

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

Decision No: [2014] NZIACDT 46

Reference No: IACDT 012/12

IN THE MATTER

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

BY

The Registrar of Immigration advisers

Registrar

BETWEEN

Yewen Xu

Complainant

AND

Sui Schep Noon

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 8 April 2014

DECISION

Preliminary

- [1] The complainant was in New Zealand and sought to get a further visa as his current visa was due to expire. He approached the adviser who provided advice and lodged an application, but Immigration New Zealand returned the application. It did not have all the documentation required. It was lodged successfully later, but failed, as did further applications.
- [2] The complainant says he received poor advice on his options, the adviser failed to lodge the application on time, misrepresented what happened, and failed to refund fees.
- [3] It became evident the adviser had not complied with the Code of Conduct in relation to initiating the client engagement process. The adviser claimed he had otherwise complied with his obligations. He said he was under time pressure and for that reason had not fully complied with the Code of Conduct.
- [4] The Tribunal has had to evaluate the competing claims of the parties. The Tribunal has upheld the complaint in part.

Interim decision

The Complaint

- [5] The Tribunal issued an interim decision that outlined the complaint, as set out in the Statement of Complaint.
- [6] In his Statement of Complaint, the Registrar identified negligence, incompetence, being incapable, engaging in dishonest or misleading behaviour, and breaches of the Code of Conduct as grounds potentially arising from the complaint.
- [7] The essential background was that the complainant was in New Zealand, holding a work visa. His life partner was studying in New Zealand.
- [8] The complainant's visa was to expire on 23 October 2011 and he approached the adviser in August 2011 regarding that matter.
- [9] For reasons the parties dispute, the adviser did not lodge a valid application until after the complainant's visa expired. Immigration New Zealand declined that application (under the discretionary section 61 provision). He lodged a further application on 10 November 2011; Immigration New Zealand declined it too. He lodged both applications on the grounds the complainant wanted to stay with his life partner in New Zealand while she studied here.
- [10] On 22 November 2011, the adviser lodged an application for a student visa for the complainant. Immigration New Zealand also declined this application.
- [11] The complainant says:
 - [11.1] He received incorrect advice regarding his immigration options;
 - [11.2] The adviser failed to lodge the first application in time;
 - [11.3] The adviser misrepresented that Immigration New Zealand declined one of more of the applications on the grounds the life partnership was not adequately established. He did so knowing that was not the true ground;
 - [11.4] The adviser did not set fees properly or pay refunds. That included a failure to set out, in writing, the fees, terms and conditions and the like.
- [12] The complainant's Statement of Reply contained an additional allegation that the adviser failed to comply with the Code of Conduct in relation to written agreements (clause 1.5). The Tribunal in its interim decision informed the adviser that he was at risk of an adverse finding on that issue also.

Opportunity to respond

- [13] The interim decision noted the adviser disputed the alleged facts.
- [14] As matters stood, it was not possible to deal adequately with the disputed facts “on the papers”. A hearing “on the papers” is the routine form for hearing in this Tribunal.
- [15] First, the Tribunal considered it necessary to give the adviser notice that his response lacked the supporting records, which he was required to keep. It also gave him the opportunity to apply for an oral hearing, as there were credibility issues to resolve.
- [16] Accordingly, the interim decision provided the adviser with a further opportunity to respond to the complaint.

The Response to the interim decision*Adviser*

- [17] The adviser responded to the interim decision with an affidavit, he did not apply for an oral hearing.
- [18] His response to the various allegations in the complaint was as follows.

Incorrect advice regarding immigration options

- [19] The adviser did not provide written material created at the time where he set out his client's immigration options.
- [20] He set out an analysis of the complainant's circumstances and said why a work visa or student visa was not available. He then said only a visitor visa under partnership was a potential option, and that was consistent with his advice.
- [21] He also produced an email from the complainant's partner which he says is consistent with her understanding that advice in September 2011, before applying for a visa.
- [22] He explained the first application failed due to Immigration New Zealand not being satisfied of the genuineness of the relationship on which it relied. He then assisted with a further application, providing new information.
- [23] After the second application failed, the adviser claims to have said a student visa application was a possibility, if funds were provided from the complainant's family in China so he could pursue study in New Zealand. He provided a copy of his letter to Immigration New Zealand that was consistent with his advice.

