

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

Decision No: [2015] NZIACDT 74

Reference No: IACDT 044/14

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**Desmond Chand**

Complainant

**AND**

**Artika Devi**

Adviser

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**DECISION**

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**REPRESENTATION:**

**Registrar:** In person.

**Complainant:** In person.

**Adviser:** In person.

Date Issued: 12 June 2015

## DECISION

### Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The alleged facts on which the complaint is based are:
- [1.1] Ms Devi's client went to her practice to obtain immigration services.
  - [1.2] Ms Devi failed to complete the steps required to commence the professional engagement.
  - [1.3] An unlicensed person provided immigration services.
  - [1.4] Ms Devi failed to ensure her client's interests were represented when her licence was cancelled.
- [2] Ms Devi denies the grounds of complaint. She has provided explanations of the various aspects of the complaint. The issues are first to decide whether Ms Devi's explanations, if true, are an adequate justification. Then, to the extent her explanations do answer the complaint, to decide whether her position or the complainant's position on the respective issues is more probable.

### The complaint

- [3] The Registrar's statement of complaint put forward the following background as the basis for the complaint:
- [3.1] Ms Devi was a director of Fast Track Immigration and Employment Services Ltd (the company) since its incorporation on 27 August 2009 until 23 September 2011. The company changed its name to Universal Immigration Services New Zealand Ltd on 14 December 2010. The company provided immigration services, and Ms Devi was the sole licensed immigration adviser in the practice from 17 April 2009 until 12 September 2011.
  - [3.2] In or around August 2010 the complainant contacted the company after Immigration New Zealand had declined his work visa application and a request for a visa under section 35A of the Immigration Act 1987 (now section 61 of the Immigration Act 2009). He met with Mr Ashneel Nand and Ms Sunita Devi; they were not licensed immigration advisers. Ms Devi was present for part of the initial meeting; she looked at some documents, and said she could assist before leaving the meeting.
  - [3.3] Between August 2010 and June 2011 the company undertook the following immigration actions for the complainant:
    - [3.3.1] A request for a work visa under section 35A of the Immigration Act 1987;
    - [3.3.2] A request for the Minister's intervention;
    - [3.3.3] A request for a work visa under section 61 of the Immigration Act 2009.
  - [3.4] The correspondence recorded that Ms Devi was the licensed immigration adviser dealing with the work, and she signed the section 61 request on 15 June 2011.
  - [3.5] Ms Devi agreed to provide immigration services to the complainant, but did not enter into a written agreement. The only contact she had with the complainant was the initial meeting in August 2010, after that he dealt with Mr Nand.
  - [3.6] This Tribunal cancelled Ms Devi's licence on 5 September 2011 after upholding a different complaint. The cancellation took effect seven days later. At that point the complainant held a work visa and Mr Nand had advised him to apply for residence as soon as possible.

- [3.7] The complainant continued to deal with Mr Nand for another year; he paid Mr Nand over \$3,000 in fees to make an application for residence and ultimately ended up being in New Zealand unlawfully, as his work visa expired without Mr Nand giving him warning. The complainant only discovered that Ms Devi did not have a licence when he terminated Mr Nand's services in October 2012.
- [4] The Registrar identified potential infringement of professional standards during the course of Ms Devi's engagement, the allegations were that :
- [4.1] Ms Devi breached clauses 1.5(a), (b) and (d) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). The provisions require a written agreement for the delivery of immigration services, disclosure, and client acceptance of those terms in writing. The circumstances supporting this allegation were:
- [4.1.1] The complainant engaged Ms Devi to provide professional services.
- [4.1.2] Ms Devi did not comply with the provisions of the 2010 Code, as she did not have a written agreement, confirmation of acceptance in writing, or explain significant matters to her client.
- [4.2] Ms Devi breached clause 2.1(b) and 3 of the 2010 Code. The provisions require a licensed immigration adviser to comply with immigration legislation and maintain professional business practices related to staff. The circumstances supporting this allegation were:
- [4.2.1] Ms Devi used unlicensed staff to perform a significant component of her immigration services.
- [4.2.2] All correspondence with Immigration New Zealand was in her name and she signed the complainant's work visa application as his adviser on 15 June 2011. However, she had no contact with the complainant after the initial meeting; Mr Nand dealt with him.
- [4.2.3] Ms Devi potentially breached her obligations under the 2010 Code, as unlicensed persons could not lawfully provide immigration services and unlicensed staff provided immigration services.
- [4.3] Ms Devi breached clause 1.1(c) of the 2010 Code. The provisions required Ms Devi to act with due care, diligence, respect and professionalism to take steps to ensure her client's interests were represented, if she could not continue. The circumstances were:
- [4.3.1] When Ms Devi's licence was cancelled by the Tribunal, she could no longer act for the complainant.
- [4.3.2] Ms Devi did not take steps to notify the complainant; he only ascertained Ms Devi was not acting when he terminated the company's services in October 2012.
- [5] The grounds of initial complaint put forward by the complainant were wider; however, the complainant has not filed a statement of reply seeking to pursue the wider grounds of complaint. Accordingly, the Tribunal will only consider the grounds the Registrar put forward as potentially supported by the evidence.

