

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

Decision No: [2014] NZIACDT 32

Reference No: IACDT 021/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Achudan Nair

Complainant

AND

Artika Archina Devi

Adviser

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: D M Kruger, McClymont & Associates, Auckland.

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

Date Issued: 19 March 2014

DECISION

Preliminary

- [1] The complainant lodged an expression of interest and Immigration New Zealand invited him to apply for a residence visa.
- [2] The adviser was acting for him; she did not lodge the application until his current visa had expired. The result was Immigration New Zealand could not consider his application.
- [3] The complainant says he provided all the information requested. In addition, a staff member in the adviser's practice told him the adviser had a relationship with Immigration New Zealand that guaranteed his application would be successful.
- [4] The adviser says the complainant failed to provide the information she needed to lodge the application and that she and her staff were professional at all times.
- [5] It is necessary to determine which account is correct. The adviser has not applied for an oral hearing, not provided evidence to support her denial, and has not provided material she should have on file if her denial is correct. The Tribunal found the complainant's account is correct and upheld the complaint.

The complaint

- [6] The Registrar filed a Statement of Complaint.
- [7] The foundation of the complaint is an allegation by the complainant that:
 - [7.1] The complainant engaged the adviser to assist with seeking a residence visa. They entered into an agreement dated 13 August 2010. The fee was \$5,000; the complainant would pay in instalments; disbursements were additional.
 - [7.2] At some point a staff member associated with the adviser's practice told the complainant he could be certain of getting a visa due to the adviser's connection with Immigration New Zealand.
 - [7.3] The process to get a visa required first an expression of interest to be filed, and then, if Immigration New Zealand invited the complainant to apply, he could lodge his application for a residence visa.
 - [7.4] The complainant paid fees and provided all necessary information.
 - [7.5] The adviser lodged an expression of interest and, on 6 September 2010, Immigration New Zealand invited the complainant to apply for a residence visa.
 - [7.6] The adviser failed to notify the complainant he could apply for a visa.
 - [7.7] The complainant made inquiries and a staff member associated with the adviser's practice told him he could apply for a visa.
 - [7.8] The adviser did lodge an application for the visa but only after his work visa had expired, so Immigration New Zealand could not process it.
 - [7.9] The complainant personally made inquiries with Immigration New Zealand and found his application for a visa was not under consideration. He raised the issue with a staff member at the adviser's practice who said Immigration New Zealand was making a false statement.
 - [7.10] The complainant went to the police and lodged a complaint. The adviser offered a refund of fees less a 20% administration charge.

Interim decision

- [8] The adviser filed a Statement of Reply denying liability; the statement asserted that 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.
- [9] The interim decision gave the adviser notice that the material before the Tribunal potentially supported the conclusions that:
- [9.1] The adviser failed to manage her practice with professionalism by allowing a staff member to guarantee a successful application on engaging the adviser and making false allegations against Immigration New Zealand (Clause 1.1 of the Code of Conduct).
 - [9.2] The adviser failed to confirm in writing when she lodged applications and did not provide timely updates (Clause 3(a) of the Code of Conduct).
 - [9.3] The adviser failed to exercise due care and diligence, and to act professionally with the result that the complainant's application for a visa was not prepared and lodged in a timely manner (Clause 1 of the Code of Conduct).
 - [9.4] The adviser failed to refund fees when her engagement terminated. The adviser was not entitled to any fees as she failed to complete work that was necessary to achieve the immigration objective she was engaged to assist with (Clause 3(d) of the Code of Conduct).
- [10] The Tribunal also noted that the Statement of Complaint raised the issue of dishonest or misleading behaviour without providing particulars or facts that would support that finding. The Statement of Complaint raised negligence, incompetence also. The interim decision took the view the facts potentially supported a finding that the Code of Conduct had been breached. The parties did not challenge that approach, and accordingly this decision will deal with the complaint based on potential breached of the Code of Conduct rather than the other grounds which were baldly alleged.
- [11] The interim decision invited the adviser to reflect on her response and provide any further material she wished. She is a professional who was required to keep and maintain records of her professional engagement; the Tribunal invited her to explain why this engagement appeared not to have reached a successful outcome and produce her records.

