

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

Decision No: [2014] NZIACDT 30

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

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

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

Date Issued: 19 March 2014

DECISION

Preliminary

- [1] This complainant says he went to the adviser's practice and dealt only with unlicensed persons. He says he never met the adviser. It is a criminal offence for an unlicensed person to give immigration advice, as defined in the Act. It is unprofessional for a licensed person to be a party to unlawful conduct of that kind.
- [2] The adviser denied what the complainant said; she said she had met with him. She accepted only incidental clerical work had been carried out by unlicensed persons and in accordance with the Act.
- [3] Whether the Tribunal upholds the complaint primarily turns on a factual matter. The Tribunal has accepted the account given by the complainant and upheld the complaint. The Tribunal's finding is that the adviser failed to perform her duties and allowed an unlicensed person to unlawfully carry out her responsibilities.

The complaint

- [4] The Registrar filed a Statement of Complaint with the Tribunal; it sets out the facts alleged in support of the complaint and information gathered by the Registrar.
- [5] The background to the narrative is that 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, the complainant said, unsatisfactory.
- [6] The Registrar identified the grounds of the complaint as being that the adviser:
 - [6.1] Was negligent;
 - [6.2] Incompetent;
 - [6.3] Incapable;
 - [6.4] Engaged in dishonest or misleading behaviour; and
 - [6.5] Breached the Code of Conduct in relation to failure to act professionally, return documents promptly, communicate properly with her client and refund unearned fees.
- [7] The factual basis for those grounds of complaint was:
 - [7.1] The adviser did not have any contact with the complainant.
 - [7.2] A failure to inform the complainant that the adviser's practice had moved to a new address.
 - [7.3] The adviser (through a company) claimed credit for the issue of a work visa without performing the work.
 - [7.4] The adviser failed to inform the complainant of progress with an application.
 - [7.5] The adviser failed to refund fees.
- [8] In the Statement of Complaint the Registrar wrote the following with regard to the adviser:
 - [8.1] The complainant says he has never met the adviser.
 - [8.2] There is a written agreement that refers to the adviser (the implication is the adviser signed it when the complainant was not present).

- [9] The Registrar identified the grounds for referring this complaint in his Statement of Complaint. They are outlined in para [6] above. The facts said to support the grounds are general (refer para [7] above).

The adviser's Statement of Reply

- [10] The adviser responded to the Statement of Complaint by filing a Statement of Reply.
- [11] The Statement of Reply contains information that discloses a substantial role; she accepts:
- [11.1] She was a "voluntary worker" for Universal Immigration Services Limited. That company and its personnel apparently provided immigration services.
- [11.2] 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.
- [12] The adviser claims she commenced the engagement properly, her personal signature appearing on the contract for services.
- [13] It also appears the adviser was the only licensed immigration adviser involved with the company.

Interim decision

- [14] The material before the Tribunal was not adequate for a final decision, without giving the parties the opportunity to provide further evidence or submissions. Accordingly, the Tribunal issued an interim decision, which identified the Tribunal had reached the following position on the papers then before it:
- [14.1] The Statement of Complaint did not make it clear the adviser had a role in dealing with the complainant's instructions.
- [14.2] The adviser provided information that established she did engage with the instructions.
- [14.3] The submissions presented by counsel for the adviser appeared 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.
- [14.4] Licensed immigration advisers have professional duties to their clients imposed by the Act, and where the Tribunal upholds a complaint, advisers 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.
- [15] These obligations are an elementary feature of the professional environment that applies to licensed immigration advisers.
- [16] The interim decision noted decisions of this Tribunal which address the regime in the Act. Features relevant to the present complaint include:
- [16.1] Unless a person is licensed or exempt from holding a licence, it is a criminal offence to provide "immigration advice".
- [16.2] The Act defines "immigration advice" in broad terms.
- [16.3] 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.
- [16.4] The scope of "clerical work", which can be legally carried out by a person who is not licensed, is narrow.

- [16.5] 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.
- [16.6] A corporate body cannot hold a licence as an immigration adviser.
- [17] The material then before the Tribunal pointed to a potential finding the adviser was entirely responsible for the provision of professional services to the complainant.
- [18] A factual dispute was 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 related to the complainant's application, except clerical work.
- [19] The interim decision pointed out the adviser needed to have had contact with the complainant in order to establish a proper professional relationship. The adviser needed to personally engage with the complainant, get information and inform the complainant of his immigration options before taking instructions from the complainant. 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.
- [20] If the adviser did not meet the complainant, and signed the agreement only after the engagement was illegally commenced by Mr Nand, it would be open to the Tribunal to find that:
- [20.1] She was a party to unlicensed persons providing immigration advice and services in her name,
- [20.2] The engagement with the complainant was unlawful and not in accordance with the Code of Conduct, as:
- [20.2.1] It was not properly commenced, with a licensed immigration adviser engaging with the client and undertaking the advice and disclosure obligations; and
- [20.2.2] The adviser allowed unlicensed persons to perform professional duties.
- [20.3] 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.
- [21] Those findings would establish a breach of the Code of Conduct in that:
- [21.1] The adviser acted unprofessionally by being a party to the unlawful provision of immigration advice (Clause 1.1 of the Code of Conduct).
- [21.2] The adviser failed to initiate the professional relationship in accordance with the Code of Conduct (Clause 1.5 of the Code of Conduct).
- [21.3] The adviser failed to refund fees (Clause 3(d) of the Code of Conduct).
- [22] However, the interim decision went on to say, on the basis of the material then held, that 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 did not provide a basis for an adverse finding.
- [23] The Tribunal, accordingly, gave the parties the opportunity to present evidence at an oral hearing.
- [24] The Tribunal put the adviser on notice regarding the material presently before the Tribunal. Saying, she was 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.

