

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

Decision No: [2014] NZIACDT 27

Reference No: IACDT 036/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

**Wattan Veer Vikashwarjeet & Vandna
Avikshni Devi**

Complainants

AND

Artika Archina Devi

Adviser

DECISION

REPRESENTATION:

Registrar: In person.

Complainants: In person.

Adviser: S Singh, Singhs Barristers & Solicitors, Auckland.

Date Issued: 17 March 2014

DECISION

Preliminary

- [1] The complainants are a couple, who say they engaged the adviser to assist with a visa for the parents of one of them. They say they told the adviser of a potential issue; one of the parents had previously had a visa revoked due to what Immigration New Zealand regarded as a “character issue”.
- [2] They say the adviser indicated this was not of great moment, and did not include details on the application lodged with Immigration New Zealand. Immigration New Zealand declined the application on character grounds and considered the application was potentially improper due to non-disclosure.
- [3] The complainants say an unlicensed person carried out some of the work, their fees were mishandled, and when this Tribunal cancelled the adviser’s licence, she did not tell them and arrange for continuing representation.
- [4] The adviser generally disputes the facts alleged in support of the complaint, and claims she delivered professional services properly. She says the complainants withheld information about the character issue, which was not her fault.
- [5] The Tribunal has accepted the account given by the complainants and upheld the complaint.

The complaint

- [6] The material allegations in the complaint were set out in the Statement of Claim. The key elements being:
 - [6.1] The complainants approached the adviser to assist with seeking a visitor’s visa for the parents of one of the complainants.
 - [6.2] At the initial meeting, the complainants explained to the adviser there was a potential issue in that one of the persons seeking a visa had previously had a visa revoked due to a character issue.
 - [6.3] The adviser gave the advice that, as the application was new, they should not worry about the previous character issue, that Immigration New Zealand had approved cases that were more difficult, and that the adviser knew of such cases.
 - [6.4] Relying on the advice, the complainants entered into an agreement with the adviser, dated 2 August 2011, for the provision of her professional services.
 - [6.5] An employee at the adviser’s practice carried out the professional work for the complainants, and they had no contact with the adviser after she signed the agreement.
 - [6.6] This Tribunal, with effect from 12 September 2011, cancelled the adviser’s licence. The Tribunal gave her an opportunity to arrange for continuing professional representation for clients before the cancellation took effect.
 - [6.7] The adviser had not lodged the application before she lost her licence. The adviser did not inform her clients she was about to lose her licence, or take any other steps to protect their interests, or discharge her professional duties to them.
 - [6.8] On 17 October 2011, someone in the adviser’s former practice lodged an application for the visitor visas. The application did not identify the adviser. It appears a person who did not hold a licence prepared and lodged the application unlawfully.
 - [6.9] Unlicensed persons at the adviser’s former practice continued to provide immigration advice, and took fees for doing so.

- [6.10] On 17 February 2012, Immigration New Zealand declined the application for visitor visas on the grounds of the character issue the complainants raised when first instructing the adviser.

Interim decision

- [7] The adviser filed a Statement of Reply denying liability; the statement asserted the Tribunal should dismiss the complaint. However, it did not fully address the complaint. In the circumstances, the Tribunal took the view it was important to ensure the adviser was clearly on notice of the potential findings on the material then before the Tribunal.
- [8] The interim decision gave the adviser notice the material before the Tribunal potentially supported the allegations that:
- [8.1] The complainants raised the character issue at their first meeting with the adviser.
- [8.2] The outcome of the application was foreseeable; the adviser gave advice that was wrong and that wrong advice was the foundation for her instructions.
- [8.3] The adviser did not confirm her advice in writing in accordance with Clause 3(f) of the Code of Conduct (she had not produced evidence of doing so).
- [8.4] The complainants requested that the fees they had paid be refunded. The adviser has not refunded the fees being \$1,800 paid initially, and a further \$350 paid after she lost her licence.
- [9] The interim decision went on to say potential grounds for upholding complaint within the Tribunal's jurisdiction were that:
- [9.1] The adviser failed to provide appropriate advice regarding the difficulties raised by the character issue.
- [9.2] The adviser had complete instructions to apply for visitor visas from 2 August 2011 and should have lodged the application promptly. She failed to lodge it between 2 August 2011 and 12 September 2011 when this Tribunal cancelled her licence, and should have lodged it.
- [9.3] The adviser was a party to an unlicensed person dealing with her clients in relation to professional matters, and undertaking work she had instructions to complete. She did so knowing that person could not lawfully undertake the work.
- [9.4] The adviser was obliged to keep unearned fees in a client account, and should have been in a position to account for them; in fact, she had not complied.
- [9.5] This Tribunal, after cancelling the adviser's licence, allowed a period for the adviser to communicate with clients and arrange their ongoing professional representation. During that period, the adviser needed to determine whether she was obliged to refund fees or make arrangements acceptable to her client, such as paying unearned fees to the new adviser. All the fees appear to have been unearned, as the adviser's instructions followed her inadequate advice regarding the prospects of a visa issuing and she did not lodge the application.
- [10] If the potential factual findings were made out, the interim decision made it clear the Tribunal could potentially determine:
- [10.1] The adviser failed to provide timely updates, or confirm in writing the details of material discussions (Clause 3 of the Code of Conduct).
- [10.2] The adviser failed to carry out her lawful, informed instructions to file an application for a visitor visa and did so:
- [10.2.1] Through lack of care, diligence, and professionalism (Clause 1 of the Code of Conduct), and/or did so

