

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

Decision No: [2014] NZIACDT 70

Reference No: IACDT 043/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Kisione Kaufusi

Complainant

AND

Alungamonu (Laki) Tangilanu (Monu)

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: Richard Small, lawyer, Pacific Legal, Lower Hutt

Adviser: In person

Date Issued: 19 June 2014

DECISION

Preliminary

- [1] The complainant engaged the adviser to assist when his visa expired. There were several options available to him and he required advice on the appropriate action to take as well as professional assistance to implement his decisions.
- [2] The grounds of complaint are in essence that the adviser failed to:
 - [2.1] Complete the compulsory steps for client engagement; specifically she failed to provide advice on the options available and obtain informed instructions;
 - [2.2] Carry out the work she agreed to perform; and
 - [2.3] In addition, she failed to communicate with her client during the process.
- [3] The adviser has not challenged the Statement of Complaint. Accordingly, the Tribunal has upheld the complaint in the respects identified.

The Statement of Complaint

- [4] 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:
 - [4.1] The adviser breached the Licensed Immigration Advisers Act 2007 (the Act), in that:
 - [4.1.1] She was negligent (section 44(2)(a) of the Act);
 - [4.1.2] While performing professional services she breached her duties of care, diligence, respect and professionalism under the Licensed Immigration Advisers Code of Conduct 2010 (the Code), (clause 1.1(a));
 - [4.1.3] Breached her duties in relation to written agreements (clauses 1.5(a), (b), (d) and 8(b) of the Code);
 - [4.1.4] Breached her duties in relation to fees (clause 8(b), (c) and (e) of the Code); and
 - [4.1.5] Breached her duties in relation to business management (clause 3(a) of the Code).
- [5] The background facts alleged in the complaint were that:
 - [5.1] The complainant's visa expired on 13 October 2010.
 - [5.2] In November 2010, the complainant met with the adviser and engaged her to submit an appeal against his liability for deportation to the Immigration and Protection Tribunal (IPT).
 - [5.3] The adviser obtained documents relating to his family circumstances, which the complainant understood were to support the appeal. The complainant's wife signed a form supporting an application for a visa.
 - [5.4] Later, on 13 December 2010 the complainant signed a written agreement for the adviser to provide professional services. The agreement related to applying for a work visa under section 35A (a discretionary application available when a person does not have a visa).
 - [5.5] The same day the complainant signed the written agreement, he gave the adviser sums of money:

- [5.5.1] \$500 in cash as professional fees; and
- [5.5.2] A bank cheque for \$550 payable to Immigration New Zealand for the filing fee for an appeal to the IPT. The statement of complaint notes that the adviser disputes receiving the cheque.
- [5.6] On 21 December 2010, the adviser submitted a request for a work visa under section 61 of the Immigration Act 2009 (formerly section 35A of the Immigration Act 1987). Immigration New Zealand refused the request on 15 February 2011.
- [5.7] The adviser failed to notify the complainant that Immigration New Zealand declined the request. The complainant personally ascertained that information from Immigration New Zealand in April 2011.
- [6] The Statement of Complaint provides particulars of the potential infringements of professional obligations:
- Negligence (section 44(2)(a) of the Act) and/or a breach of the duty to perform services with due care, diligence, respect and professionalism under the Code (clause 1.1(a))*
- [6.1] When the complainant approached the adviser, his visa had recently expired. She had a duty to provide advice regarding his exposure to deportation and his immigration options. That included informing him of the limited timeframe of 42 days to lodge an appeal against liability for deportation.
- [6.2] Lodging an appeal would preserve his status and, after the time limit expired, an appeal was not available.
- [6.3] There is no evidence that the adviser informed her client of the effect of submitting an appeal. She also failed to take effective action or get informed instructions not to appeal.
- Breached her duties in relation to written agreements (clauses 1.5(a), (b) and (d) of the Code)*
- [6.4] The adviser did not have a written agreement when first engaged in the instructions, in November 2010.
- [6.5] A dispute regarding the scope of services resulted.
- Breached her duties in relation to fees (clause 8(b), (c) and (e) of the Code)*
- [6.6] The adviser did not set out details of fees when first engaged in the instructions in November 2010.
- [6.7] A dispute regarding the fees agreed and paid resulted.
- Breached her duties in relation to business management (clause 3(a) of the Code)*
- [6.8] The adviser failed to notify the complainant when submitting the request under section 61, did not provide timely updates and did not inform the complainant when Immigration New Zealand refused the request.

Reply to the Statement of Complaint

The complainant

- [7] 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

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

Discussion

- [9] 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 evidence supporting them.

