

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

Decision No: [2015] NZIACDT 66

Reference No: IACDT 008/15

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

I T

Complainant

AND

K R R

Adviser

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

Adviser: Mr Peter Moses, Barrister, Auckland.

Date Issued: 28 May 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal.
- [2] Mr R is a licensed immigration adviser. The complainant sought his assistance after Immigration New Zealand said his work visa application would potentially fail.
- [3] The complainant said that Mr R had pressured him to sign an agreement, and he had only partly completed the agreement because he was unsure whether he could afford the fee. The next day he engaged another adviser and told Mr R by telephone that he had done so and did not require Mr R's services.
- [4] Mr R says the complainant signed an agreement with full disclosure and understanding; he urgently contacted Immigration New Zealand and intervened successfully. Only later, did the complainant tell him about engaging the other adviser.
- [5] Mr R invoiced the complainant for the full fixed fee in the agreement, but ultimately accepted he could not properly charge a fee as his agreement was not in a satisfactory form to charge on that basis.
- [6] The only ground of complaint the Registrar has lodged is that Mr R charged a fee that was not fair and reasonable.
- [7] The Tribunal has to determine whether Mr R and the complainant entered into the agreement properly and when the complainant terminated Mr R's services. Both questions are relevant to what was a fair and reasonable fee, the lack of an agreement and the date the instructions were terminated may affect what work was chargeable.
- [8] The Tribunal accepts this complaint should simply be determined on the papers; the parties have not sought an oral hearing. The Tribunal has determined it cannot be satisfied on the papers that Mr R's agreement was not entered into properly, or that his instructions were terminated before he did the work. However, it has found, as Mr R eventually accepted, his fee was not fair and reasonable due to the inadequacy of his agreement.
- [9] However, the Tribunal determined it should dismiss the complaint. This is because Mr R has accepted the fee was not reasonable and has not further pursued payment of it. This places the issue below the threshold for an adverse disciplinary finding.

The complaint

- [10] The Registrar's Statement of Complaint put forward the following background as the basis for the complaint:
- [10.1] The complainant submitted a work visa to Immigration New Zealand on 10 April 2014. Immigration New Zealand responded with a letter identifying concerns regarding the position of employment he relied on, and his employer responded. At this point, the complainant approached Mr R. The key events that followed were:
- [10.1.1] On 18 June 2014, the complainant met with Mr R, and signed a written agreement and authority to act.
- [10.1.2] The following day the complainant met with another licensed immigration adviser, and decided to engage her. He signed a written agreement with her.
- [10.1.3] The complainant said he then (the same day as engaging the second adviser), told Mr R what had occurred in a telephone conversation.
- [10.1.4] On 24 June 2014, Immigration New Zealand approved the complainant's work visa. Mr R emailed the complainant to tell him, and said he would let him know when Immigration New Zealand returned his passport.

- [10.1.5] The following day Immigration New Zealand arranged for the complainant's passport and documents to go to the second adviser.
- [10.2] Mr R invoiced the complainant for \$1,725. The complainant said he had not authorised him to pursue his case, and had engaged the other adviser. Mr R engaged a debt collection agency, and sought to recover \$2,366.67.
- [11] The Registrar identified potential infringement of professional standards during the course of Mr R's engagement, the allegations were that potentially:
- [11.1] Mr R breached clause 20(a) of the Licensed Immigration Advisers Code of Conduct 2014 (the 2014 Code), which required that any fees charged be fair and reasonable in the circumstances. The grounds for potential breach of that obligation were:
- [11.1.1] Mr R issued an invoice for three things:
- [11.1.1] A work visa consultation,
- [11.1.1] Follow up with Immigration New Zealand, and
- [11.1.1] A case discussion with Immigration New Zealand.
- [11.1.2] The complainant engaged another adviser after the initial consultation. He did not have copies of any of the documents relating to the complainant's circumstances that Immigration New Zealand was considering. Mr R did not prepare any of the documents Immigration New Zealand dealt with.
- [11.1.3] The initial consultation was free of charge.
- [11.1.4] In these circumstances, the fee was potentially not fair and reasonable.
- [12] The complainant lodged the complaint raising additional grounds; however, he did not pursue them in a statement of reply. It is not necessary to discuss them further.