### **The responses**

- [6] The complainant did not file a statement of reply, and was not required to do so unless he disagreed with the Statement of Complaint.
- [7] Ms Devi did file a statement of reply. She said:
- [7.1] She provided client advice to the complainant.
- [7.2] Mr Nand corresponded with Immigration New Zealand as and when required.

- [7.3] She was not involved with the company after 12 September 2011, when the cancellation of her licence took effect.
- [7.4] The company, not Ms Devi, was responsible for refunds.
- [7.5] She engaged with the complainant and presented him with an agreement. He agreed with the terms, but he would not take it away with him. She thought she would finalise the matter later. Ms Devi does not have a copy of the agreement, as the practice was taken over by another licensed immigration adviser.
- [7.6] Ms Devi was involved when the complainant successfully applied for a visa, but not later when he should have applied for residence.
- [7.7] Ms Devi claimed the complaint was frivolous, connected with an unexplained process in the District Court, motivated by an attempt to recover fees and in an endeavour to justify the complainant's failure to make a timely application for residence.
- [8] Her specific responses to the grounds of complaint are:

*Failure to have a written agreement*

- [8.1] The complainant refused to take copy of the service agreement and Ms Devi cannot obtain a copy of it. He refused to take the copy after he told Ms Devi that they were "like family", as she was related to his employer. Ms Devi has accepted that she should have refused to do work until the agreement was signed; and says she believed she could finalise the agreement later.
- [8.2] Ms Devi was a voluntary immigration adviser for the company; she was not paid, the company received fees.

*Using unlicensed staff to provide immigration services*

- [8.3] Ms Devi says she did deal with the complainant after the first meeting.
- [8.4] The only work other people did was clerical work.

*Steps taken on cancellation of Ms Devi's licence.*

- [8.5] Another licensed immigration adviser took over the company's practice after Ms Devi's licence was cancelled.
- [8.6] Ms Devi did not provide immigration advice after that point.
- [8.7] The company advised clients of Ms Devi's loss of licence.
- [9] She claims the complaint is fabricated.

**Discussion**

*The standard of proof*

- [10] 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 facts*

- [11] The Registrar provided a chronology and supporting documentation; Ms Devi has not filed documents supporting her assertions, and she has not sought an oral hearing.
- [12] I am satisfied the facts set out in the Statement of Complaint are consistent with, and supported by, the material filed with it. It is apparent from Ms Devi's own response that she has little or no understanding of the professional responsibilities she held. Ms Devi, as the licensed immigration adviser operating the practice, was personally responsible for the

professional service delivery. She was also personally responsible for fees and any professional obligations arising in respect of fees, irrespective of whether she in fact received those fees.

- [13] Ms Devi's response contains a factual admission that Mr Nand was providing immigration services; she said he "had correspondence with Immigration New Zealand on behalf of clients as and when required".
- [14] Ms Devi was required to keep records under the 2010 Code. The obligations are rigorous. Clause 3 requires a continuous record of a client engagement, including confirming oral communications in writing. Ms Devi was personally responsible for keeping those records for seven years under clause 3(e) of the 2010 Code. Ms Devi should be in a position to produce records to support her claims; to say she left the records with the company and did not take steps to secure them is no justification as the responsibility is personal.
- [15] Ms Devi's own account is sufficient to find the most significant elements of the complaint established. To the extent Ms Devi's claims differ from the complainant, I prefer the complainant's account on the balance of probabilities. I do that with caution, as there has not been an oral hearing, and I accordingly place most emphasis on the written record, as far as it goes.