Negligence (section 44(2)(a) of the Act) and/or a breach of the duty to perform services with due care, diligence, respect and professionalism under the Code (clause 1.1(a))

- [10] The adviser does not accept she had instructions to lodge an appeal.
- [11] However, that is not the central issue. The Statement of Complaint correctly identifies that an appeal to the IPT was one of several options available to the complainant. The obvious possibilities were:

[11.1] Accepting that leaving New Zealand was appropriate given his visa had expired,

[11.2] Seeking discretionary relief on a request under section 61, or

[11.3] Lodging an appeal with the IPT.

- [12] The adviser had a clear and obvious professional duty to review those options, and any others that emerged after interviewing him and gathering details of his circumstances and immigration history. She then had a duty to set out her advice in writing, or record in writing the details of discussions in which she delivered the advice (clause 3(f) of the Code).

- [13] The adviser has not provided any explanation, or evidence of her fulfilling those obligations. The complainant says the adviser entered an agreement to make a request under section 61, and accepted a bank cheque as the filing fee for an appeal.

- [14] The Statement of Complaint put the adviser on notice of the complaint; she has not provided a response or any material to establish she carried out her professional duties. The complaint is unanswered, and the written record is consistent with the complaint.

- [15] I am satisfied the adviser failed to provide advice of the available options, take informed instructions and carry them out. Instead, she took uninformed instructions to take two actions, and carried out one of them. She lodged a request under section 61, but failed to lodge an appeal.

- [16] I am satisfied the adviser was negligent, and failed to meet the minimum standards of a licensed immigration adviser acting with care, diligence and professionalism in relation to her instructions.

- [17] Accordingly, this aspect of the complaint is upheld pursuant to section 44(2)(a) and (e) of the Act.

Breached her duties in relation to written agreements (clauses 1.5(a), (b), (d) and 8(b) of the Code)

- [18] The Code required the adviser to have a written agreement before she undertook any work for the complainant. Despite this, the adviser commenced the instructions without one, including having the complainant's wife sign an application for a visa.

- [19] As such, she breached the Code which required her to:

[19.1] Provide a written agreement containing a full description of the services to be provided (clause 1.5(b));

- [19.2] Before entering any agreement, explain in writing and plain language, the terms of the agreement and all significant matters relating to it (clause 1.5(a))
- [19.3] Set out fees and disbursements in writing (clause 8(d));
- [19.4] Get the complainant's written acceptance of the terms of the agreement (clause 1.5(d)).
- [20] Those steps are necessary and important when taking instructions, and establishing the professional relationship. The duty to explain all significant matters (clause 1.5(a)), and to record material discussions (clause 3(f)) are intended to prevent a complaint of this kind.
- [21] If the adviser had a record of explaining the options available, the reasons for particular choices and an agreement to provide the services, then this complaint would not have arisen. I am satisfied the adviser failed to take those steps as she took fees on the basis of a loose arrangement after having commenced work with no written agreement. This complaint illustrates the importance of these duties. The adviser's failure to initiate the client engagement in accordance with the Code led to the complainant losing his only opportunity to appeal against liability for deportation; without first receiving advice on the merits of an appeal.
- [22] I am satisfied the adviser breached clauses 1.5(a), (b) and (d) of the Code. Accordingly, this aspect of the complaint must be upheld pursuant to section 44(2)(e) of the Act.
- Breached her duties in relation to fees (clause 8(b), (c) and (e) of the Code)*
- [23] It is clear that the adviser carried out work incurring costs before setting out the fees and disbursements in writing. This is simply another dimension of the failure to take instructions professionally and record them.
- [24] I am satisfied the adviser breached clauses 8(b), (c) and (e) of the Code. She did not set out the fees, payment terms and conditions and provide invoices with a full description of the services. Accordingly, this aspect of the complaint must be upheld pursuant to section 44(2)(e) of the Act.
- Breached her duties in relation to business management (clause 3(a) of the Code)*
- [25] The adviser failed to notify the complainant when submitting the request under section 61, did not provide timely updates and did not inform the complainant when Immigration New Zealand refused the request.
- [26] She had clear duties to communicate and breached clause 3(a) of the Code by failing to do so. Accordingly, this aspect of the complaint must be upheld pursuant to section 44(2)(e) of the Act.

Decision

- [27] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [28] The adviser was negligent, which is a ground for upholding the complaint and breached the Code of Conduct in the respects identified. These are grounds for complaint pursuant to section 44(2)(a) and (e) of the Act.
- [29] In other respects the complaint is dismissed.

Submissions on Sanctions

- [30] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [31] 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.

[32] 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

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

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

[33.2] 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.

[33.3] 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 19th day of June 2014.

G D Pearson
Chair