

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

Decision No: [2014] NZIACDT 66

Reference No: IACDT 028/12

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**Wei Kai Chung and Yii Hee Lok**

Complainants

**AND**

**Lip Funn (James) Yap**

Adviser

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**DECISION**

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**REPRESENTATION:**

**Registrar:** In person

**Complainants:** In person

**Adviser:** In person

Date Issued: 30 May 2014

## DECISION

### Preliminary

- [1] The Registrar received a complaint relating to the adviser.
- [2] In essence, the complaint is founded on the grounds that:
  - [2.1] The adviser used unlicensed staff to provide immigration advice and services.
  - [2.2] The adviser only addressed essential matters some two months after accepting and beginning to act on instructions, when he should have addressed them at the outset.
- [3] The adviser has largely accepted the core facts. However, he says staff acted under his instructions and he engaged with difficulties as necessary.
- [4] The Tribunal is required to determine whether the material before it establishes the allegations against the adviser.
- [5] The first issue primarily involves determining whether the adviser could comply with his professional duties by having his staff engage with clients under his instructions.
- [6] The second aspect of the complaint requires the Tribunal to identify the process of providing advice to the complainants regarding their immigration prospects, and establish whether it was timely and adequate.
- [7] The Tribunal has upheld the complaint in both respects. It has determined the adviser breached the Code of Conduct as he did not properly evaluate the complainant's immigration prospects and his delivery of services through unlicensed staff breached his professional duties.

### The Statement of Complaint

- [8] The Registrar filed a statement of complaint. It says the complainants lodged the complaint on wider grounds, but the Registrar identified material that supports the following grounds of complaint:
  - [8.1] He breached clauses 2.1(b) and 3 of the Code in relation to staff management.
  - [8.2] The adviser breached clause 1.1(a) of the Licensed Immigration Advisers Code of Conduct 2010 (the Code) in that he failed to perform his services with due care, diligence and professionalism.
- [9] The Registrar identified the material facts supporting the allegations in his statement of complaint. In essence, these were as follows:
  - [9.1] The adviser has his practice in Malaysia; he is the director of the practice. The other persons in the practice, who dealt with the complainants, were unlicensed employees.
  - [9.2] In November 2011, the complainants communicated with an unlicensed employee in the adviser's practice. The following month another unlicensed employee said he looked forward to assisting the complainants.
  - [9.3] On 14 December 2011, the adviser's practice entered two agreements related to applying for Long-Term Business Visas to enter New Zealand. The adviser signed the agreements.
  - [9.4] Later that month an unlicensed employee emailed the complainants a checklist of information and documents required to submit their applications for visas. The adviser was a recipient of the email.

- [9.5] One of the unlicensed employees referred the complainants to another unlicensed employee on the basis, she had the expertise to assist them to complete the documents.
- [9.6] On 19 January 2012, the complainants said they wished to withdraw, and sought a refund of fees. They expressed concern the adviser's practice did not inform them of changes in the business migration rules in New Zealand. An unlicensed employee encouraged the complainants to continue with their application.
- [9.7] On 17 February 2012, the adviser approached Immigration New Zealand concerning the possibility of the complainants applying for a visa on the basis they would operate a franchise food outlet. There was a potential difficulty as the applicants had experience in the construction and hardware industries and a criterion for the visa was relevant experience. Immigration New Zealand explained an application to open a new business would be the strongest option in those circumstances. An unlicensed employee at the adviser's practice then relayed that information to the complainants who reiterated that they had withdrawn their instructions to act and were seeking a refund.
- [10] The statement of complaint provided particulars of the grounds of complaint:
- [10.1] The complaint potentially established a breach clauses 2.1(b) and 3 of the Code as:
- [10.1.1] The adviser was the only person in his practice who could provide immigration advice lawfully as he was the only person holding a licence.
- [10.1.2] The adviser had limited contact with the complainants and he knew unlicensed staff provided immigration advice in breach of the Act.
- [10.2] The complaint also potentially established breach of duties of care, diligence and professionalism (clause 1.1(a) of the Code) as:
- [10.2.1] The adviser's only role in the instructions was to sign the 14 December 2011 agreement and to communicate with Immigration New Zealand.
- [10.2.2] Unlicensed employees dealt with all the other aspect of the instructions, they could not do so lawfully; accordingly, the adviser acted unprofessionally.
- [10.2.3] The adviser sought information from Immigration New Zealand two months after he was engaged, the information was necessary earlier. That reflected a lack of care, diligence and professionalism.

