

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

Decision No: [2014] NZIACDT 68

Reference No: IACDT 039/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Vasanthi Somlu

Complainant

AND

Richard Uday Prakash

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: Noel King, King Law Auckland

Date Issued: 17 June 2014

DECISION

Preliminary

- [1] The complainant engaged the adviser to assist her family. They were in New Zealand without current visas.
- [2] The complaint put forward by the complainant is that the adviser:
 - [2.1] Asked for, and accepted, a deposit of \$2,000, and did so improperly as he had not first completed the client engagement process in relation to setting out fees, disclosure or a written agreement.
 - [2.2] Later he drafted a defective agreement, and failed in other respects to complete the client engagement process properly.
 - [2.3] Did not issue invoices for all the fees paid.
 - [2.4] Did not return documents when asked.
- [3] The adviser has not challenged the allegations, and the Tribunal has upheld the complaint.
- [4] The grounds on which the Tribunal upheld the complaint are the adviser's failure to initiate the client engagement properly, and return documents. They are all obligations imposed by the Code of Conduct. The Tribunal has not upheld the complaint in relation to invoices.

The Statement of Complaint

- [5] The Registrar filed a statement of complaint. It says the complainant lodged the complaint on wider grounds, but the Registrar identified material that supports the following grounds of complaint.
- [6] The adviser breached the Licensed Immigration Advisers Code of Conduct 2010, in that he:
 - [6.1] Failed to comply with the Code's requirement that a professional engagement must be established with a written agreement containing a full description of services (clause 1.5(a) and (b));
 - [6.2] Breached the Code's requirement regarding the disclosure and recording process for setting fees (clause 8(c), (d), and (e)); and
 - [6.3] Did not return passports and personal documents as required by the Code (clause 1.3(b)).
- [7] In outline, the background was:
 - [7.1] The complainant and her family were in New Zealand unlawfully as their visas had expired. They engaged the adviser to assist them.
 - [7.2] In November 2010, the Adviser agreed to submit a request for a special direction to the Minister of Immigration. On 30 November 2010, the complainant's husband paid a deposit of \$2,000 for this service.
 - [7.3] The complainant and the adviser signed a written agreement in respect of the service on 2 December 2010. She paid a further \$587.50 at that point. The agreement provided for a further \$2,587.50 in fees, making a total of \$5,175.00. The complainant was to pay the balance in instalments of \$200/week.
 - [7.4] On 17 December 2010, the adviser notified the complainant he would stop working on the special direction application, as the progress payments stopped.
 - [7.5] The adviser did not lodge the application, did not refund fees, and retained the family's passports until they threatened to go to the police.

- [8] The statement of complaint provides particulars of the potential infringements of professional obligations:

Clause 1.5(a) and (b) – The adviser must make clients aware, in writing, of the terms of the agreement and all significant matters before they enter the agreement, and the agreement must contain a full description of the services the adviser agrees to provide.

- [9] The written agreement did not contain an adequate description of the services the adviser agreed to provide. The agreement only had a box labelled “other” ticked; there was no further description of the services.
- [10] The adviser failed to set out in writing the terms and significant matters relating to the agreement.

Clause 8(c), (d) and (e) – The adviser must set out particulars of fees prior to signing a written agreement, and provide an invoice with full details of the relevant services

- [11] The Code requires that before commencing work an adviser must personally ensure the basis for fees and costs is properly established.
- [12] In this case, on 30 November 2010 the adviser took a deposit of \$2,000. The only fee set out in writing was \$500 for requesting and reviewing the complainant’s immigration file.
- [13] The adviser took the payment of \$2,000 before entering into an agreement relating to the application for a special direction
- [14] The agreement relating to the balance of fees to pay was unsatisfactory. It provided the complainant would pay the balance when the adviser filed the application, and inconsistently provided the payments were in weekly instalments. The complainant paid instalments and the adviser did not issue invoices for them.

Clause 1.3(b) – The adviser must return passports and other personal documents to clients on request, without delay and in a secure manner

- [15] The duty to return documents is a positive one.
- [16] The adviser was in possession of passports from approximately September 2010 to 31 August 2011, and failed to return them despite requests to do so.

Reply to the Statement of Complaint

The complainant

- [17] The complainant did not file a statement of reply, and was not required to do so unless challenging the statement of complaint. As there was no challenge, it is only necessary to determine the aspects of the complaint in respect of which the statement of complaint identifies supporting grounds.

The adviser

- [18] The adviser did not file a statement of reply and, like the complainant, was only required to do so if challenging it.

Discussion

- [19] I have reviewed the statement of complaint and the documents filed in support. I am satisfied the complaint must be upheld in the respects where the statement of complaint has identified grounds and supporting evidence.

