BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2014] NZIACDT 49

Reference No: IACDT 0048/12

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**The Registrar of Immigration Advisers**
	Registrar
Between	**Ahmed Muhsen Ikbarieh**
	Complainant
AND	**Osama (Sam) Hammadieh**
	Adviser

DECISION

REPRESENTATION:

Registrar: Ms T Turfrey, Ministry of Business, Innovation and Employment, Wellington

Complainant: In person

Adviser: In person

Date Issued: 15 April 2014

DECISION

Preliminary

[1] The complainant engaged with the adviser's practice in the United Arab Emirates (UAE). There were difficulties, and the adviser says there were concerns that one or more persons in that office behaved improperly.

[2] However, that is only background and cannot form part of the complaint.

[3] After the practice in the UAE closed, the adviser offered to continue the instructions through his Australian office. He offered a contract, which the complainant signed. However, the contract document was not on letterhead, had no logo and did not name any legal entity as the service provider.

[4] The adviser provided advice to the effect the complainant had a good prospect of selection if he lodged an expression of interest. In fact, the "points" the complainant held made selection impossible or extremely unlikely.

[5] The complainant also expressed concern about the authenticity of the contract, and asked the adviser to sign the document. He refused, but drafted a new contact and charged $720 for doing so.

[6] The adviser says he provided advice to allow the complainant to research whether it was correct that he had a good prospect of selection, and charged fair and reasonable fees, using the appropriate process.

[7] The Tribunal has to determine whether the adviser gave adequate advice, and whether he could justify the fees and the process for setting them.

The Statement of Complaint

[8] The Registrar filed an amended Statement of Complaint dated 14 February 2014.

[9] It records the complainant lodged the complaint on wider grounds, but the Registrar identified material supporting three aspects:

[9.1] The adviser failed to perform his services with due care, diligence, respect, and professionalism (clause 1.1(a) of the Code of Conduct 2010 (the Code));

[9.2] He either:

[9.2.1] Failed to set out the fees and disbursements before commencing work incurring costs in accordance with the requirements of clause 8(b) of the Code; or

[9.2.2] He failed to obtain written agreement to a material increase in costs (clause 3(c) of the Code).

[9.3] Breached clause 8(a) of the Code in that he failed to set fees that were fair and reasonable in the circumstances.

[10] In outline, the background set out in the Statement of Complaint was:

The agreement

[10.1] On 23 January 2012, the complainant signed an agreement with the servicer provided identified by the trading name Visa and Immigration Services Australia (the agreement).

[10.2] The agreement related to the complainant's proposal to migrate to New Zealand, and contemplated services relating to:

[10.2.1] Preparing and lodging an expression of interest after getting a pre-skills assessment with the New Zealand Qualifications Authority (NZQA),

[10.2.2] Monitoring selection of the Expression of Interest, and

[10.2.3] Preparing and lodging an application for residence.

[10.3] The agreement provided for a fixed professional fee of A$2,650. The adviser did not sign the agreement.

The expression of interest

[10.4] On 22 March 2012, the adviser informed the complainant that the pre-skills assessment by NZQA showed the complainant had 100 points for the expression of interest pool. The adviser asked the complainant if he would like to lodge the EOI first, or wait until he had obtained a job offer.

[10.5] In response, the complainant asked the adviser about his chances of success in the EOI pool. The Adviser provided a link to the history of selection points for 2012, and advised him that this showed there had been many selections from the "100 point group".

Signing the agreement

[10.6] On 26 March 2012, the complainant requested that the adviser sign the agreement. Initially the adviser declined to sign it, but on 18 April 2012, the Adviser informed the complainant that he had signed and posted the document a couple of days earlier.

[10.7] The complainant did not receive the agreement. After further email correspondence with the adviser, on 17 May 2012 the adviser said he would courier the agreement from his office in Australia to the complainant in the UAE for $88. The Adviser also stated that he would amend the contract to include a fee for the costs of additional administrative work incurred in reaching that point.

[10.8] On 24 May 2012, the complainant agreed to accept a scanned copy.

[10.9] On 25 May 2012, the adviser agreed to send the agreement by email once he drafted another contract. He also requested payment of $720 for two hours spent on:

[10.9.1] Drafting the contract in accordance with the complainant requirements,

[10.9.2] Sending the contract,

[10.9.3] Answering emails, and

[10.9.4] Resending emails.