### **The Adviser's Response**

- [11] The adviser responded to the statement of complaint with a statement of reply.
- [12] In essence, the adviser's response to the complaint is:
- [12.1] He was engaged in the initial advice regarding possible visas and pricing.
- [12.2] He exercised care and diligence. Staff acted on the adviser's behalf and relayed information after obtaining instructions from the adviser.
- [12.3] The complaint relates to the amount of the refund.
- [12.4] The adviser dealt with Immigration New Zealand, made it clear he was the adviser, and only used staff to relay information. The adviser was personally engaged in dealing with concerns Immigration New Zealand raised.

## The Complainant's Response

[13] The complainant filed a reply to the adviser's statement of reply. The key points were:

[13.1] The issue relating to the refund of fees is a matter for this Tribunal.

[13.2] They were willing to pay for services provided.

## Discussion

### *The standard of proof*

[14] 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 [55].

[15] It is necessary to address the allegations against the adviser and consider the factual basis for each of them.

### *Clauses 2.1(b) and 3 - Breach of the Code of Conduct in relation to staff management*

[16] Clause 2.1(b) of the Code sets out that licensed immigration advisers must, at all times, act in accordance with the Immigration Advisers Licensing Act 2007 and applicable international obligations. Advisers must also maintain professional business practices relating to staff management, under clause 3.

[17] As the licence holder in his practice the adviser had a personal responsibility to ensure when clients approached his practice, he delivered professional services in accordance with the Code, and the Act. Clauses 2.1(b) and 3 of the Code mandate those obligations

[18] In many areas of professional and licensed practice, extensive use is 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.

[19] If there was no legislative direction, a licensed immigration adviser could conduct their practice making extensive use of unqualified people.

[20] 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.

[21] 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 exceptional in the regulation of professional service delivery.

[22] 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.

[23] Against that background, the policy behind the stringent restrictions in the Act on unlicensed persons providing immigration services is evident.

[24] 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.

- [25] It is an offence under section 63, whether or not any part of it occurred within New Zealand (section 73).
- [26] Section 7 defines the scope of “immigration advice” 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 ...
- [27] There are exceptions. 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.
- [28] 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.
- [29] *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
- [30] The definition refers to administrative tasks, such as keeping records, maintaining financial accounts and the like.
- [31] 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”.
- [32] 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.
- [33] That other person may properly be the person who is making the application, a licensed immigration adviser, or a person who is exempt from licensing. The person typing or writing out the form in those circumstances is not giving immigration advice.
- [34] The definition does not give any authority for the unlicensed person to make inquiries and determine what to record on the form. Under “clerical work” a person must do nothing more than “record” information as directed.
- [35] 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.
- [36] The effect of clauses 2.1(b), and 3 of the Code is that the adviser is required to ensure his practice, and staff within his practice respect and comply with the Act’s limitations on unlicensed persons delivering immigration services.