The responses

- [13] The complainant raised the following matters in response to the Statement of Complaint:
- [13.1] He did not consider Mr R's notes were correct, as he found discrepancies.
- [13.2] He said he was pressured to sign the agreement; he was concerned regarding the level of fees. He just wrote his name and date of birth, and the form, which was not completed. He engaged a different adviser the following day, and told Mr R that he had done so.
- [13.3] Mr R completed parts of the agreement without further authority from the complainant.
- [14] Mr R filed a memorandum and an affidavit. The key elements in his response were:
- [14.1] He accepts the fee could not be recovered, as the agreement was not sufficiently clear as to the basis for calculating the fee.
- [14.2] The complainant was not forced to sign the agreement; it was completed and signed in the complainant's presence.
- [14.3] When he met with the complainant, he reviewed the issues, and fully informed the complainant of his circumstances and the options available.
- [14.4] He says the complainant did not telephone him and terminate his instructions.
- [14.5] He attended to the instructions urgently dealing with Immigration New Zealand, and it was only after he had told the complainant that the visa had been issued, was he told

of the other adviser. The other adviser did not contact Mr R and arrange a handover in accordance with the 2014 Code (clause 10(a)).

[14.6] A dispute over payment developed. Mr R withdrew the debt collection process when the complaint was lodged.

Discussion

The standard of proof

[15] 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 issue

[16] The issue before the Tribunal is simply whether Mr R charged fees that were “fair and reasonable in the circumstances”.

[17] Mr R’s position is that he charged a fixed fee, carried out urgent work, was successful and sought to recover the agreed fee. He offered to discount it when there was a dispute, and then accepted his agreement was deficient and the money irrecoverable.

[18] Those facts are not in dispute. What is in dispute is whether Mr R’s instructions were either incomplete as the agreement was not complete, or withdrawn shortly after the initial free consultation.

[19] There are two possibilities that potentially make the fees not “fair and reasonable in the circumstances”:

[19.1] They were not fair and reasonable due to the terms or standing of the agreement; or

[19.2] Mr R charged for work he offered to perform without cost and for work he was not authorised to perform.

The facts

[20] On the papers before me it is not possible to be satisfied whether it is more likely the agreement was completed properly as Mr R says, or improperly as the complainant says. It is common practice to provide paper copies of documents to clients rather than create a verifiable record using emails or electronic transmission. There is no copy before me that is inconsistent with the copy Mr R relies on.

[21] Potentially an oral hearing could allow one claim or the other to be preferred. However, neither party seeks that course; even after hearing evidence it is quite likely the issue would be decided on the basis of the onus of proof rather than being able to prefer one account or the other. Further, the grounds of complaint the Registrar has pursued are not at the more serious end of the spectrum.

[22] In these circumstances, I will deal with the agreement on the basis that the copy before me existed when the complainant left Mr R’s office on 18 June 2014, as I cannot reach any more adverse finding on the material before me on the balance of probabilities.

[23] Much the same reasoning applies to my finding regarding the telephone conversation that the complainant says occurred the following day. The materials before me do not include any records that prove there was a telephone call that day; I simply have two irreconcilable accounts. An oral hearing is likely to result in the onus of proof deciding the issue. On the papers before me I will deal with the matter on the basis I do not have sufficient evidence to be satisfied Mr R’s instructions were probably cancelled on 19 June 2014.

Whether the fees were fair and reasonable

[24] This Tribunal has consistently approached fees on the basis that the various forms of the Code of Conduct allow different methods of calculating fees. As a general principle, the

reasonableness of fees will relate to the likely time required, complexity, responsibility, urgency and a range of other factors. The fee may well be, and often is, a fixed fee, regardless of the time in fact required. The fee may also be based on time engaged, with or without a cap, and may be adjusted when the work requires changes.