- [10.2.2] Negligently (section 44 of the Act) by not informing the complainant properly of the likelihood of an application being successful, and not lodging the application.
- [10.3] The adviser was a party to an unlicensed person providing immigration advice as defined in the Act, and accordingly acted unprofessionally (Clause 1 of the Code of Conduct), and/or engaged in dishonest or misleading behaviour (section 44(2)(d) Immigration Advisers Licensing Act 2007).
- [10.4] The adviser failed to bank unearned fees in a separate bank account (Clause 4 of the Code of Conduct), failed to issue proper invoices (Clause 8(e) of the Code of Conduct), and failed to account for and refund fees when her engagement terminated (Clause 3(d) of the Code of Conduct).
- [10.5] When the adviser lost her licence, she failed to notify the complainants that she could no longer act for them and failed to arrange appropriate professional support. That conduct lacked professionalism (Clause 1 of the Code of Conduct), and resulted in the complainants' affairs being wholly or partly in the hands of unlicensed persons acting unlawfully.
- [11] The Tribunal notes it does not have jurisdiction over persons who are not licensed immigration advisers; accordingly the events after the adviser lost her licence cannot be grounds for upholding the complaint. However, losses including the fees of \$350 paid after the cancellation were potentially a consequence of any failure to act professionally at the termination of her practice.
- [12] The interim decision gave the adviser the opportunity to reflect on her response and provide any further material she wished. It noted she was a professional who was required to keep and maintain records of her professional engagement (Clause 3 of the Code of Conduct); she was told she should explain the allegations in the complaint with reference to her records and produce those records.

Response to the interim decision

- [13] The adviser, through her counsel, responded to the interim decision. The response did not include any affidavits, or an application for an oral hearing. The response comprised submissions that contended:
- [13.1] The complainants failed to inform the adviser of the character issue; she could not have anticipated it.
- [13.2] Delay in filing the application was a result of the complainants not providing information in a timely manner. The adviser performed all her duties appropriately.
- [13.3] The adviser did not allow anyone to provide immigration advice without a licence; staff only performed "clerical work" as defined in the Act.
- [13.4] The adviser received no fees; she was only a voluntary worker for a company that took the fees.
- [13.5] The complainants were informed the adviser's licence had been cancelled; they decided to continue to be represented by the persons who continued to provide immigration services from the office where the adviser had her business. A licensed person took over the instructions.
- [13.6] The adviser earned the fees paid; the complainants gave incorrect information so any problems lay with them.
- [13.7] The adviser has not retained any of her records; she left them with the company with which she had operated her practice, and the directors of which have left New Zealand and the records cannot be located.

- [14] The complainants responded saying they did not agree with the adviser's submissions, and reiterated aspects of their complaint.

