BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2015] NZIACDT 75

Reference No: IACDT 041/14

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**The Registrar of Immigration Advisers** Registrar
BETWEEN	**A Z** Complainant
AND	**M X** Adviser

DECISION

REPRESENTATION:

Registrar: Ms K England, lawyer, MBIE, Auckland.

Complainant: In person.

Adviser: Mr S Laurent, lawyer, Laurent Law, Auckland.

Date Issued: 22 June 2015

DECISION

Introduction

[1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal.

[2] Ms X is a licensed immigration adviser. The complaint was to the effect that Ms X did not have a written agreement for the services she provided to the complainant and she did not deal properly with fees and other payments.

[3] Ms X put forward an explanation and neither the Registrar nor the complainant has disputed it. She explained she did not have a written agreement because, although she prepared one, she gave it to an unqualified staff member to deliver to the complainant. As no fees were charged, he decided not to deliver it to the complainant for signature. Ms X accepts she failed to follow up and should have done so.

[4] There is no complaint relating to how Ms X performed the work to which the unsigned agreement related and accordingly the error had no detrimental effect. The Tribunal has found in all the circumstances that Ms X's error fell below the threshold for an adverse disciplinary finding.

[5] In relation to the fees, Ms X explained that the complainant had approached Y Agency (Y) prior to her being employed there. Y was an education provider that also offered immigration services; however, Y referred the complainant to another licensed immigration adviser, working in a separate practice, as it did not have any licensed immigration advisers employed at the time. The independent immigration adviser made several unsuccessful attempts to obtain a visa for the complainant; there is no evidence currently before the Tribunal as to whether these services were properly carried out and indeed that is not relevant to the matter currently in issue. After Ms X took up employment at the practice she began dealing with the complainant's immigration matters. She says she engaged with the complainant but did not attempt to review the responsibilities of the other adviser. She says it was not appropriate for her to purport to review the work and financial arrangements of another adviser in a separate practice.

[6] The Tribunal found Ms X was correct to say she was not responsible for funds where the responsibility lay with another licensed immigration adviser in a different practice from the practice where she took up a position.

[7] Accordingly, the Tribunal has dismissed the complaint.

The complaint

[8] The Statement of Complaint identifies that there is potential support for the Tribunal to conclude the adviser received immigration instructions, acted on them, but:

[8.1] Failed to enter into a written agreement for the service and to set out fees disbursements and payment terms (in breach of clauses 1.5(a), (b) and (d), and 8(b) and (c) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code)); and

[8.2] Held fees, funds to pay disbursements and tuition fees; and may have failed to deal with the funds in accordance with the Code of Conduct (in breach of clause 3 of the 2010 Code).

Ms X's position

[9] Ms X says she accepts the first ground, but the second is misconceived. A company employed her as a licensed immigration adviser. Earlier, the company had engaged an independent licensed immigration adviser, who had her own practice, as a service provider. That other adviser had established a professional relationship with the complainant. The company could not and did not hold a licence. Accordingly, the other licensed immigration adviser had the client relationship until May 2013, when Ms X first became involved with the complainant.

[10] The Statement of Complaint takes the approach that Ms X was effectively taking over instructions within the practice where she had taken employment, and accordingly had obligations to review and take responsibility for any client funds and outstanding compliance issues when she took over the instructions.

[11] However, Ms X says that is a misconception. Her employer could not have the client relationship, as it was not a licensed immigration adviser. The independent licensed immigration adviser necessarily held the client relationship; she operated her own practice and allowed Y to act as agent for her client. Accordingly, Ms X had no duty to look into the conduct of the other licensed immigration adviser. She says her duties were to establish a new client relationship, in the context of her employer's business. She was only responsible for establishing that client relationship, and then accounting for funds and the like within that client relationship.

The Registrar and the complainant's responses

[12] The complainant did not reply to the Statement of Complaint or Ms X's Statement of Reply.

[13] The Tribunal gave the Registrar an opportunity to file any submissions in reply, evidence addressing the issues raised by Ms X and the opportunity to apply to cross-examine Ms X. The Registrar indicated she considered the Tribunal should determine the complaint on the material before it.

Discussion

The facts

[14] Ms X's explanation is unchallenged and is consistent with the written record; accordingly, I accept what she says regarding the facts. The key elements are that she:

[14.1] Did not commence the initial professional engagement or provide the initial immigration services; another licensed immigration adviser in a separate practice did that.

[14.2] Did not receive fees or other payments from the complainant; the other licensed immigration adviser and Y were responsible for that. Y's role in those initial instructions was the other licensed immigration adviser's responsibility.

[14.3] Did provide services to the complainant, but did not intend to charge for the services and did not charge for the services.

[14.4] Ms X drafted an agreement, which said, "You don't have any service fee(s) for this work." The agreement is unsigned, as Ms X had completed the steps required to commence the client relationship, and left the signed agreement with an unqualified staff member in Y. He mistakenly and unilaterally decided that the complainant did not need to sign the agreement, because there was no fee for the work.

The absence of a written agreement

[15] Ms X accepts she did not have the written agreement confirmed in writing and, accordingly, she did not meet the requirements of the 2010 Code. However, in mitigation Ms X does say that she did properly undertake the relevant disclosure processes and, in fact, the only error was not following up to ensure the complainant signed the agreement. There is no complaint that Ms X failed to deliver the services promised in accordance with professional standards.

[16] This is a case where I must consider whether this ground of complaint meets the threshold for an adverse disciplinary finding. 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."

[17] 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* [2012] NZHC 2154.

[18] Section 50 contemplates the Tribunal upholding a complaint without necessarily imposing a sanction. However, section 45(1) of the Act provides that the Registrar of 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.

[19] 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.

[20] In the present case, given:

[20.1] Ms X's professional service delivery, in relation to the instructions she received, is not in issue. She completed the work agreed and there is no evidence that the application failed through any fault attributable to her;

[20.2] She did not charge a fee for the work; and

[20.3] There is no evidence of harm to the complainant from Ms X's failure to obtain his signature on the agreement.

I am satisfied this is a case where the Tribunal should not make any adverse disciplinary finding, and must dismiss this ground of complaint.

Dealing with funds

[21] The parties have not disputed Ms X's claim that she did not deal with the funds in question, another licensed immigration adviser in a different practice was responsible for the fees taken in relation to the immigration work provided, and Y who is responsible for the tuition fees . It follows that the Tribunal must dismiss this ground of complaint against Ms X as she had no right or responsibility to deal with fees received by a licensed immigration adviser in a separate practice or those taken by the company before her arrival.

[22] The situation may be quite different where a licensed immigration adviser takes charge of client funds in a practice formerly under the control of a different licensed immigration adviser. It is unnecessary to discuss that issue here, as that was not what happened in this case. I am satisfied that, despite the continued involvement of Y, Ms X's engagement was separate and distinct from that of the other adviser; and she did not deal with any tuition fees in connection with her immigration services.

[23] For completeness, I note that one of the matters Ms X raised, for which there was no response was the payment of the Immigration New Zealand fee on lodging the section 61 request. Ms X said there was no evidence the complainant paid a fee. It would not be surprising given that Immigration New Zealand only retains the fee on a successful application, and there had been previous failed applications. As there is no answer to Ms X's statement, I accept it and find the complainant probably did not pay a fee for the section 61 request Ms X lodged.

Decision

[24] The Tribunal dismisses the complaint.

DATED at Wellington this 22nd day of June 2015

_____
G D Pearson
Chair