The adviser's response to the interim decision

- [12] The adviser responded to the interim decision with a submission from her counsel and indicated she did not wish to seek an oral hearing. She invited the Tribunal to decide the complaint on the papers.
- [13] The adviser did not provide any affidavit evidence, only submissions. The key points in the submissions were:
- [13.1] She denied anyone told the complainant the adviser had a connection with Immigration New Zealand or that a visa approval was guaranteed. Further she always acted professionally.
 - [13.2] She claimed to have maintained contact with the complainant and referred specifically to:
 - [13.2.1] A meeting on 13 August 2010 when an agreement to provide services was signed.
 - [13.2.2] A letter from Immigration New Zealand sent on 30 August 2010 confirming the complainant's expression of interest was under consideration. The adviser contacted the complainant, and the complainant agreed to uplift a copy from the adviser's office.

- [13.2.3] Sometime after the expression of interest was selected from the pool the adviser sent a letter to the complainant informing him the expression of interest was lodged and selected.
- [13.2.4] The adviser was waiting for the further step of Immigration New Zealand inviting the complainant to apply for residence and a letter dated 6 September 2010 from Immigration New Zealand gave notice of that. The adviser notified the complainant.
- [13.3] The complainant entered a credit contract for the payment of fees to the adviser on 12 September 2010 and has falsified a claim he borrowed from his employer. The complainant has falsified the complaint in an attempt to recover fees for work that was done and has provided false information to the Tribunal.
- [13.4] The complainant met with the adviser on 17 October 2010 to discuss an application for extension of his work visa; the adviser requested necessary information. The complainant failed to provide the information. The complainant did not have the money to file the application. The complainant's work visa expired. It follows; an application for another visa could not be processed.
- [13.5] The adviser completed all the necessary work properly.
- [14] The adviser's submissions had no documents attached or references to documents that supported the claim she communicated with her client professionally and effectively.

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).
- [16.2] A written agreement is required (Clause 1.5).
- [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).
- [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 and 9).
- [17] This engagement required explaining to the complainant what the 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)).
- [18] Preparing material to submit to Immigration New Zealand is a crucial step in any application. 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 has not provided the records that are essential to show that she undertook her engagement with the complainant in the manner required by the Code of Conduct.

- [20] The extent of the material before the Tribunal from the adviser's file (mostly provided by other parties) is:
- [20.1] An agreement for the provision of professional services dated 13 September 2010.
 - [20.2] Receipts dated 13 September 2010, 27 October 2010, and 6 December 2010.
 - [20.3] Immigration New Zealand's records of communications; the adviser has not provided copies from her records (except for two letters). It provides no information regarding communications between the adviser and the complainant, but does show the complainant resorted to direct contact with Immigration New Zealand to find out what was happening to his application.
 - [20.4] A copy of a loan agreement.
 - [20.5] Letters dated 30 August 2010 and 18 February 2011 from Immigration New Zealand to the adviser (respectively saying the complainant's expression of interest had been accepted, and he was invited to apply for residence).
- [21] The complainant has provided a coherent account along with the records he has 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.
- [22] The only document that deals with taking instructions is an agreement for the provision of immigration services, dated 13 September 2010. It is not illuminating beyond recording the engagement related to: "Permanent Residence". The record is devoid of any evidence the adviser informed the complainant of what was happening, what he had to do, or any issues arising in the process.
- [23] The information before the Tribunal is consistent with the complainant's claim that:
- [23.1] The adviser failed to communicate regarding developments with the complainant's application; and
 - [23.2] The adviser failed to inform the complainant his application could not be considered.
- [24] The adviser had a duty under the Code of Conduct to create and keep a record of her communications with the complainant. It is apparent that she did not do so.
- [25] The adviser has denied that a person in her practice told the complainant he could be certain of getting a visa due to the adviser's connections with Immigration New Zealand. However, there is no evidence provided from staff members. The adviser has simply made the denial with no evidence she even inquired into the matter. She provided no evidence that she managed her practice in an effective and professional manner.
- [26] It is evident from Immigration New Zealand's record that the adviser filed an application for residence after the complainant's visa expired, with the result the application could not be considered. The adviser ought to have been fully aware of the relevant time constraints. She blames the complainant for not providing information. If that were true, she was obliged to ensure she documented what information she needed and the consequences of not providing it on time. There is no evidence she did so.
- [27] The record is consistent with the complainant's account that he provided what the adviser requested. Immigration New Zealand's record also supports what the complainant says; it is evident he contacted Immigration New Zealand to find out what had happened to his application. When he found out, he went to the police and the Authority with his concerns.
- [28] I have seen nothing in the record before me that is inconsistent with the complainant's account and the record is not consistent with the adviser's account. Furthermore, the adviser has provided only submissions, not evidence; she has chosen not to provide sworn evidence or seek an oral hearing where her evidence could be tested by cross-examination.