- [25] The two issues the parties were invited to address in anticipation of an oral hearing were:
- [25.1] What contact the adviser had with the complainant.
- [25.2] What professional work the adviser did for the complainant (and the role of any other person, if material).

Response to the interim decision

- [26] The complainant did not reply to the interim decision, and was not required to do so.
- [27] The adviser responded to the interim decision with submissions from the adviser's counsel.
- [28] The submissions said the adviser did not wish to participate in an oral hearing and invited the Tribunal to decide the complaint on the papers.
- [29] The key points in the submissions were:
- [29.1] Unlicensed persons performed clerical duties and provided publicly available information; they did not breach the Act.
- [29.2] On 17 January 2011, the adviser was working on a "voluntary basis". A client engagement process was undertaken. The submission does not say what the adviser's role was.
- [29.3] The submissions say the adviser contacted the complainant after Immigration New Zealand declined his application (this is the first point at which the submissions specifically state that there was direct communication between the adviser and the complainant).
- [29.4] The complainant was making a false allegation that the adviser did not have contact with him.

Discussion

The evidence

- [30] The adviser was required to document her engagement fully.
- [31] The Code is prescriptive in requiring certain actions to occur at the commencement of the client engagement. As a minimum:
- [31.1] Before commencing work the basis for costs and fees must be established (Clause 8(b) and (d)).
- [31.2] A written agreement is required (Clause 1.5(a)).
- [31.3] 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) and (b)).
- [31.4] 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)).
- [32] This engagement required adviser to explain to the complainant what his options were, the risks, and the processes involved before 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)).
- [33] Preparing material to submit to Immigration New Zealand is a crucial step. If a person submits wrong information, 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)

[34] The complainant has provided a coherent account; he provided the records he had to support his account of his dealings with the adviser. The Registrar has also gathered Immigration New Zealand's record and placed that before the Tribunal.

[35] The adviser has not provided the documents she should have had on her file.

[36] The adviser has had the opportunity of providing sworn evidence and being subject to cross-examination. She has chosen not to do that.

[37] Furthermore, the submissions presented by her counsel say the complainant is making "a false allegation"; however, on the issue of whether the adviser met the complainant in the initial interview, the submissions do not specifically say the adviser attended that meeting. She did say in her response to the interim decision:

"Assistance was provided to the complainant by the clerical staff in recording information on the form under instructions and as advised by the complainant together with other clerical work a clerical staff could undertake."

[38] The comment appears to be an admission unlicensed persons were engaged in completing forms for the complainant, or the adviser failed to carry out her professional duties. That is because:

[38.1] The adviser accepts she was engaged to give professional advice.

[38.2] The complainant was entitled to have the adviser gather information, take instructions, and complete the forms using her professional skills.

[38.3] Accurately completing forms is important work, with serious consequences if they are not accurate. Typically, the outcome of providing erroneous information is that Immigration New Zealand will consider that goes to the applicant's character, and no visa will be issued. The forms contain warnings an adviser must explain to clients.

[38.4] While it may be clerical work to fill out a form under instruction from an applicant, the adviser had a professional obligation to direct the process, and give her client advice. She could not properly leave that to her client, or lawfully have an unlicensed person provide the advice and guidance required.

[39] There is a complaint, which is entirely consistent with the written record, denied generally but not specifically by the adviser and not rebutted by evidence that can be tested. The adviser's denial has the further impediment of not being supported by documentation that should exist. She was required to keep records for 7 years (Clause 3(e) of the Code of Conduct).

[40] 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).

[41] I am satisfied on the balance of probabilities that the complainant's account of his dealings with the adviser's practice is accurate. I accept the complainant did not meet the adviser.

A party to an unlicensed person providing immigration advice

The legislative restriction

[42] 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.

- [43] 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 that 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.
- [44] 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.
- [45] It is evident the legislative scheme has been constructed in a manner designed to exclude unlicensed people from being engaged in the delivery of professional services to a degree that is far from universal in the regulation of professional service delivery.
- [46] 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.
- [47] Against that background, the policy behind the stringent restrictions in the Act on unlicensed persons providing immigration services is evident.
- [48] 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.
- [49] 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.
- [50] 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 ...
- [51] 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.
- [52] The scope of *clerical work* is important, as otherwise, the very wide definition of immigration advice would likely preclude any unlicensed person working in an immigration practice in any capacity.
- [53] *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
- [54] The definition refers to administrative tasks, such as keeping records, maintaining financial accounts and the like.
- [55] 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”.

