fees paid for immigration work. He received about \$75 in respect of the fees Mr Chand's father paid at the time of the initial consultation. He believed those fees were the amount paid for immigration work, and he was not responsible for the balance which related to employment search work. Furthermore, he did not have any direct contact with Mr Chand, and it was Mr Chand who paid the second instalment.

Responsibility

- [14] In the Tribunal's decision *JM v DTM* [2011] NZIACDT 1, the Tribunal emphasised these aspects of professional responsibility:

[38] It is evident a key element of the mechanism in the Act is that licensed immigration advisers are clearly identified; client relationships commence with the Adviser identifying their standing, and providing of a copy of the Code (Code clause 1.4). The scope of section 6 is wide, and one no doubt intended to ensure licensed advisers are not able to be used as a "front" for unlicensed operators. The legislation is structured to effect functional exclusion from the professional relationship of any person who is not either licensed or exempt.

[39] The legislation provides an important privilege to licensed immigration advisers in allowing them to exclusively provide immigration advice (along with exempt persons). However, consistent with that, licensed advisers carry professional obligations. They are personally responsible for the professional relationship, regardless of whether they are employees, or otherwise.

[40] Dealings in relation to fees in my view come with section 7, so a licensed immigration adviser must deal with the client in relation to fees (unless it is simply a clerical aspect such as issuing invoices, which is provided for in section 7(b)(iii)). Determining the value of professional work, and negotiating what is to be paid requires knowledge and experience in immigration, and assists with an immigration matter.

[41] The purpose of the Act is set out in section 3, and it includes promoting and protecting the interests of consumers receiving immigration advice. Abusive practices in relation to fees were certainly among the concerns the Act was intended to meet. Some confirmation licensed immigration advisers are responsible for dealing with fees as well as other aspects of the professional relationship is found in the scope of disciplinary sanctions. Licensed immigration advisers will potentially be personally responsible under section 51(1)(h) for the refunding of fees in the event such an order is made as a disciplinary sanction. It will not be an answer to say their employer received the fees.

- [42] Accordingly, licensed immigration advisers are given the freedom to practise as employees where they have little control over the business practices of their employer. However, they do so at their peril unless they establish proper protection for their professional independence, and assurance they can ensure they manage and deliver service for all aspects of the professional relationship (alone or with another licensed adviser).
- [15] It is not open to a licensed immigration adviser to claim they are subordinate to an employer or contractor, or say an unlicensed person was responsible for aspects of the professional relationship.
- [16] The usual point of difficulty is what is controllable. Proper control requires that a professional person maintain effective control over employees and resources within a practice. Regardless, there are occasions when professional persons are blameless victims of deception, or other circumstances, and that will not trigger professional disciplinary consequences. However, the issue in this complaint relates to discharging a financial obligation, not the absence of a job offer or procuring the payment of fees by saying there was a job offer.
- [17] When Mr Chand's father engaged with Global he was told Mr Ahuja was a licensed immigration adviser, given a copy of the Code of Conduct, and led to believe his engagement was under Mr Ahuja's professional control. Clarity in such matters is mandatory under the Code of Conduct. The Code must be provided to the prospective client, and all significant matters relating to the professional engagement explained. Mr Ahuja gave evidence of taking those steps.
- [18] The only question to determine is whether Mr Ahuja was personally responsible for the fees. Mr Ahuja's response that Global were providing other services could potentially mean fees were outside of the professional relationship for which he carried responsibility. It is also necessary to consider the fact Mr Chand's father commenced the professional relationship, and Mr Chand paid the fees.

