

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

Decision No: [2015] NZIACDT 30

Reference No: IACDT 022/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Koli Nau Makahili

Complainant

AND

Hakaoro Hakaoro

Adviser

DECISION

REPRESENTATION:

Registrar: Ms K England, Ministry of Business Innovation and Employment, Auckland.

Complainant: In person.

Adviser: In person

Date Issued: 17 March 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal.
- [2] The complaint is that Mr Hakaoro accepted instructions to assist the complainant with a request for a visa. He was in New Zealand unlawfully as he did not hold a visa. Mr Hakaoro:
- [2.1] Failed to provide information relating to fees in writing prior to signing the written agreement; and the written agreement did not contain details of the services he would provide.
- [2.2] He lodged an application under section 61, when his client was not eligible. Apparently, he did not realise that, because he failed to make a routine inquiry with Immigration New Zealand.
- [2.3] When a person applies for a visa under section 61 their immigration history is a vital factor, and available from Immigration New Zealand.
- [2.4] Mr Hakaoro has not explained why he did not make such a request, and it was essential in this.
- [3] Mr Hakaoro has not responded to the complaint with an explanation or justification addressing the grounds of complaint.
- [4] The Tribunal has concluded it must uphold the complaint, as the material before it establishes those facts, and they amount to systematic non-compliance with the duties Mr Hakaoro owed to the complainant.

The complaint

- [5] The Registrar filed a statement of complaint, she put forward the following background as the basis for the complaint:
- [5.1] On 27 March 2006, the complainant's visa expired and he was for that reason in New Zealand unlawfully.
- [5.2] On 21 April 2012, the complainant engaged Mr Hakaoro to assist with his immigration situation, and they entered a written agreement. On 26 April 2012, the complainant paid a consultancy fee of \$50, and then \$2,000 for professional services.
- [5.3] Mr Hakaoro did not seek information regarding the complainant's immigration history from Immigration New Zealand. On 25 June 2012, he lodged a request for a visa under section 61 of the Immigration Act 2009. Immigration New Zealand refused the request.
- [6] The Registrar identified potential infringements of professional standards. They were:
- [6.1] That Mr Hakaoro was negligent when lodging the section 61 request (in breach of section 44(2)(a) of the Immigration Advisers Licensing Act 2007 (the Act)). The grounds were:
- [6.1.1] The complainant's visa, which expired in March 2006, was a limited visa. He had been in New Zealand since it expired. Section 85 of the Immigration Act 2009 excluded the complainant from making a request under section 61 of that Act.
- [6.1.2] Mr Hakaoro could have obtained the information from Immigration New Zealand on request; he negligently failed to inquire into the complainant's immigration history.

- [6.1.3] The Registrar noted as an alternative that the conduct potentially breached clauses 1.1(a) and 2.2 of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code).
- [6.2] That Mr Hakaoro breached clause 1.5(b) of the 2010 Code in relation to the written agreement not containing a description of the immigration services he would provide. The grounds were:
- [6.2.1] That provision of the 2010 Code required that the agreement contain a full description of the services Mr Hakaoro was providing.
- [6.2.2] The agreement did not contain that information.
- [6.3] That Mr Hakaoro breached clause 8(d) of the 2010 Code in relation to setting out details of fees and payment terms prior to entering a written agreement. The grounds were:
- [6.3.1] The written agreement did not refer to the fees of \$50 and \$2,000, and they were not set out elsewhere prior to the agreement.
- [6.3.2] Mr Hakaoro failed to comply with clause 8(d) which required that he set out that information prior to signing a written agreement.

The responses

- [7] Mr Hakaoro did not file a statement of reply. He belatedly applied to have the complaint referred back to the Registrar. In a separate decision, the Tribunal declined that application, on the grounds there is no justification for Mr Hakaoro's failure to answer the complaint.
- [8] The complainant did not file a statement of reply. They were not required to do so if they accepted the Registrar's statement of complaint set out the facts and matters in dispute appropriately.

Discussion

The standard of proof

- [9] The Tribunal determines 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].

The material before the Tribunal

- [10] The Registrar provided a chronology, and supporting documentation. The parties have not disputed this record or added to it.
- [11] I am satisfied this material supports the grounds of complaint alleged.
- [12] Mr Hakaoro has had many opportunities to provide an explanation, and has wholly failed to answer the complaint. It is not a complicated complaint, and the Registrar has provided the documentation supporting it.

The facts

- [13] The Statement of Complaint and the supporting documents establish the facts. They are simple.
- [14] Mr Hakaoro failed to provide information relating to fees in writing prior to signing the written agreement; and the written agreement did not contain details of the services he would provide.
- [15] He lodged an application under section 61, when his client was not eligible. He did not realise that as he failed to make a routine inquiry with Immigration New Zealand. Otherwise, he proceeded to make an invalid request.

- [16] When a person applies for a visa under section 61, their immigration history is a vital factor; it is not realistic to assume a client will have a full understanding of that history. The history will usually shape the submissions that support the request. Accordingly, it is a routine and necessary step to make an inquiry before lodging a section 61 request.
- [17] Mr Hakaoro has not explained why he did not make such a request; and it was essential in this case as his client was not eligible. I am satisfied that the request should have been made.

The charges of professional misconduct

- [18] The professional misconduct potentially arising from the facts before the Tribunal, are set out above in paragraph [6]. The facts properly found each of the grounds. Mr Hakaoro breached the Act and the 2010 Code due to the facts identified in that paragraph.
- [19] I accordingly find Mr Hakaoro:
- [19.1] Was negligent, which is a ground for complaint pursuant to section 44(2) of the Act. Mr Hakaoro negligently failed to request his client's immigration history from Immigration New Zealand. To make such an inquiry was routine, necessary in this case, and Mr Hakaoro has failed to provide any reason why he could have reasonably thought otherwise at the time. As Mr Hakaoro was negligent, it is not necessary to consider the provisions of the 2010 Code, which the Registrar identified as alternative grounds.
- [19.2] Also breached clauses 1.5(b) and 8(d) the 2010 Code. Mr Hakaoro did not set out details of his fees and payment terms before signing the written agreement to provide services; and he did not set out a full description of the services in the agreement. Those provisions of the 2010 Code required him to do so; and he has not provided any justification for his failure to do so.

Decision

- [20] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [21] Mr Hakaoro was negligent, and breached the 2010 Code; they are grounds for complaint pursuant to section 44(2) of the Act.

Submissions on Sanctions

- [22] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [23] 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, Mr Hakaoro is entitled to make submissions and respond to any submissions from the other parties.
- [24] 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.
- [25] The Registrar is requested to report on the extent to which Mr Hakaoro has complied with previous orders the Tribunal has imposed in respect of sanctions, and the steps she has taken to enforce the orders.

Timetable

- [26] The timetable for submissions will be as follows:
- [26.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [26.2] 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.

[26.3] 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 March 2015

G D Pearson
Chair