[10.10] He calculated the charge as 2 hours at $360/hr. The Adviser required payment before continuing with the application process.

[11] The Statement of Complaint provides particulars of the potential infringements of professional obligations:

Clause 1.1(a) – the obligation to perform services with due care, diligence, respect and professionalism

[11.1] The complainant asked about his chances of success in the expression of interest pool. The adviser replied saying there had been many selections at his level.

[11.2] In fact, in 2012 there had been no selections from the pool for persons with points between 100 and 140 whether or not they had a job offer.

[11.3] The adviser failed to provide advice meeting the standard required under the Code of Conduct.

Clause 8(b) and alternatively clause 3(c) of the Code of Conduct – not setting out fees before commencing work or, alternatively, not obtaining an agreement in writing to an increase in fees

[11.4] The agreement provided for a fixed cost for services. The next payment due was $1,000 on lodging an expression of interest (which did not occur).

[11.5] If there was to be any fee in excess of the agreed fee, the adviser had the options of:

[11.5.1] Entering a new agreement; or

[11.5.2] Obtaining consent to increased fees.

[11.6] He took neither option. He attempted to charge for work he commenced before setting out the fees for it.

Clause 8(a) – setting fair and reasonable fees

[11.7] The adviser drafted a new agreement to allow him to charge a fee over and above that provided in the original agreement.

[11.8] The adviser said he was charging $720 for amending and sending another contract, answering and resending emails.

[11.9] It was the adviser's initiative to change the agreement and provide further fees for administrative work. Accordingly, it may not be fair and reasonable to charge for that additional administrative work.

Reply to the Statement of Complaint

The complainant

[12] The complainant did not file a statement of reply, and was not required to do so unless he took issue with the statement of complaint. Accordingly, I treat the grounds identified in the Statement of Complaint as the scope of the complaint to be determined; there will be no adverse finding on the wider grounds of the initial complaint.

The adviser

[13] The adviser filed a Statement of Reply, he raised the following points:

[13.1] While the adviser had not signed the agreement for the provision of professional services, he was not required to do so.

[13.2] The lump sum provided as a professional fee in that agreement was only an estimate, and identified as such in the agreement.

[13.3] Approximately a year prior to the agreement the statement of complaint identifies, there was an agreement with the adviser's practice. The adviser said the complainant signed an:

> "agreement with Hammadieh Consultancy ("HC") in or about Feb 2011 for IELTS training and visa services. The agreement was signed by the complainant and the manager of the company Ferly Reyes. The complainant requested that I continue to act for him and I advised him we could and on the same terms as his agreement with HC. The complainant was happy with same so I sent him out the agreement.
>
> The complainant alleges he did not receive the agreement. However it was sent and unlike the postal system in New Zealand the UAE is first class, so lost mail is unheard of. By this stage the complainant was being

> confrontational and insisted that we amend a perfectly legal contract to his liking. Given that the contract was legal and valid at the date of signing the complainant was aware that any fees outside the contract are charged at a rate of $360 per hour. The complainant was also aware of the fact that other costs, outlays, were payable by him – i.e. courier fees."

[13.4] The response did not include a copy of this version of the agreement.

[13.5] The adviser made an administrative error in the link he provided for the complainant regarding his prospects of successfully applying; however, the adviser submitted that it was the complainant's responsibility not the adviser's. He said:

> "I deny the allegation that I did not perform service with due care, diligence, respect and professionalism as alleged or at all as the history of pool selections goes back several years. The link provided should have been to the general history, so it was a technical error that the 2012 landing page was provided. However it was clear from our correspondence and given there was no mention in my email to the complainant to only look at 2012, that the complainant needed to review the complete history to get a sense of how Immigration New Zealand makes it selections. Furthermore the IAA would know that pool selection prediction cannot be looked at by taking just one year into consideration, one has to look at a few years and Immigration New Zealand does not provide a guide on how it makes selections."

[13.6] On 28 February 2012 and 22 March 2012 the adviser states he sent emails advising the complainant that a job offer was the best way to proceed. The adviser did not provide a copy of the 28 February email. The relevant part of the 22 March email did not provide advice, it said: "... you are left with 100 points. ... Will you be waiting until your employment offer is obtained or do you want to lodge your EOI first?"

[13.7] The fees and disbursements set out in the agreement were only estimates, and they did not bind the adviser. The adviser properly charged for additional work "as soon as the costs became known."