Discussion

The evidence

- [15] The adviser was required to document her engagement fully.
- [16] The Code is prescriptive in requiring certain actions to occur at the commencement of the client engagement. As a minimum:
- [16.1] Before commencing work the basis for costs and fees must be established (Clause 8(b)).
- [16.2] A written agreement is required (Clause 1.5(a)).
- [16.3] The adviser must make clients aware of the terms and significant matters relating to that agreement (almost inevitably including their immigration options and processes that apply) (Clause 1.5(a)).
- [16.4] Clients must receive a copy of the Code and have it explained to them. They must also receive a copy of the adviser's complaints procedure (Clauses 1.4(a) and 9(b)).
- [17] This engagement required the adviser to explain to the complainants what their options were, the risks, the processes involved, and then taking instructions. Only then, could the adviser have lawful informed instructions and meet the obligation to act with professionalism (Clause 1.1). Furthermore, the adviser was required to confirm in writing the details of material discussions with clients (Clause 3(f)).
- [18] Preparing material to submit to Immigration New Zealand is a crucial step. If a person submits information that is not accurate, there are potentially grave adverse consequences for that person's ability to advance that, or any other, immigration application. The precision that is expected is a matter a licensed immigration adviser must impress upon clients. A form that looks to be in order may well contain inaccurate information, and have irreparable consequences for a client. It is an obligation of care and professionalism to ensure a client understands these obligations and consequences (Clause 1.1).
- [19] The adviser says she had records, but has lost access to them. The alternative is the complainants are correct and the adviser failed to create records as she did not act professionally.
- [20] The complainants have provided a coherent account; they provided the records they had to support their account of their dealings with the Adviser. The Registrar has also gathered Immigration New Zealand's record and placed that before the Tribunal.
- [21] The only document that deals with taking instructions is an agreement for the provision of immigration services dated 2 August 2011. It is not illuminating beyond recording that the objective of the engagement was: "Visa: Parents multiple".
- [22] A letter of 26 March 2012 written by an unlicensed person in the adviser's practice responding to a request for a refund of fees said:
- "You have requested a multiple entry visa. An eligibility assessment exercise was taken in this regard. Subsequent to this you agreed to engage the services of our company."
- [23] It is correct to say an eligibility assessment was necessary; however, there is no record of an effective "eligibility assessment exercise". The complainants are clear on what did in fact happen in that process. They say they disclosed the essential character information that ultimately precluded a visa from issuing and the adviser said the information was not important.

- [24] The adviser has not produced any written material that is inconsistent with that, or consistent with a thorough review of eligibility. The complainants have consistently complained, and sought a refund, on the basis the adviser failed to deal properly with the character information they disclosed at the outset.
- [25] The adviser has had the opportunity of providing sworn evidence, and being subject to cross-examination. She has chosen not to do that.
- [26] In these circumstances, there is a complaint, which is entirely consistent with the written record, denied by the adviser, but not rebutted by evidence that can be tested. The adviser's denial has the further impediment of a claim that documentation that should exist is no longer available. They were records she was required to keep for 7 years (Clause 3(e) of the Code of Conduct).
- [27] 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).
- [28] I am satisfied on the balance of probabilities the complainants' account of the instructions they gave to the adviser and her response is accurate.

Failure to provide timely updates and confirm in writing the details of material discussions

- [29] I am satisfied the adviser failed to provide timely updates, or confirm in writing the details of material discussions (Clause 3 of the Code of Conduct).
- [30] The adviser was required to undertake an effective review of the relevant immigration opportunities. I am satisfied she was on notice that there was a character issue. That issue had to be discussed, the importance of disclosure identified, and the potential consequences in terms of eligibility discussed.
- [31] Then there had to be written communications regarding progress, including what was needed to lodge the application. The adviser now blames her clients for lack of information to progress the application. There should be correspondence to show she asked for it, and the consequences of not providing it; there is none. I am satisfied the complainants' account is correct and they provided what was requested of them.
- [32] I am satisfied the adviser did not comply with Clause 3 in respect of the communications required.

Failure to get and carry out informed instructions

- [33] The adviser was required to get lawful informed instructions (Clause 1 of the Code of Conduct). The complainants told her of the character issue; she needed to evaluate that in the manner identified previously in para [30] above. I am satisfied she:
- [33.1] Failed to discuss how that issue might affect entitlement to a visa;
- [33.2] Failed to warn of the importance of disclosure, and the consequences of failing to disclose; and
- [33.3] Irresponsibly understated the significance of the issue.
- [34] That she then, proceeded with instructions founded on her clients misunderstanding of the difficulties arising from the character issue. Those instructions were not informed, due to the adviser's failure to give professional advice.
- [35] The adviser breached Clause 1 of the Code of Conduct, which required her to act with due care, diligence, and professionalism and carry out the lawful informed instructions of clients.
- [36] I am also satisfied the conduct was negligent, and that is a ground for upholding the complaint under section 44(2)(a) of the Act.