- [25] Fairness and reasonableness is not solely determined on the value of the work; the terms relating to the risk of the work being more or less than anticipated may have a considerable bearing. Disclosure is also important, and will often have to take account of the commercial sophistication of the client. A multi-national business regularly seconding staff is likely to be charged differently from a client who has no exposure to New Zealand professional practice.
- [26] To his credit, Mr R has accepted his agreement was defective. It nominates what appears to be a fixed fee of \$1,500 + GST. As this is a consumer contract, it would be preferable the price was GST inclusive. However, the contract simply describes the services as "Work Visa". These particular instructions concerned a matter that could become intractable, and require extensive work. If Mr R was intending to convey he was willing and in a position to see the matter through to appeals and other requests, the fixed fee may have been a very modest one. If he intended he would simply make a phone call which would possibly resolve the issue, and that that was the end of his engagement, then the price was likely excessive.
- [27] When Mr R issued his invoice for \$1,500 + GST it was not fair or reasonable as:
- [27.1] The work he performed did not justify that fee. It appears that in reality there was one lengthy telephone conversation.
- [27.2] To make that fee fair and reasonable, Mr R required the informed consent of the complainant to a fair fixed fee arrangement. He did not have that in place as the agreement was unclear as to the extent of the services he was willing to perform for that fee, had the initial phone conversation proved unfruitful.
- [28] While Mr R's invoice referred to the initial consultation, I do not attach any significance to that as he understood he was charging on a fixed fee basis; accordingly, a reference to the initial consultation had no real significance in that context. In relation to charging for work after the complainant terminated his instructions, I am unable to reach a view on the balance of probabilities that Mr R knew his services were no longer needed before substantially completing the instructions.
- [29] Accordingly, my conclusion is that the fee was not fair and reasonable, but only because Mr R had made an error of judgement relating to establishing a proper foundation for the charging of a fixed fee.

Does my conclusion justify an adverse disciplinary finding

- [30] Mr R has recognised that he was not entitled to the fee and has accepted he cannot recover it. Had he not done so, I would have no hesitation in upholding the complaint as I have found that the fee was not fair or reasonable.
- [31] The Statement of Complaint does not raise issues relating the form of the agreement or privacy issues arising in respect of referring the matter to a debt collection agency. In relation to the latter, *Taylor v Orcon Ltd* [2015] NZHRRT 15 reviews certain privacy obligations, which may have reciprocal professional disciplinary consequences. As the Statement of Complaint did not raise those issues as grounds of complaint, I put them to one side.
- [32] The only matter I must weigh is an error of judgement where Mr R sought to recover a fee, promptly offered to discount the fee and later accepted he could not recover the fee when he gained a better understanding of his practices.
- [33] Not every lapse is sufficient to uphold a complaint in a professional disciplinary context. In a decision of the Health Practitioners Disciplinary Tribunal, *Re Tolland* No 325/Mid10/146P, 9 September 2010 at para [39], the HPDT observed:

"Negligence, in the professional disciplinary context, does not require the prosecution to prove that there has been a breach of a duty of care and damage

arising out of this as would be required in a civil claim. Rather, it requires an analysis as to whether the conduct complained of amounts to a breach of duty in a professional setting by the practitioner. The test is whether or not the acts or omissions complained of fall short of the conduct to be expected of a [practitioner] in the same circumstances... This is a question of analysis of an objective standard measured against the standards of the responsible body of a practitioner's peers."

- [34] While directed to negligence, the analysis is of wider application. Typically, a professional disciplinary issue will involve finding whether there has been a breach of duty in a professional setting, by measuring the breach against real world standards where perfection is not attainable. A responsible body of a practitioner's peers gives weight to the realities of day-to-day professional practice, and human error. Accordingly, a necessary element of the test is to determine whether any lapse is sufficiently serious to warrant upholding the complaint as a professional disciplinary matter. Though the statutory context is quite different, a relevant discussion of the underlying policy issues to be weighed can be found in *Orlov v New Zealand Law Society (No 8)* [2012] NZHC 2154.
- [35] Section 50 contemplates the Tribunal upholding a complaint without necessarily imposing a sanction. However, section 45(1) of the Act provides that the Authority may treat a complaint as trivial or inconsequential and not pursue it, or treat an issue as best settled between the parties. I am satisfied the proper course is to apply the usual principles to complaints in this jurisdiction and require a level of gravity before making an adverse disciplinary finding.
- [36] The Act does not attempt to prescribe where the boundary is, and any attempt by this Tribunal to do so is unlikely to be successful. It is necessary to consider the facts of each complaint.
- [37] In the present case, given Mr R actions in promptly offering a discount and later accepting he could not recover the debt, I am satisfied the events are below the threshold for an adverse disciplinary finding.

Decision

- [38] The Tribunal dismisses the complaint.

DATED at Wellington this 28th day of May 2015.

G D Pearson
Chair