[13.8] Alternatively, the complainant cancelled or rescinded the agreement by an email of 4 April 2012. That email was in a series of emails in which the complainant had queried the form of the agreement, which raised the issue it was on plain paper with no letterhead and had no signature.

[13.9] The fee of $720 was fair and reasonable, as the amount of time taken to respond to the complainant and to deal with the administrative issues was well over 5 hours. Additionally, the adviser only charged for two hours at $360 per hour.

The complainant's response to the adviser's Statement of Reply

[14] The complainant noted that his concerns regarding the agreement being on plain paper and unsigned were in the context of a history of fraud in the adviser's UAE office. The adviser raised this issue of fraud himself.

[15] The complainant did no more than seek the adviser's assurance he accepted responsibility for the agreement.

[16] The adviser was the person who should have been providing professional advice, not the complainant researching it. Furthermore, the adviser failed to respond to a request for an explanation as to what met Immigration New Zealand's requirements for a "job offer".

Discussion

Background

[17] It is important to give the background dimension and perspective.

[18] The adviser said in his initial response to the Authority that this client relationship began in the UAE with an agreement between Hammadieh Consultancy FZ LLC. The adviser did not explain his role with that company. However, he said it ceased trading and he offered clients the choice of receiving services from the managing partner in the UAE, or through the adviser in Australia.

[19] In the course of dealing with interlocutory processes, the adviser told the Tribunal there had potentially been fraud in the UAE office.

[20] The Registrar when filing the Statement of Complaint did not raise as a ground of complaint the possibility of the adviser being responsible for dealings with the complainant prior to the point when he personally entered into an agreement with the complainant.

[21] It is important to appreciate this agreement came after there had been difficulties with an earlier agreement that had the branding of Hammadieh Consultancy FZ LLC. The Adviser says this company, apparently bearing his name, ceased trading.

[22] The new agreement has no branding. It does not have the name of a legal entity as the service provider named is "Visa & Immigration Services Australia". It does not identify a company, it does say the Adviser will be the "Migration Agent", but does not say he is a party to the agreement.

[23] The agreement says the estimate of costs does not bind the firm.

[24] The agreement is not satisfactory for reasons the complainant identified:

[24.1] There is no legal entity identified as responsible for the agreement.

[24.2] There is no seal or signature indicating that a service provider assents to and is responsible for performing that agreement.

[25] While it is possible to enter contracts without writing and accept terms without signatures, the form of the agreement reasonably caused concern on the part of the complainant. He had already entered into an agreement apparently associated with the adviser and had been told the entity ceased trading. The complainant was entitled to know what legal entity he was dealing with and to know the adviser was personally responsible for meeting professional obligations.

[26] The complainant made polite and reasonable inquiries that followed directly from the unsatisfactory agreement the adviser presented. This correspondence was in the following terms:

[26.1] On 26 March 2012, the complainant asked for a "signed and stamped agreement", noting he had not received any official copy from the adviser.

[26.2] The adviser replied the following day saying each country has its own laws on what makes a valid contract, there were no company seals in Australia and the agreement was valid.

[26.3] In response, the complainant said that was fine, but since he had signed it at least a signature from the adviser or a representative was expected; he noted the absence of a company letterhead or logo and it was on plain paper.

[26.4] The adviser said in an email on 4 April 2012: "This is our agreement. None of our other clients had had issue with it. There is nothing else I can do for you on the agreement."

[26.5] At this point the complainant wrote:

> I respect your idea, but have a look to attached file ... the old agreement with HC was stamped and sealed, while if you look to the new agreement through VISA .. is nothing proving that the file is related to your office!!! you tell me how I can prove that you are the one who created the agreement, anyone can do same I can do hundreds of agreement and fill the blanks ... I'm not asking that much great thing I'm asking as right as client, just to sign the agreement.
>
> any agreement should have two signatures as customer and service provider around whole the world ... You are comparing with other clients first I'm not here in Australia or NZ to know the rules I'm in UAE, second not all your clients have faced trouble with your branch office in UAE (HC) as you know my files were handled herein UAE through your partner office (HC) suddenly HC disappeared and VISA from Aus[tralia] Appeared to continue the files you have to consider this point seriously,,, as you are lawyer I expect you to understand my point and send my back same agreement signed by your office it won't cost you time just a pen and sign…[sic]

[27] The adviser says this correspondence justified him regarding the agreement as terminated and allowing him to incur costs of $720 to draft a new agreement and refuse further work until the complainant paid that fee.