A party to an unlicensed person providing immigration advice

The legislative restriction

- [37] In many areas of professional and licensed practice there is extensive use made of people who do not hold the professional qualifications required of the person primarily responsible for providing the service. In some cases those persons hold different and complementary qualifications, such as lawyers and legal executives; surgeons, nurses, and anaesthetists; pilots and first officers. Often people without formal qualifications provide essential services in these settings too, under delegation from the qualified person who is responsible for the work.
- [38] If there was no legislative direction, a licensed immigration adviser could conduct their practice making extensive use of unqualified people, and the case would not be easily made out they acted unreasonably or irresponsibly in doing so. Any complaint would likely require a demonstration of failure to delegate appropriately, or supervise properly if that were the law. Unqualified people successfully provide very important skills in many areas of professional service delivery.
- [39] However, the Act was, among other things, intended to put an end to a history of a small minority of advisers who exploited vulnerable migrants. The background to the Act is discussed in *ZW v Immigration Advisers Authority* [2012] NZHC 1069, and reflected in section 3 of the Act.
- [40] It is evident the legislative scheme has been constructed in a manner designed to exclude unlicensed people being engaged in the delivery of professional services, to a degree that is far from universal in the regulation of professional service delivery.
- [41] It was foreseeable that some people who had formerly provided immigration services, and failed to gain a licence, would seek to have a licensed person “rubber stamp” their continuing activity in the industry. Unfortunately, this Tribunal’s work demonstrates that was a well-founded apprehension, and an area where enforcement action has been necessary.
- [42] Against that background, the policy behind the stringent restrictions in the Act on unlicensed persons providing immigration services is evident.
- [43] Section 63 of the Act provides that a person commits an offence if they provide “immigration advice”, without being either licensed, or exempt from the requirement to be licensed.
- [44] Section 73 provides that a person may be charged with an offence under section 63, whether or not any part of it occurred outside New Zealand.
- [45] The scope of “immigration advice” is defined in section 7 very broadly. It includes:
- using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand ...
- [46] There are exceptions to consider. Section 7 provides that the definition does not include “clerical work, translation or interpreting services”. Accordingly, the question arises as to whether the work in issue came within that exception.
- [47] The scope of *clerical work* is important, as otherwise, the very wide definition of immigration advice would likely preclude any non-licence holder working in an immigration practice in any capacity.
- [48] *Clerical work* is defined in section 5 of the Act in the following manner:
- clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:
- (a) the recording, organising, storing, or retrieving of information:
- (b) computing or data entry:

- (c) recording information on any form, application, request, or claim on behalf and under the direction of another person

- [49] The definition is directed to administrative tasks, such as keeping records, maintaining financial records and the like.
- [50] The definition deals specifically with the role an unlicensed person may have in the process of preparing applications for visas. They may record information “on any form, application, request, or claim on behalf and under the direction of another person”.
- [51] The natural meaning of those words is that the unlicensed person relying on the “clerical work” exception, may type or write out what another person directs.
- [52] That other person may properly be the person who is making the application, a licensed immigration adviser, or a person who is exempt from being licensed. The person typing or writing out the form in those circumstances is not giving immigration advice.
- [53] The definition does not give any authority for the unlicensed person to make inquiries, and determine what is to be recorded on the form. Under “clerical work” they must do nothing more than “record” information as directed.
- [54] The other exception in section 7 is that immigration advice does not include “providing information that is publicly available, or that is prepared or made available by the Department”. This also excludes the possibility of an unlicensed person engaging with the specific factual situation of the person making an application as they may only provide information, not advice.

The facts in this case

- [55] The adviser was informed in the interim decision that the material before the Tribunal indicated:
- An employee engaged in the adviser’s practice carries out the professional work for the complainants and they had no contact with the adviser after she signed the agreement.

- [56] If correct, there has been a breach of the prohibition in the Act and the adviser must have been a party to the breach as she commenced the engagement and did not complete it.
- [57] The complainants say (and it was stated in the Statement of Complaint), that after the initial instructions they contacted the adviser’s office, asked to speak with her, and were told an unlicensed person was dealing with their application.
- [58] The adviser denies this occurred. However, she has provided no evidence at all that she engaged in carrying out the instructions. For the reasons discussed, there should be records if she did that and she should be able to recall and give evidence on the issue. The only response has been broad denials, claims clerical work was undertaken, and claims she was not responsible for aspects of the instructions as she was a volunteer.
- [59] I am satisfied the adviser took the instructions and left them in the hands of an unlicensed person in her office. I accept the complainants’ account and can find nothing that is inconsistent with it in the material before me.
- [60] It follows the adviser breached the Code of Conduct in that she acted unprofessionally in becoming a party to the unlawful provision of immigration advice (Clause 1.1 of the Code of Conduct).

Dealing with fees

- [61] The adviser was the only licensed party who engaged with the complainants; she accepted their instructions. There is no prohibition on her using a company to deliver services; however, the Code of Conduct requires her personally to ensure the services are delivered.