Failure to lodge the first application in time

- [24] The adviser claimed that the responsibility for the application being lodged after the complainant's visa expired was delays caused by the complainant in not providing information and materials.
- [25] He provided a narrative, with supporting evidence, that demonstrates a history of making regular and timely progress and argues that while the application was late it did not affect the outcome of the application. Furthermore, the lateness appeared to result from a misunderstanding regarding a medical certificate, with a prompt response when identified.

Misrepresented that Immigration New Zealand declined one or more of the applications on the grounds the life partnership was not adequately established.

- [26] The adviser provided a copy of a letter from Immigration New Zealand setting out the reasons for not issuing a visa. The letter included a statement that there was insufficient evidence to demonstrate the relationship was genuine and stable. He says he gave a copy to the complainant.

The adviser did not set fees properly or pay refunds. That included a failure to set out, in writing, the fees, terms and conditions.

- [27] The adviser said he did not hold client funds paid in advance and sent out invoices only after he had completed work.
- [28] He says he did not pay refunds for services provided as none were due. He did, however, refund \$500 to the complainant, being the amount paid for application fees which were not debited by Immigration New Zealand.
- [29] The adviser received instructions on 18 October 2011; he had his clients sign an authorisation. He did not have time to do more, as he was too busy lodging the application.
- [30] The authorisation document dated 18 October 2011 refers to a contractual obligation to “pay all the fees for services performed”, but provides no particulars of the work to be undertaken or the fees.

Failure to comply with the Code of Conduct, in relation to written agreements (clause 1.5).

- [31] The adviser did not specifically refer to the issue regarding the absence of a written agreement. The only relevant document appears to be the authorisation dated 18 October 2011.

Complainant

- [32] The complainant responded to the adviser’s reply. His reply was as follows.

Incorrect advice regarding immigration options

- [33] The complainant said the adviser did not raise the option of a student visa until after the application for a visitor visa based on his partnership failed.
- [34] Had the adviser raised the possibility of a student visa as an option, the complainant says that he would have been able to meet the requirements as his family could provide funding for study.

Failure to lodge the first application in time

- [35] The complainant claimed the adviser failed to provide a full list of all the material the complainant would need to provide to file the application.

Misrepresentation that Immigration New Zealand declined one of more of the applications on the grounds the life partnership was not adequately established.

- [36] The complainant did not challenge that he was given a copy of Immigration New Zealand’s letter.

The adviser did not set fees properly or pay refunds. That included a failure to set out in writing the fees, terms and conditions.

- [37] The complainant did not accept invoices were issued at the time, or that the adviser’s records were accurate.

Adviser’s reply to the complainant

- [38] The adviser provided a further reply in response to the complainant.
- [39] He reiterated his position, took issue with what he knew at the material time of the complainant’s circumstances, and provided a copy of a letter in which he asked for information. That letter set out information relating to the relationship that the complainant had to supply.

Discussion

Incorrect advice regarding immigration options

- [40] The adviser did not give his client written advice setting out his client's immigration options. The record also shows he applied for a visitor's visa based on partnership and later applied for a student visa. Clearly, his client had at least those options, and inevitably the option of leaving New Zealand before his visa expired and pursuing other options.
- [41] The adviser says he was under time pressure and admits he failed to initiate the engagement process in the prescribed way. However, he was required to have informed instructions and could only be in that position if the complainant understood and considered his options.
- [42] This was not an emergency, such as where a person is in custody about to be deported or something of that kind. Neither was it a situation where there was only one clear and obvious option.
- [43] The adviser was required to carry out his instructions with care, diligence and professionalism to meet the requirements of clause 1 of the Code of Conduct.
- [44] The Code of Conduct prescribes the process of client engagement. It includes mandatory requirements that the adviser will:
- [44.1] Explain and provide a copy of the Code of Conduct (clause 1.4(a) of the Code of Conduct).
 - [44.2] Explain and provide a copy of his or 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).
 - [44.3] Set out fee and disbursements (clause 8(b) and (d) of the Code of Conduct).
 - [44.4] 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).
 - [44.5] Inform their client they are entitled to seek independent legal advice before entering into agreements (clause 1.5(c) of the Code of Conduct)
- [45] The adviser was required to keep records of this process for seven years (clause 3(e) of the Code of Conduct), and confirm in writing the details of material discussions with clients (clause 3(f) of the Code of Conduct).
- [46] The material before the Tribunal satisfies me the adviser made some inquiries regarding the complainant and his circumstances, but failed to complete an evaluation of his client's circumstances in a thorough manner. He never set out anything in the nature of full advice recorded in writing. He then went through a process of pursuing two types of application.
- [47] I am satisfied the adviser's failure to provide his client with advice as to his immigration options in writing in a full and considered manner amounted to a lack of professionalism pursuant to clause 1 of the Code of Conduct.
- [48] The Statement of Complaint did not allege this conduct was negligent or lacked competence. Accordingly, there will be no finding beyond the lack of professionalism in initiating his instructions and gaining informed consent to a course of action.

