

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

Decision No: [2014] NZIACDT 3

Reference No: IACDT 004/13

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Juan Carlos Sanchez Varela

Complainant

AND

Artika Archina Devi

Adviser

NAMES AND IDENTITY OF THE PARTIES NOT TO BE PUBLISHED PENDING FURTHER ORDER
OF THE TRIBUNAL

INTERIM DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

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

Date Issued: 29 January 2014

DECISION

Preliminary

- [1] The Registrar received a complaint relating to the adviser.
- [2] The Registrar identified the basis of the complaint as being that the adviser:
 - [2.1] Was negligent;
 - [2.2] Incompetent;
 - [2.3] Incapable;
 - [2.4] Engaged in dishonest or misleading behaviour; and
 - [2.5] Breached the Code of Conduct in relation to failure to communicate with her client, and not refunding fees.
- [3] The factual basis for those bases of complaint was:
 - [3.1] The adviser did not have any contact with the complainant.
 - [3.2] A failure to inform the complainant that the adviser's practice had moved to a new address.
 - [3.3] The adviser (through a company) claimed credit for the issue of a work visa without performing the work.
 - [3.4] The adviser failed to inform the complainant of progress with an application.
 - [3.5] The adviser failed to refund fees.
- [4] The Registrar provided an outline of the alleged events on which the complaint was founded. They involved an unsatisfactory interaction relating to an immigration application.
- [5] However, the facts presented in support of the complaint state the complainant never had any contact with the adviser. Indeed the Registrar, who lodged the Statement of Complaint with the Tribunal, did not provide any facts that involved an act on the part of the adviser. Neither did the Registrar provide facts that were grounds for regarding the adviser as responsible for what occurred with the complainant's immigration affairs other than the tenuous inferences which might be drawn from the fact that the contract was with the "adviser's company".
- [6] However, in this instance the adviser has filed a Statement of Reply. It contains new and fundamentally important facts. In particular, the adviser appears to admit she was involved in the matters that led to the complaint. Furthermore, she was the sole licensed immigration adviser involved, and others undertook significant work.
- [7] This decision is an interim decision that puts the adviser on notice of potential adverse findings that may follow from combining the information contained in the Registrar's Statement of Complaint and the adviser's Statement of Reply. They are conclusions that are quite different from those which might be reached from the contents of the Registrar's Statement of Complaint alone.

The Statement of Complaint

- [8] The Registrar filed a Statement of Complaint with the Tribunal, which set out the facts alleged in support of the complaint, and information gathered by the Registrar.
- [9] There is a background narrative where the complainant and a person, who is not a licensed immigration adviser, engaged in an arrangement for the provision of immigration services. The provision of those services was not satisfactory.

- [10] In the Statement of Complaint, the Registrar wrote the following with regard to the adviser:
- [10.1] The complainant says he has never met the adviser.
- [10.2] There is a written agreement that refers to the adviser (the implication is the adviser signed it when the complainant was not present).
- [11] Registrar identified the grounds for referring this complaint in his Statement of Complaint. They are outlined in para [2], above; the facts said to support the grounds are general (refer para [3], above).

The adviser's response

- [12] The adviser responded to the Statement of Complaint by filing a Statement of Reply.
- [13] The Statement of Reply contains information that discloses a substantial role; she accepts:
- [13.1] She was a "voluntary worker" for Universal Immigration Services Limited. That company apparently provided immigration services.
- [13.2] She was aware of the complainant, acted for him, and had personal dealings with him. Apart from clerical work, she did all the work related to the complaint.
- [14] However, the adviser claims that the engagement was commenced properly, her personal signature appearing on the contract for services.
- [15] It also appears the adviser was the only licensed immigration adviser involved with the company.

Discussion

- [16] The material before the Tribunal is not adequate for a final decision, without giving the parties the opportunity to provide further evidence or submissions.
- [17] The Statement of Complaint does not make it clear the adviser had a role in dealing with the complainant's instructions.
- [18] However, the adviser has provided information that establishes the adviser did engage with the instructions.
- [19] The submissions presented by counsel for the adviser appear to overlook the significance of the adviser's role. The general thrust of the submissions is that the adviser did not have responsibility beyond being a "voluntary worker". Whereas, her own admissions indicate that she was the sole person holding a licence in the immigration practice.
- [20] Licensed immigration advisers have professional duties to their clients imposed by the Act, and where the Tribunal upholds a complaint, they personally face sanctions including orders for repayment of fees, and compensation. They cannot avoid those statutory responsibilities due to contractual arrangements they or their clients have with a service company involved in the adviser's immigration practice.
- [21] These obligations are an elementary feature of the professional environment that applies to licensed immigration advisers.
- [22] Decisions of this Tribunal address the regime in the Act governing licensed immigration advisers. Features relevant to the present complaint are as follows:
- [22.1] Unless a person is licensed or exempt from holding a licence, it is a criminal offence to provide "immigration advice".
- [22.2] The Act defines "immigration advice" in broad terms.

