

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

Direction No: [2014] NZIACDT 42

Reference No: IACDT 068/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Ofa Ki Tanitini Lomu

Complainant

AND

Alungamonu (Laki) Tangilanu (Monu)

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: Ms C Giquel, Office of Peseta Sam Lotu-liga MP, Auckland.

Adviser: In person

Date Issued: 31 March 2014

DECISION

Introduction

- [1] The Complainant engaged the Adviser to apply for a visa.
- [2] The complaint is that the Adviser failed to undertake the process for client engagement (in particular an appropriate written agreement), did not do the work and did not refund the fee paid.
- [3] The Adviser did not challenge the statement of position setting out the complaint. The Tribunal has upheld the complaint.

The Complaint

- [4] The Registrar filed a statement of complaint, which identified the factual background as being:
 - [4.1] On 4 January 2011, the Complainant engaged the Adviser to assist with a visa application. She paid a fee of \$500.
 - [4.2] There was no written agreement for the provision of immigration services.
- [5] The statement of complaint identifies the potential grounds for upholding the complaint, with particulars. The key elements and particulars being:
 - [5.1] A breach of clause 1.1 of the Code of Conduct – obligations relating to care diligence and respect. The particulars are:
 - [5.1.1] The Adviser had instructions to apply for a visa on 4 January 2011, but did not lodge the application.
 - [5.1.2] When her licence expired on 23 September 2011, she had not lodged the application.
 - [5.1.3] The Adviser failed to perform the services agreed, carryout her instructions, and then failed to ensure the Complainant's interests were protected after her licence expired.
 - [5.2] A breach of clause 1 and 8 of the Code of Conduct – obligations relating to written agreements, including fees. The particulars are:
 - [5.2.1] There was no written agreement between the Complainant and the Adviser.
 - [5.2.2] The Adviser failed to comply with the requirements related to client engagement under clauses 1 and 8 of the Code of Conduct. They relate to what the parties record in writing, and the process for doing so.
 - [5.3] A breach of clause 3(d) of the Code of Conduct – obligation to provide refunds payable upon completing or ceasing a contract for services. The particulars are:
 - [5.3.1] The Complainant paid the Adviser \$550 for services; the Adviser did not provide the services.
 - [5.3.2] The Adviser has not repaid the Complainant.

Responses to the Statement of Complaint

- [6] Neither the Complainant nor the Adviser responded to the statement of complaint. No response was required if the statement of complaint was unchallenged.

Discussion

[7] The Adviser has not responded to the statement of complaint. Documentation filed with the statement of complaint supports its contents.

[8] 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 at [112]). I am satisfied the statement of complaint, with its supporting documents, establishes the grounds of complaint.

Failure to carryout instructions

[9] I am satisfied the Adviser had instructions and failed to carry them out. The Complainant paid the Adviser to apply for a visa; the Adviser agreed to make the application but did nothing to discharge her obligation.

[10] The Adviser was required to carry out her instructions with care, diligence and professionalism. Her unexplained and unjustified failure to carry out her instructions breached each of those obligations.

[11] Accordingly, I am satisfied the Adviser breached clause 1 of the Code of Conduct.

No written agreement

[12] I am satisfied the Adviser did not have a written agreement. The Code of Conduct prescribes the process of client engagement. It includes mandatory requirements that the adviser will:

[12.1] Explain and provide a copy of the Code of Conduct (clause 1.4(a) of the Code of Conduct).

[12.2] Explain and provide a copy of their 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).

[12.3] Set out fee and disbursements (clause 8(b) and (d) of the Code of Conduct).

[12.4] Make their 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).

[12.5] Inform their client they are entitled to seek independent legal advice before entering into agreements (clause 1.5(c) of the Code of Conduct)

[13] The Adviser was required to keep records of this process for seven years (clause 3(e) of the Code of Conduct). I am satisfied the Adviser did not have a written agreement

[14] I find the Adviser failed to set out in writing the terms of the agreement to provide immigration services; in failing to doing so, she breached clauses 1.5 and 8 of the Code of Conduct.

[15] The statement of complaint does not address the other elements of the client engagement process (mentioned in [12], above), The Tribunal will not make any findings in relation to them.

Not refunding the fee paid

[16] The Complainant paid the Adviser \$500 for work she did not perform.

[17] The money was client funds, and she had not earned it before her licence expired, after that time she could not lawfully provide the services.

[18] The Adviser was obliged to refund the money she received when her licence expired (at the latest) pursuant to clause 3(d) of the Code of Conduct; she breached that obligation.

Decision

- [19] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [20] The Adviser breached the Code of Conduct in the respects identified. These are grounds for complaint pursuant to section 44(2) of the Act.

Submissions on Sanctions

- [21] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [22] 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.
- [23] 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

- [24] The timetable for submissions will be as follows:
- [24.1] The Authority and the Complainant are to make any submissions within 10 working days of the issue of this decision.
- [24.2] 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.
- [24.3] 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 31st day of March 2014.

G D Pearson
Chair