- [62] Relevantly, the Code of Conduct required her to:
- [62.1] Maintain a separate clients' bank account for holding all clients' funds paid in advance for fees (Clause 4 of the Code of Conduct);
- [62.2] Provide any refunds payable upon completing or ceasing a contract for services (Clause 3(d) of the Code of Conduct).
- [63] This was not a situation where the adviser had any reason to think that someone else was performing those duties. There was a company Universal Immigration Services NZ Ltd, which apparently took fees. Of this, the adviser says, "I followed the instructions that were provided by the director [of the company] in respect of fees being collected".
- [64] The director of the company was not a licensed immigration adviser, or qualified in any material respect. She was not entitled to rely on direction from such a person where that direction does not comply with her professional responsibilities.
- [65] She was required to discharge the professional obligations on her. She had to account for the fees solicited using her identity as a licensed immigration adviser. One of the requirements in establishing the professional relationship was that her prospective clients were shown the Code of Conduct (Clause 1.4(a)), it was explained to them, and they were given a copy. Accordingly, the adviser was required to represent to them that until she earned fees she would place them into a client funds account in accordance with Clause 4 of the Code of Conduct.
- [66] It is inescapable she was obliged to ensure the funds were banked and accounted for in the manner that she was also required to represent to her clients. The adviser has not claimed that she did bank and account for the funds, simply that she left it to an unlicensed person.
- [67] Accordingly, I am satisfied the adviser failed to bank client funds in accordance with Clause 4 of the Code of Conduct, and failed to refund fees in accordance with Clause 3.
- [68] The adviser was required to refund the fees in full for two reasons. She did not have informed instructions to carry out professional services and the services performed were performed unlawfully. Accordingly, she was obliged to refund the fees in full.

Notification of licence cancellation

- [69] The adviser accepts she did not notify her clients when this Tribunal cancelled her licence, despite being given time to give notice and arrange the refund of unearned fees. She said, in her Statement of Reply, she left "the company to advise their clients". The complainants were the adviser's clients. Neither the adviser nor the unlicensed persons in her practice informed the complainants, who were then in a position where unqualified persons continued dealing with their affairs.
- [70] That conduct was unprofessional, and resulted in further exploitation of them including fees of \$350 being solicited.
- [71] I am satisfied this amounted to unprofessional conduct in breach of Clause 1 of the Code of Conduct.

Decision

- [72] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [73] The adviser breached Clauses 1, 3, and 4 of the Code of Conduct in the respects identified, and was negligent. They are grounds for complaint pursuant to section 44(2) of the Act.
- [74] In other respects, the Tribunal dismisses the complaint.

Suppression of name

- [75] The adviser sought an order to keep her identity confidential. The grounds were she:

- [75.1] Is no longer a licensed immigration adviser.
- [75.2] Acted in a professional manner and denies wrongdoing on her part.
- [75.3] Has another career, where she is in “a special relationship of mutual confidence and trust”.
- [75.4] Did not gain financially.
- [75.5] Due to her culture, there will be repercussions for her and her family.
- [76] The submissions have an element of unreality. The Tribunal has upheld a number of complaints against the adviser and cancelled her full licence. The decisions are public information, and involve conduct as serious as the present complaint. The incremental effect of publishing another disciplinary finding, which is the issue, is not consistent with the grounds advanced.
- [77] There is no sensible reason not to publish the present complaint in these circumstances. I appreciate counsel could of course advance reasons for suppression that were not advanced previously, and if a case were made out the Tribunal would make an appropriate order. However, the situation is one where publication is a routine consequence of the disciplinary process.
- [78] There are no special circumstances. If the adviser is in a position of mutual confidence and trust in her current work, that is not a justification for suppressing her professional disciplinary background.
- [79] Unfortunately, the adviser’s disciplinary history is not an isolated lapse; rather she has engaged in a sustained course of conduct resulting in multiple complaints the Tribunal has upheld. That is not information the Tribunal should deny to the public, particularly when the adviser is seeking confidence and trust in a professional capacity. The Tribunal has found on repeated occasions she had abused trust and confidence given to her as a licensed immigration adviser.
- [80] Accordingly, the Tribunal will not make an order restricting publication of this decision.

Submissions on sanctions

- [81] The Tribunal has upheld the complaint accordingly; pursuant to section 51 of the Act, it may impose sanctions.
- [82] 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, the adviser is entitled to make submissions and respond to any submissions from the other parties.
- [83] 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

- [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] The adviser 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 the adviser within 5 working days of the adviser filing and serving those submissions.

DATED at WELLINGTON this 17th day of March 2014

G D Pearson
Chair