- [22.3] It is not possible for a client engagement to commence, in accordance with the Code of Conduct, without a licensed immigration adviser personally engaging with the client.
- [22.4] The scope of “clerical work”, which can be legally carried out by a person who is not licensed, is narrow.
- [22.5] A licensed immigration adviser is personally responsible for all aspects of a client engagement, and will be personally responsible for the refund of fees, compensation, and the like.
- [22.6] A corporate body cannot hold a licence as an immigration adviser.
- [23] The material before the Tribunal points to a potential finding that the adviser was entirely responsible for the provision of professional services to the complainant.
- [24] A factual dispute is central to the complaint. The complainant says the adviser had no contact with him. The adviser says she did engage with the complainant, and did all work except clerical work.
- [25] The adviser had to have contact with the complainant to establish a proper professional relationship. The complainant needed to know what his immigration options were, and the adviser had to get information and instructions. In addition, the disclosure and advice required by the Code of Conduct was a necessary professional duty. A licensed immigration adviser had to perform this work, as it is “immigration advice” as defined under the Act.
- [26] If the adviser did not meet the complainant and signed the agreement only after the engagement was illegally commenced by Mr Naad, it would be open to the Tribunal to find that:
- [26.1] She was a party to unlicensed persons providing immigration advice and services in her name.
- [26.2] The engagement with the complainant was unlawful, and not in accordance with the Code of Conduct, as:
- [26.2.1] It was not properly commenced with a licensed immigration adviser engaging with the client and undertaking the advice and disclosure obligations; and
- [26.2.2] The adviser allowed unlicensed persons to perform professional duties.
- [26.3] The adviser is responsible for refunding all fees paid, as they had been solicited with her being a party to the instructions and her status as a licensed immigration adviser being used.
- [27] Those findings would establish a breach of the Code of Conduct in that:
- [27.1] The adviser acted unprofessionally by being a party to the unlawful provision of immigration advice (Clause 1.1 of the Code of Conduct).
- [27.2] The adviser failed to initiate the professional relationship in accordance with the Code of Conduct (Clause 1.5 of the Code of Conduct).
- [27.3] The adviser failed to refund fees (Clause 3(d) of the Code of Conduct).
- [28] However, if the adviser did meet and commence the engagement with the complainant in accordance with the Code of Conduct, then the Registrar’s Statement of Complaint does not provide a basis for an adverse finding.
- [29] The alleged lack of contact is the primary ground for the allegations of negligence, incompetence, being incapable, and engaging in dishonest or misleading behaviour. The secondary ground for the first three is a failure to communicate a change of address. However, the adviser contends the allegations of miscommunication arise from the unavailability of the complainant and confusion over email addresses.

- [30] The Registrar forwarded the allegation of dishonest or misleading behaviour on the additional basis that the adviser falsely claimed credit for gaining a work visa. This has led to a factual dispute between the complainant, who says it was his work, and the adviser, who says it was her work.
- [31] If the adviser did engage with the complainant and perform the work, the Statement of Complaint does not set out why fees were refundable. Even if the complainant's work contributed to the successful visa application, it does not automatically follow a refund was due. The parties may address both the facts, and the implications.
- [32] Information about the work the adviser did is sparse in the material before the Tribunal. That should not be the case, given the adviser's responsibility under the Code of Conduct to maintain full records.
- [33] A crucial factual dispute needs to be resolved. Namely, what did the adviser personally do in relation to her engagement by the complainant? Was there a personal meeting, and what else did she do?
- [34] To reach a final decision it will be necessary to give the parties an opportunity to present oral evidence, as there is a significant factual dispute regarding whether there was a personal meeting between the adviser and the complainant.
- [35] It is a matter for the parties to decide whether to take up this opportunity. The Tribunal will then decide the complaint on the material held by the Tribunal (including any further material presented orally or in writing by the parties).

Directions

- [36] The Tribunal will give the parties the opportunity to present evidence at an oral hearing.
- [37] The Tribunal puts the adviser on notice regarding the material presently before the Tribunal. She is at risk of a finding that she was a party to an unlicensed person providing immigration advice. If the Tribunal made that finding, the conduct would potentially be unprofessional, and a breach of Clause 1 of the Code of Conduct.
- [38] The two issues the parties should address in anticipation of an oral hearing are:
- [38.1] What contact the adviser had with the complainant.
- [38.2] What professional work the adviser did for the complainant (and to role of any other person, if material).
- [39] The parties may apply to have other issues addressed at an oral hearing.
- [40] The Tribunal will not, of its own motion, require the parties to participate in an oral hearing, and will decide the complaint on the evidence it has before it if the parties elect not to call evidence.
- [41] The adviser should understand the Tribunal could potentially conclude the written record is consistent with the complainant's account, as the material before the Tribunal does not contain documented evidence of the active engagement expected of a licensed immigration adviser acting in accordance with the Code of Conduct.

Timetable

- [42] Within 15 working days of this direction, the parties should provide signed briefs of evidence containing any evidence they wish to call at an oral hearing. A memorandum identifying additional issues the parties may wish to have addressed at an oral hearing, if any, should accompany these briefs.
- [43] Each party will have 5 working days to reply to any briefs of evidence.

- [44] If the parties do not file briefs of evidence, the Tribunal will forgo the oral hearing and decide the complaint on the information then before it.
- [45] The Tribunal will convene a telephone conference to address the procedure for an oral hearing if the parties file briefs of evidence.

DATED at WELLINGTON this 29th day of January 2014

G D Pearson
Chair