- [56] 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.
- [57] 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. In this case, a licensed immigration adviser had an important professional task when the forms were completed.
- [58] 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.
- [59] 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. This exception does not arise on the facts of this case.

The facts in this case

- [60] The Statement of Complaint sets out an allegation the complainant attended the adviser’s practice and asked to consult with her. Instead, Mr Ashneel Nand, who is not a licensed immigration adviser, provided the professional services. The complainant says he never met with the adviser. He says Mr Nand:
- [60.1] Initiated the professional relationship;
- [60.2] Accepted the complainant’s documents and advised on his immigration prospects; and
- [60.3] Dealt with fees.
- [61] The complainant’s allegation involves a sustained breach on the prohibition against an unlicensed person providing immigration advice as defined.
- [62] The documents supporting the complaint show that the adviser’s name was used in dealings with the Immigration New Zealand.
- [63] The adviser in her Statement of Reply admits that she was aware of the instructions. Her defence is that the complainant has falsely claimed she did not deal with him personally.
- [64] For the reasons discussed, the papers before me satisfy me that I should prefer the complainant’s account. I am satisfied the adviser did not meet with the complainant, and allowed unlicensed staff to unlawfully provide immigration advice as defined in the Act.
- [65] It follows her conduct was unprofessional and she breached Clause 1 of the Code of Conduct.

Failure to commence the professional engagement in accordance with the Code of Conduct

- [66] To properly commence the professional engagement, the adviser was required to personally:
- [66.1] Explain and provide a copy of the Code of Conduct (Clause 1.4(a) of the Code of Conduct).
- [66.2] Explain and provide a copy of her internal complaints procedure and the complaints and disciplinary procedures that are outlined in the Immigration Advisers Licensing Act 2007 (Clause 9(b) and (c) of the Code of Conduct).
- [66.3] Set out fee and disbursements (Clause 8(b) and (d) of the Code of Conduct).
- [66.4] Make her client aware in writing of the terms of an agreement for the provision of services, and all significant matters relating to it (Clause 1.5(a) and (b) of the Code of Conduct).

- [66.5] Inform the client that they are entitled to seek independent legal advice before entering into agreements (Clause 1.5(c) of the Code of Conduct)
- [67] The adviser did not meet with the complainant; only a licensed immigration adviser could legally complete the steps necessary to properly commence the professional engagement as it constitutes "immigration advice" under the Act. Accordingly, the adviser failed in her professional responsibilities.
- [68] I find the adviser failed to comply with her duties in the above respects and in doing so acted unprofessionally (Clause 1.1). The Tribunal upholds the complaint on that ground also.

Refund of fees

- [69] The adviser failed to perform her professional duties and used unlicensed persons to engage with the complainant. The engagement was performed in breach of the Act throughout.
- [70] The Code of Conduct required the adviser to provide any refunds payable upon completing or ceasing a contract for services (Clause 3(d) of the Code of Conduct).
- [71] One of the requirements in establishing the professional relationship was that the licensed immigration adviser must show the Code of Conduct to the client (Clause 1.4(a)), explain it, and provide a copy. Accordingly, the adviser was required to represent to her client she would be personally responsible for fees, and do so in a manner that met the requirements of the Code of Conduct (refer Clauses 1, 3, 4, and 8).
- [72] The adviser failed to initiate the professional engagement in accordance with the Code of Conduct (Clauses 1, 3, and 8 of the Code of Conduct).
- [73] The complainant did not have the protections intended by the Code of Conduct and further he was not satisfied with the services provided. The adviser was required to refund the fees paid in full because her engagement was irregular in terms of the Code of Conduct and performed in breach of the Act. The subsequent failure to refund fees was also a breach of Clause 3 of the Code of Conduct.

Decision

- [74] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [75] The adviser breached the Code of Conduct in the respects identified. That is a ground for complaint pursuant to section 44(2)(e) of the Act.
- [76] In other respects, the Tribunal dismisses the complaint.

Suppression of name

- [77] The adviser sought an order to keep her identity confidential. The grounds were that she:
- [77.1] Is no longer a licensed immigration adviser.
- [77.2] Acted in a professional manner and denies wrongdoing on her part.
- [77.3] Has another career, where she is in "a special relationship of mutual confidence and trust".
- [77.4] Did not gain financially.
- [77.5] Due to her culture, there will be repercussions for her and her family.
- [78] 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.

- [79] 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.
- [80] 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.
- [81] 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.
- [82] Accordingly, the Tribunal will not make an order restricting publication of this decision.

Submissions on sanctions

- [83] The Tribunal has upheld the complaint accordingly; pursuant to section 51 of the Act, it may impose sanctions.
- [84] 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.
- [85] 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

- [86] The timetable for submissions will be as follows:
- [86.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [86.2] 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.
- [86.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of her filing and serving those submissions.

DATED at WELLINGTON this 19th day of March 2014

G D Pearson
Chair