[28] In my view, the adviser's attitude is irreconcilable with him acting in a professional manner in good faith toward his client. His client identified appropriate and reasonable concerns. The communications were in an electronic form and he had every reason to protect himself against dishonesty, all the more so as it appears the adviser had exposed the complainant to potential dishonesty in a branch of his practice.

[29] The agreement properly invited scrutiny. It did not have a logo or identification, there was no legal entity named as a party. "Limited", "Pty", "LLC", or a similar identification of a corporate body did not accompany the name of the entity. The adviser is named as a party, but without his licence number.

[30] Further, the agreement contained unprofessional elements such as purporting in the "fine print" that the service provider could use the complainant's "general information and visa grant for promotional purposes".

[31] It is a matter of concern that the adviser was unwilling to provide a signature accepting personal responsibility for the agreement. The complainant was fair and reasonable in asking the adviser to provide a signed agreement. Any client facing the sort of evasive response the adviser exhibited would reasonably be concerned as to whether they were dealing with a licensed professional.

[32] Accordingly, I do not accept the adviser was in anyway absolved from his obligations by the conduct of the complainant, who acted politely and reasonably in all respects.

[33] The adviser is the only licensed immigration adviser involved in the instructions, he was aware of the instructions and he is accountable for dealing with them.

Clause 1.1(a) – the obligation to perform services with due care, diligence, respect and professionalism

[34] The ground of complaint regarding care, diligence, respect and professionalism concerns the adviser's advice when advising of the complainant's chances of success in the expression of interest pool. The adviser said "There have been many EOI selections from the 100 point group and you can see this on the following outline ...".

[35] In fact, in 2012 there had been no selections from the pool for persons with points between 100 and 140 whether or not they had a job offer.

[36] The Adviser has not disputed those facts. He says he made an error in the link he provided for the complainant regarding his prospects of successfully applying, and it was the complainant's responsibility not the adviser's to look into the matter (refer above para.[13.5]).

[37] The complainant, unsurprisingly, responds saying the adviser should have provided professional advice; it was not his job as the client to research the issue.

[38] The level of points and the history of selection by Immigration New Zealand from the pool are fundamental to the prospects of being able to migrate to New Zealand and gain residence. The agreement provided for an initial assessment of skills and the next step was lodging an expression of interest.

[39] On 22 March 2012, the results of the pre-skills assessment were available. The adviser asked the complainant whether he wanted to proceed with an expression of interest or wait until he had a job offer. In reality, applying without a job offer would have had little or no prospect of success. The adviser had an obligation to know that and to tell his client of that fact at that point.

[40] None-the-less, the complainant immediately inquired as to the prospects of success given he had 100 points. The adviser emailed his client and provided the erroneous information there had been many selections from the pool at that level. That information was wrong. An adviser with a minimum level of competence undertaking that work:

[40.1] Would have understood the advice was of fundamental importance to her or his client's immigration prospects,

[40.2] That she or he was required to give accurate advice on this issue, and

[40.3] That the advice given was wrong.

[41] It is an unimpressive submission on the adviser's part to claim his client should have researched the issue and identified his advice was wrong.

[42] I am satisfied the adviser acted without due care; he did not provide accurate information, he did not diligently research the information he needed to provide for his client and his actions were unprofessional. The adviser has wholly resisted that he has professional obligations to his client to provide essential advice.

[43] Accordingly, I am satisfied the adviser's duties of care, diligence and professionalism were breached and accordingly this ground of complainant is upheld as a breach of clause 1 of the Code of Conduct.

Clause 8(b) and alternatively clause 3(c) of the Code of Conduct – not setting out fees before commencing work or, alternatively, not obtaining an agreement in writing to an increase in fees

[44] The ground of complaint regarding setting fees concerns the adviser's demand for fees to draft a new agreement and to deal with correspondence in relation to that agreement.

[45] The Statement of Complaint puts the matter on the basis the adviser had the options of:

[45.1] Entering a new agreement; or

[45.2] Obtaining consent to increased fees.

[46] Whereas, he took neither option and attempted to charge for work he commenced before setting out the fees for it.