*The facts in this case*

- [37] The record leaves me in no doubt the complainants principally dealt with the adviser's employees. The adviser appears to admit this and says they did so after obtaining instructions and advice from him.
- [38] However, as already discussed, that is not consistent with the record and, even if true, it would not justify unlicensed staff performing the work.
- [39] The record, and what the adviser admits, leaves no room for concluding the employees were performing only clerical functions. They were engaging with the complainants, giving advice, preparing documentation. They potentially referred issues to the adviser as and when they thought it necessary; though the record shows, they regarded other unlicensed employees as the appropriate persons to provide services at least on some occasions.
- [40] What occurred in this case is a foreseeable consequence of unqualified staff dealing with matters they could not lawfully engage with and that were beyond their expertise and experience. It appears the adviser, even now, does not appreciate he could not conduct his practice through his employees engaging with clients on his instructions.
- [41] The adviser is required to understand the stringent limits the Act places on a licensed immigration adviser. I am satisfied the adviser unlawfully allowed unlicensed staff to provide *immigration advice* as defined in the Act.

*Clause 1.1(a) - Duties of care diligence and professionalism*

- [42] There are two elements to the complaint brought under clause 1.1(a) of the Code: :
- [42.1] First, the adviser allowed unlicensed staff to engage with the complainants. He was the only person in his practice that could lawfully provide immigration advice and services.
- [42.2] Second, the adviser only engaged with the potential difficulties the complainants faced in gaining a visa after about two months, not when he accepted the instructions.
- [43] The adviser has not disputed the essential facts; he says it was acceptable that he supervised staff and personally engaged with the instructions as necessary.
- [44] The first difficulty for the adviser is that he was obliged to obtain informed instructions before accepting an engagement to carry out immigration work (clause 1.1(b) of the Code). Alternatively, he could have properly accepted a limited engagement to assess the complainant's immigration opportunities.
- [45] Instead, some two months after accepting instructions the adviser was for the first time engaging with fundamental issues such as what type of business was acceptable for the visa his clients sought. Of course, unforeseeable difficulties can arise, however the adviser does not say that was the case. Rather, he suggests or implies that it is only to be expected these elementary aspects of the instructions would be addressed later.
- [46] The complainants were entitled to have all the relevant information regarding their immigration options and an opportunity to assess them against their circumstances before then deciding on the course they wish to pursue.
- [47] I have reviewed the written record. It shows the adviser's employees engaged with the instructions. The adviser's claim that he controlled the client relationship and service delivery is not consistent with his own records. For example in an email of 30 December 2011 an unlicensed employee wrote an email to the complainants saying:

"... I won't be able to assist you [to complete the application] because even I don't know about that. So you actually have to wait till the time [another unlicensed employee] comes back because she is the right person to assist you on that."

- [48] The email is only an example, the record presents a very clear picture that unlicensed employees were carrying out the instructions and that the complainants only became aware of the circumstances in which they could obtain visas as matters progressed.
- [49] I am satisfied the adviser failed to personally engage with the instructions with care, diligence and professionalism as he was required to do, being the only licensed immigration adviser in his practice. As a result, the complainants did not have a timely evaluation of their circumstances, and the adviser lacked informed instructions to carry out the work his practice performed.
- [50] Furthermore, the adviser unprofessionally allowed unlicensed persons to provide immigration advice.
- [51] Accordingly, I am satisfied the adviser breached clause 1.1(a) of the Code in those respects.

#### *Conclusion*

- [52] It follows the adviser:
- [52.1] Was unprofessional in breach of clause 1.1(a) of the Code;
- [52.2] Did not act in accordance with immigration legislation, so breached clause 2.1(b) of the Code; and
- [52.3] He failed to maintain professional business practices in respect of staff management in breach of clause 3 of the Code.

#### **Decision**

- [53] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [54] The adviser breached the Code of Conduct in the respects identified, which are grounds for complaint pursuant to section 44(2)(e) of the Act.
- [55] In other respects, the Tribunal dismisses the complaint.

#### **Submissions on Sanctions**

- [56] As the Tribunal has upheld the complaint, pursuant to section 51 of the Act it may impose sanctions.
- [57] The Authority and the complainants 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.
- [58] 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*

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

**DATED** at WELLINGTON this 30<sup>th</sup> day of May 2014.

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**G D Pearson**  
Chair