Clause 1.5(a) and (b) – The adviser must make clients aware, in writing, of the terms of the agreement and all significant matters before they enter the agreement, and the agreement must contain a full description of the services the adviser agrees to provide.

- [20] There are fundamental difficulties with the way in which the adviser commenced these instructions.
- [21] His clients were a family that were in New Zealand unlawfully as their visas had expired. That created a circumstance of some urgency as Immigration New Zealand could commence deportation processes at any time. Indeed, Immigration New Zealand has obligations to consider enforcement processes.
- [22] The adviser approached Immigration New Zealand to get the family's immigration history. Immigration New Zealand would then expect the family to take action to address their unlawful status promptly.
- [23] Furthermore, persistent non-compliance with New Zealand immigration law is a serious and unfavourable factor when seeking discretionary concessions. The longer the delay, the less likely it would be that the Minister would be willing to exercise discretion favourably.
- [24] Accordingly, the adviser should have set out in writing an evaluation of the family's circumstances. It should have included the options elected, the prospects of a successful outcome, and when the adviser would take steps.
- [25] Instead, there is an agreement that is ambiguous as to whether the adviser would file an application, or delay for some three months while the complainant paid \$2,587.50 in instalments of \$200/week. Furthermore, there is an absence of written advice in the agreement, or reference to advice; and no adequate description of the services the adviser was to provide.
- [26] I am satisfied the adviser failed to make his clients aware in writing and in plain language of the terms of the agreement and all significant matters relating to it. He breached clause 1.5(a) in those respects.
- [27] I am also satisfied the adviser failed to set out a full description of the services to be provided in the agreement. He breached clause 1.5(b) in that respect.

Clause 8(c), (d) and (e) – The adviser must set out particulars of fees prior to signing a written agreement, and provide invoices with full details of the services the invoice relates to

- [28] The Code is prescriptive. Before a licensed immigration adviser commences work, the adviser must establish the basis for fees.
- [29] In this case, on 30 November 2010 the Adviser took a deposit of \$2,000. There was an agreement relating to a fee of \$500 for requesting and reviewing the complainant's immigration file.
- [30] When the adviser received the payments of \$2,000, there was no agreement relating to it. The provisions to ensure clients understand the merits of a particular application are necessary and important. It is not acceptable for a licensed immigration adviser to take fees when his clients lack information of that kind. Without it, they cannot make informed decisions regarding whether to engage the adviser. They also need to understand what work the adviser will perform, to determine whether fees are fair and reasonable in the circumstances.
- [31] I am satisfied the adviser received the payment of \$2,000 before entering into an agreement relating to the request for a special direction by the Minister, or completing the preliminary disclosure requirements. He also failed to issue an invoice for the deposit.
- [32] I am satisfied the adviser breached the Code in:
- [32.1] Failing to set out his fees and payment terms before receiving fees of \$2,000, and in doing so breached clauses 8(c) and (d).

[32.2] The written agreement did not set out the terms for payment; it was ambiguous as to whether the adviser would progress his instructions while receiving fees in instalments, or he would submit the request only after payment in full. Accordingly, terms and conditions were not set out in accordance with the Code. He breached clause 8(c) in that respect.

[33] It is clear the adviser received and invoiced \$500, \$2,000, and \$587.50. The complainant and the adviser differ on the balance of instalments. The complainant says he paid a total of \$3,200. It appears the adviser says the amount paid was the amount receipted. I am not satisfied the standard of proof has been met to make an adverse finding that any receipts were not invoiced.

[34] I am satisfied the adviser breached clauses 8(c) and (d) of the Code in the respects identified, and dismiss the complaint in relation to invoices.

Clause 1.3(b) – The adviser must return passports and other personal documents to clients on request, without delay and in a secure manner

[35] The duty to return documents is a positive one.

[36] The adviser was in possession of passports from approximately September 2010 to 31 August 2011, and failed to return them despite requests to do so.

[37] However, the adviser was properly in possession of them until the last few days of the period, when he received the request to return them.

[38] The requirements in the Code are clear and unambiguous, and understanding the obligation is an elementary competence for any licensed immigration adviser. While the adviser in some respects challenged the complainant's account, after receiving the statement of complaint he has not taken issue with the allegation as set out in the statement of complaint.

[39] I am satisfied the adviser breached clause 1.3(b) in this respect, as he knew his client requested he return personal documents, and failed to do so without delay.

Decision

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

[41] 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.

[42] In other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

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

[44] 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.

[45] 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

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

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

- [46.2] 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.
- [46.3] 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 17th day of June 2014.

G D Pearson
Chair