[47] I am satisfied the adviser had no justification for doing any further work in relation to the contract or charging fees on that basis. The complainant asked for no more than authentication of a defective document. The adviser used this as an excuse to purport to carry out further work and refused to provide services unless paid fees for that work.

[48] The adviser contends the complainant rejected the agreement. That is not correct, he asked the adviser to authenticate it, as the adviser had failed to do that. He required no more than a signed copy of the agreement with a covering letter. The need for that was the result of the adviser's own failure to provide an agreement with a legal entity as the service provider, or evidence the document was genuine.

[49] Instead of complying with a reasonable request, the adviser purported to perform work his client had not instructed him to perform and charged for it. He says the fees and disbursements set out in the agreement were only estimates and were without binding effect. He says he properly charged for additional work "as soon as the costs became known."

[50] The Code of Conduct is uncomplicated. Clause 8 requires that "before commencing work incurring costs" an adviser must set out the fees to be charged. The fees may be set out as an hourly rate and estimate of time, or as a fixed cost.

[51] The agreement the adviser drafted provides for fixed costs, not an hourly rate.

[52] The agreement says the fixed cost is an estimate only, however, clause 3(c) of the Code of Conduct requires an agreement in writing to any material increase in costs. There was no such agreement to increase the cost in this instance.

[53] I am satisfied the adviser chose to commence work which he treated as incurring costs in circumstances where he had not set out the fees first or obtained an agreement in writing to an increase over the fees in the agreement. Accordingly, he breached clause 8 of the Code of Conduct.

Clause 8(a) – setting fair and reasonable fees

[54] The ground of complaint concerning whether the adviser charged fair and reasonable fees is that the adviser drafted a new agreement to allow him to charge a fee over and above that provided in the original agreement.

[55] The adviser said he was charging $720 for amending and sending the contract, answering and resending emails.

[56] The complaint alleges it was the adviser's initiative to change the agreement and provide further fees for administrative work and that it was not fair and reasonable to charge for that additional administrative work.

[57] I am satisfied the adviser had no right or justification for charging the additional fees. The existing agreement bound him. He says he spent five hours on this work, he has not explained how a competent adviser could take so long on the task. Regardless, the complainant only asked him to provide a signed copy of an existing agreement. That was a result of the adviser failing to provide a satisfactory agreement in the first place.

[58] I do not accept there was any justification for additional chargeable work, and furthermore the existing agreement bound the adviser as to the fixed fee (unless and until he had agreement to a variation).

[59] The agreement provided a fixed price. While the agreement said fees could be increased, that was subject to the adviser's professional obligation to comply with clause 3(c) of the Code of Conduct, a client has to agree to the increase when the increase is known. A licensed immigration adviser cannot contract out of the obligations in the Code of Conduct. The intent of the Code of Conduct is to ensure that fees are transparent at the outset.

[60] I am satisfied the adviser set fees that were neither fair nor reasonable; he purported to charge fees for work he was not entitled to charged for.

[61] Accordingly, I am satisfied this ground of complainant must be upheld as a breach of clause 8 of the Code of Conduct.

Decision

[62] The Tribunal upholds the complaint pursuant to section 50 of the Act.

[63] The adviser breached the Code of Conduct in the respects identified. These are grounds for complaint pursuant to section 44(2)(e) of the Act.

[64] In other respects, the complaint is dismissed.

Submissions on Sanctions

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

[66] The Tribunal gives the adviser notice it considers this a serious complaint. In particular:

[66.1] The lack of care evidenced when giving elementary and important advice raises serious concerns regarding his competence;

[66.2] His attitude to his client's request for authentication of the agreement was unreasonable and unjustified, it evidenced an unprofessional attitude to a client; and

[66.3] The attempt to procure fees he was not entitled to by using the threat of refusing services is an aggravating issue.

[67] In these circumstances, the Tribunal invites the adviser to provide submissions on the issues of whether:

[67.1] The Tribunal should cancel his full licence and require him to practice under supervision; and

[67.2] Whether he should be required to undertake the training required of entrants to the profession.

[68] This does not mean that the Tribunal will not consider the other sanctions available under section 51 of the Act, in addition to, or substitution for, such orders.

[69] The Authority and the complainant also 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.

[70] 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

[71] The timetable for submissions will be as follows:

[71.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.

[71.2] 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.

[71.3] 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 15th day of April 2014.

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G D Pearson
Chair