[29] 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).

[30] I am satisfied on the balance of probabilities the complainant's account supporting the complaint is accurate; to the extent that it differs from the adviser's, I accept the complainant's claims.

Failure to manage her practice with professionalism

[31] The complainant says staff in the adviser's practice told him the adviser had a relationship with Immigration New Zealand that guaranteed his application would be successful. The adviser denies that, not because she made inquiries and is satisfied it did not happen, rather because it should not have happened.

[32] I am satisfied it did happen as the complainant says. The adviser was obliged to ensure her staff understood ethical obligations and engaged with clients in a respectful and professional manner. Importantly, the adviser should have been personally dealing with issues of substance, not leaving this to unqualified staff.

[33] I am satisfied the adviser failed to manage and control her staff professionally; with the result they provided false and misleading information to the complainant. Accordingly, I am satisfied the adviser was in breach of Clause 1 of the Code of Conduct as her conduct lacked professionalism.

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

[34] 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).

[35] The adviser was required to have written communications regarding progress, including when she needed to lodge the complainant's application. The adviser now blames her client for lack of information to progress the application. There should be correspondence to show she asked for it and explained the consequences of not providing it. There is none, I am satisfied the complainant's account is correct and he provided what was requested of him.

[36] I am satisfied the adviser did not comply with Clause 3 in respect of the communications required.

Failure to carry out instructions

[37] The adviser had instructions to lodge an application for a residence visa, she failed to do that before the complainant ceased to be in New Zealand under a current visa.

[38] At the least she was required to take all necessary steps to complete her instructions. If she required anything from the complainant, she needed to set that out clearly in writing, including the consequences of not complying if that became an issue.

[39] I am satisfied the adviser failed to take the steps required to lodge the application in time; this was due to her own failings.

[40] Her conduct lacked due care, diligence and professionalism in carrying out her instructions. Accordingly, I am satisfied the adviser breached Clause 1 of the Code of Conduct.

Dealing with fees

[41] The adviser was the only party who engaged with the complainant; she accepted his instructions. There is no prohibition on her using a company to deliver services; however, the Code of Conduct requires her to personally ensure she delivers services in accordance with the Code of Conduct.

[42] Relevantly, the Code of Conduct required her to provide any refunds payable upon completing or ceasing a contract for services (Clause 3(d) of the Code of Conduct).

- [43] 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, and otherwise take responsibility for fees personally.
- [44] It is inescapable, she was obliged to ensure fees were accounted for in the manner prescribe by the Code of Conduct. She has not refunded the fees.
- [45] The adviser was required to refund the fees in full. What she did was of no value, as she failed to lodge the application in time, and she was responsible for that failure.

Decision

- [46] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [47] The adviser breached Clauses 1 and 3 of the Code of Conduct in the respects identified. They are grounds for complaint pursuant to section 44(2)(e) of the Act.
- [48] In all other respects, the Tribunal dismisses the complaint.

Submissions on sanctions

- [49] The Tribunal has upheld the complaint accordingly; pursuant to section 51 of the Act, it may impose sanctions,
- [50] 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.
- [51] 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

- [52] The timetable for submissions will be as follows:
- [52.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [52.2] 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.
- [52.3] 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