*No written agreement*

- [16] Ms Devi says she did explain a draft agreement, but it was not finalised.
- [17] She has accepted that in the circumstances she should have refused to act until the complainant signed the agreement. I accordingly find Ms Devi failed to comply with clauses 1.5(a), (b) and (d) of the 2010 code.

*Allowing unlicensed personnel to provide immigration services*

- [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 using unqualified people, and the case would not be easily made out they acted unreasonably or irresponsibly in doing so. Any complaint would likely require a demonstration of failure to delegate appropriately, or supervise properly if that were the law. Unqualified people successfully provide very important skills in many areas of professional service delivery.
- [20] However, the Immigration Advisers Licensing Act 2007 (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 far from universal 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] Section 73 provides that a person may be charged with an offence under section 63, whether or not any part of it occurred outside New Zealand.
- [26] The scope of “immigration advice” is defined in section 7 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 to consider. 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 non-licence holder 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 is directed to administrative tasks, such as keeping records, maintaining financial records 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 being licensed. 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 is to be recorded on the form. Under “clerical work” they 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 is not an issue for the Tribunal on the facts in this complaint.
- [36] Ms Devi admits that Mr Nand “had correspondence with Immigration New Zealand on behalf of clients as and when required.” That is not clerical work; if what Ms Devi says is true, it would likely have involved the commission of serious offences.
- [37] Ms Devi says that she had continuing contact with the complainant during the engagement, and that she personally undertook the immigration work. However, as discussed in relation to having a written agreement, Ms Devi should be able to provide a documented record of that. She cannot do so. In these circumstances, I accept the complainant’s statement that he was meeting with Mr Nand, and that Mr Nand provided some or all of the immigration services.

- [38] Ms Devi was personally responsible for managing the practice. She admits she was not present on a regular basis, as she was employed fulltime as a personal banker. Accordingly, unlicensed persons were in sole charge of the practice during office hours. Ms Devi was only there outside office hours, and during the weekends. That is consistent with what the complainant describes. The reality is that Ms Devi was not present to know what Mr Nand was doing during normal office hours.
- [39] I accordingly find Ms Devi breached clause 2.1(b) of the Code of Conduct, as she allowed Mr Nand to deliver professional services to the complainant in breach of the Act, and clause 3 as she failed to control Mr Nand.

*Failure to ensure the complainants interests were represented when Ms Devi ceased to act*

- [40] The complaint is that Ms Devi failed to inform the complainant when she could no longer act, and ensure he had the opportunity to arrange professional representation. The result was that Mr Nand, who was unqualified, solicited funds and failed to deliver professional services to the complainant.
- [41] Ms Devi's answer to that complaint is to say the company told the complainant she could no longer act. She provided no evidence to support that claim; regardless, the responsibility was hers. The complainant says he continued to see Mr Nand, who he understood was operating under Ms Devi's licence as it appeared he did throughout the process.
- [42] There is no reason to doubt what the complainant says. As discussed, Ms Devi had a duty to inform her client in writing of material discussions. She admits she did not tell her client personally and she has produced no evidence the company did so. Accordingly, the most probable position is that nobody told the complainant, or assisted him to arrange proper representation. The result was that the complainant continued to receive services provided by Mr Nand in breach of the Act; Ms Devi's failure to meet her obligations caused that. She was obliged to, with due care and professionalism, take reasonable steps to ensure her client's interests were represented when she could no longer act for him. She did not do that, and breached clause 1(c) of the 2010 Code.

**Decision**

- [43] The Tribunal upholds the complaint pursuant to section 50 of the Act; Ms Devi breached the 2010 Code in the following respects:
- [43.1] Clauses 1.5(a), (b) and (d)
- [43.2] Clauses 2.1(b) and 3
- [43.3] Clause 1.1(c)
- [44] They are grounds for complaint pursuant to section 44(2)(e) of the Act.
- [45] In other respects, the Tribunal dismisses the complaint.

**Submissions on Sanctions**

- [46] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [47] The Authority and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs and compensation. Whether they do so or not, Ms Devi is entitled to make submissions and respond to any submissions from the other parties.
- [48] 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*

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

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

[49.2] 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.

[49.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of her filing and serving those submissions.

**DATED** at Wellington this 12<sup>th</sup> day of June 2015

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**G D Pearson**  
Chair