Were the fees paid, in whole or in part, separate from the engagement to provide immigration advice

- [19] Mr Ahuja contends he was the victim of the directors of Global having deceived Mr Chand by representing that a job offer was available for his father and collecting fees which should not have been paid. Mr Ahuja contends that he did not know of these events at the time. I accept Mr Ahuja's evidence, and I will proceed on the basis that is the correct position.
- [20] Mr Ahuja had obligations as the sole licensed immigration adviser to ensure that the practice was managed professionally and that clients who were offered immigration services were protected. However, in this case there is a more fundamental issue. Mr Chand 's father signed a contract which contained a schedule of payments; the initial payment was \$260 + GST, which he paid for the initial consultation with Mr Ahuja. The schedule showed the next instalment was \$1,990, "after a job is obtained". The full fee being \$3,500 + GST in addition to the initial payment. The agreement is clear; it does not relate the payments to Global finding work. The agreement relates all the fees to immigration services, and had provision for additional services, not including job search services. However the agreement did not identify that any additional services would be provided, a *yes/no* option was not marked.
- [21] An objective observer seeing Mr Ahuja present the Code to Mr Chand's father, explain the agreement to him and have him sign it, would be in no doubt about what occurred. Mr Chand's father was expected to pay the money which Mr Chand paid on his behalf; and in doing so, Mr Chand and his father would be protected by the Code of Conduct. Mr Ahuja has not provided any reason why Mr Chand's father should think that only part of the fee was covered by the agreement and legislative regime.
- [22] I do not attach any significance to the fact Mr Chand paid some of the fees on behalf of his father. The arrangements did not change, the only reason Mr Chand paid the money was his belief his father was receiving professional services. The situation is no different from others where family members make payments on behalf of another family member. The Act does not restrict who may lodge a complaint. The important element is that the payment related to Mr Ahuja's professional engagement.

- [23] Accordingly, when it became evident Mr Ahuja could not proceed with the immigration work and Mr Chand wanted his money back, he was entitled to expect Mr Ahuja to repay the money (after satisfying himself Mr Chand rather than his father was entitled to the money).
- [24] It appears a person working with Global may have misled both Mr Chand and Mr Ahuja; however, that does not absolve Mr Ahuja of his obligation. It was Mr Ahuja who chose to conduct his practice under the auspices of Global. He was in a position to ensure he had adequate control over finances, information and personnel to deliver professional services to Mr Chand's father. If he could not do so, he should not have conducted his practice in that environment. Mr Chand when he paid the money was entitled to accept at face value that he was dealing with a licensed immigration adviser, and had the relevant protection the Code of Conduct offers. He received a receipt giving him that assurance. That was consistent with the disclosure to his father of the protection the Code of Conduct provided at the commencement of the engagement (Clause 1 of the Code of Conduct).
- [25] Mr Chand did attempt to repay the initial payment, however he was not willing to repay the full fees.
- [26] Mr Ahuja had a personal obligation to repay the \$2,288.50 Mr Chand paid, and did not meet his obligation. I accept Mr Ahuja did not know of the payment and the obligation to repay until after Mr Chand lodged his complaint. However, there is nothing of significance in that. When a professional person responsible for a practice discovers personnel in the practice have disadvantaged a client, they will often not be aware until a complaint is made.
- [27] It follows I am satisfied Mr Ahuja breached clause 3(d) of the code in this respect, and I uphold the complaint to that extent.

Decision

- [28] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [29] Mr Ahuja breached the Code of Conduct in the respect identified, which is a ground for complaint pursuant to section 44(2)(e) of the Act.
- [30] In all other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

- [31] The Tribunal has upheld the complaint. Accordingly, pursuant to section 51 of the Act, it may impose sanctions.
- [32] The Authority and Mr Chand now have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation.
- [33] Whether they do so or not, Mr Ahuja is entitled to make submissions and respond to any submissions from the other parties.
- [34] 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

- [35] The timetable for submissions will be as follows:
- [35.1] The Authority and Mr Chand are to make any submissions within 10 working days after 16 January 2015 of the issue of this decision.
- [35.2] Mr Ahuja is to make any further submissions (whether or not the Authority or Mr Chand makes submissions) within 15 working days after 16 January 2015.

[35.3] The Authority and Mr Chand may reply to any submissions made by Mr Ahuja within 5 working days of him filing and serving those submissions.

DATED at WELLINGTON this 19th day of December 2014

G D Pearson
Chair