Failure to lodge the first application in time

- [49] There were elements of confusion in communications that led to delay in lodging the application. The key issue was the form of the existing medical certificate and the need for a new one.
- [50] I am not satisfied the adviser was responsible for delays in lodging the application. 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).

[51] I am not satisfied there was more than the sort of communication issues that can easily arise in a professional context and it appears the adviser was responsive when the difficulty was identified by Immigration New Zealand.

[52] Accordingly, there is no finding adverse to the adviser arising from this aspect of the complaint.

Misrepresented that Immigration New Zealand declined one or more of the applications on the grounds the life partnership was not adequately established.

[53] The adviser provided a copy of a letter from Immigration New Zealand setting out the reasons for not issuing a visa. He says he gave a copy to the complainant. The complainant does not challenge that. Accordingly, there will be no adverse finding on this aspect of the complaint.

The adviser did not set fees properly or pay refunds. That included a failure to set out in writing the fees, terms and conditions.

[54] The adviser said he did not hold client funds and sent out invoices only after he had completed work.

[55] I accept he did not hold client funds on that basis. However, clause 8 of the Code of Conduct required that the adviser:

- a) set fees that are fair and reasonable in the circumstances; and
- b) before commencing work incurring costs, set out the fees and disbursements (including Immigration New Zealand fees and charges) to be charged, including the hourly rate and the estimate of the time it will take to perform the services or the fixed cost of the services; and
- c) set out payment terms and conditions; and
- d) ensure that fees, disbursements and payment terms and condition are provided to clients in writing prior to the signing of any written agreement.

[56] The adviser took none of those steps; he now faces a complaint regarding fees. There is no justification for not complying with the Code of Conduct and, as noted, this was not an emergency potentially justifying delay in compliance.

[57] I am satisfied the adviser breached clause 8 of the Code of Conduct.

[58] The complainant also seeks a refund of fees. The adviser says that is simply because the applications were not successful. However, I do not accept that is correct.

[59] The adviser failed to initiate the client relationship in accordance with the Code of Conduct, in that he failed to enter into a written agreement and the associated disclosure requirements. He also failed to comply with the Code in relation to setting fees and failed to get informed instructions. Those failures affect the most central elements of his engagement and further the work he did provided nothing of value.

[60] I am satisfied the adviser was not entitled to charge any fees. That is the result of his own failure to comply with fundamental requirements of the Code of Conduct when establishing a professional relationship.

[61] Accordingly, the adviser breached clause 3 of the Code of Conduct, as he did not refund fees when his engagement ended.

Failure to comply with the Code of Conduct in relation to written agreements

- [62] The adviser did not comply with the obligation in clause 1.5 of the Code of Conduct to make his client aware, in writing and in plain language, of the terms of the agreement and all significant matters relating to it, with a full description of the services to be provided.
- [63] The adviser has identified an authorisation form, but it fails to meet those requirements in any substantial way.
- [64] Accordingly, he breached clause 1.5 of the Code of Conduct in that respect.

Decision

- [65] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [66] The adviser breached the Code of Conduct in the respects identified. These are grounds for complaint pursuant to section 44(2) of the Act. In other respects, the complaint is dismissed.

Submissions on Sanctions

- [67] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [68] 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.
- [69] 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

- [70] The timetable for submissions will be as follows:
- [70.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [70.2] The adviser is to make any further submissions (whether or not the Authority or the complainant makes submissions) within 15 working days of the issue of this decision.
- [70.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of him filing and serving those submissions.

DATED at WELLINGTON this 8th day of April 2014.

G D Pearson
Chair