BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2015] NZIACDT 80

Reference No: IACDT 012/15

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

DECISION

REPRESENTATION:

Registrar: Ms M Urlich, lawyer, Ministry of Business, Innovation and Employment.

Complainant: In person.

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

Date Issued: 10 August 2015

DECISION

Introduction

[1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The factual allegations on which the complaint is based are:

[1.1] The adviser failed to refund a fee of $450 at the termination of engagement.

[1.2] In a telephone call, he swore at, and physically threatened the complainant.

[1.3] He sent an unprofessional email containing threats.

[2] The adviser accepts that the refund was due, but states that the complainant owed another amount, in excess of the refund, for subsequent work. Accordingly, he wanted to be paid, before offsetting the refund. He denies he swore at, or threatened the complainant in a telephone call. He accepts he sent the email.

[3] The Tribunal held an oral hearing where the adviser gave sworn evidence and was subject to cross-examination. The complainant did not attend and gave no sworn evidence. The adviser said the complainant made false and damaging allegations against the adviser, and threatened to publish them. The Tribunal must determine whether to accept the adviser's evidence that he did not swear at or threaten the complainant. Then, evaluate whether it was proper to defer refunding the $450, and whether the email was unprofessional.

[4] The Tribunal has accepted the adviser's evidence; there was no proper basis to do otherwise. It was the only sworn evidence; it was plausible and consistent with the contemporaneous written record. The Tribunal found the adviser managed the failure to refund $450 badly, and the email was far from acceptable. However, in all the circumstances, and particularly having regard to the complainant's threats, the issues fell below the threshold for disciplinary action.

The complaint

[5] The Registrar's Statement of Complaint put forward the following background as the basis for the complaint:

[5.1] On 5 September 2013, the complainant entered into a written agreement with the adviser, who was to provide assistance with an application for a work visa. The written agreement stated the complainant was to pay a fee of $450 on signing the agreement.

[5.2] On 27 May 2013, the complainant terminated the instructions and collected all his documents from the adviser's office. He then lodged the work visa application with Immigration New Zealand himself.

[5.3] The complainant called the adviser and requested a refund of the fees. The adviser swore at the complainant and told him he would "knock [him] down". On 24 February 2014 the complainant emailed the adviser stating he wanted a refund of the fee; the

[5.4] adviser responded by email dated 28 February 2014, stating:

> "These accusations is starting to work on my nerves if you want to discuss this then you better get your attitude straight and or call me asap if I get another email from you it better be that you want to come and see me or I will refer this matter to the police and my lawyer you chose I told you you own me money so if you want your money please pay the outstanding amount due for the Residence Application I am not playing games [complainant's first name]. Next email and the consequences will be dire."

[6] The Registrar identified potential infringement of professional standards during the course of the adviser's engagement, the allegations were that:

[6.1] The adviser breached clause 3(d) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). The provision required him to provide any refunds payable on completing or ceasing a contract for services. The circumstances were:

[6.1.1] The complainant paid $450 and the adviser had only completed part of the work, before his client terminated the engagement. The adviser had not refunded any part of the fee.

[6.1.2] In the absence of an explanation, it appeared the fee paid extended beyond the services provided and a refund was due in whole or in part.

[6.2] The adviser breached clause 1 of the Licensed Immigration Advisers Code of Conduct 2014 (the 2014 Code) and/or clause 1.1(a) of the 2010 Code. It is unclear which Code was engaged as the exact timing of the alleged phone call is not known; in the circumstances it is irrelevant as both clauses required the adviser to be professional, diligent and respectful (clause 1 of the 2014 code also requires honesty); and perform his services in that manner. The circumstances were:

[6.2.1] The adviser swore at his client during a phone conversation and threatened to knock him down.

[6.2.2] He threatened in an email to refer his client to the police, and said there would be dire consequences if the complainant continued to send emails.

[6.2.3] That conduct lacked respect and professionalism.

[7] The initial grounds of complaint 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 considered to have potential support.

The responses

The complainant

[8] The complainant did not file a statement of reply, and was not required to do so if he agreed with the contents of the Statement of Complaint.

The adviser

[9] The adviser did not file a statement of reply, and he was not required to do so if he accepted the Statement of Complaint accurately set out the material information.

[10] The adviser however, had provided a response to the initial complaint in which he challenged the allegations that he swore and physically threatened the complainant. He had also admitted that he sent the email but sought to justify it on further circumstances. Despite this, however, the adviser did not respond to the statement of complaint. Given the conflicting accounts, and the lack of a statement of reply from the adviser, the Tribunal was concerned the material before it was not satisfactory to make a decision.

[11] The Tribunal had to determine the disputed facts. This complaint was of sufficient gravity that if upheld the Tribunal would potentially make orders regarding the adviser's licence. Accordingly, the Tribunal set the matter down for an oral hearing. As matters transpired, only the adviser filed briefs of evidence. An oral hearing took place, where the adviser gave evidence and was cross-examined.

[12] The complainant provided an email with some attachments for the hearing; however, he did not provide a brief of evidence and gave no oral evidence. He did not attend the hearing either in person, or by video or telephone link.

Discussion

The standard of proof

[13] 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 and circumstances

[14] The Registrar provided a chronology and supporting documentation and that record is not in dispute. The issues focus on the circumstances surrounding the refund and the alleged oral and written threats. The contentious facts relate to those issues.

[15] The first issue is the refund of $450. The adviser's position is relatively uncomplicated; essentially, he says he agreed to the refund of $450. However, he would offset it against later work the complainant had engaged him to undertake for a residence visa. He corresponded with the complainant, and asked for payment of the fees on the residence application first.

[16] The adviser managed this issue badly, as by this point in time of correspondence the relationship had deteriorated. The adviser lodged the residence visa application, and Immigration New Zealand identified concerns. Material to the difficult relationship was that the complainant had a financial interest in his employer; Immigration New Zealand viewed this as a significant problem. Immigration New Zealand had processed the application when it identified the issue and accordingly declined to refund any fees.

[17] The adviser's position is that he had done all the work to complete and lodge the application. The final part of his fee was payable on the successful application; but the only obstacle was that the complainant had a financial interest in his employer, and had not disclosed it. He says that at the time the complainant was also wrongly accusing him of "purchasing positions of employment", blaming the adviser for his predicament and threatening him with adverse publicity.

[18] The adviser's sworn evidence on these matters must be accepted. The complainant did not present any sworn evidence to the contrary. I note with some concern the complainant made new and serious allegations against the adviser by email at the commencement of the hearing. He had had every opportunity to make those allegations during the Registrar's inquiries, and the Tribunal's pre-hearing processes. The new allegations are unsubstantiated and lend some weight to the adviser's claim the complainant had made an unjustified personal attack on him.

[19] This background is significant, as it leads to the second issue. The adviser denies the telephone call where he allegedly swore and made physical threats. His is the only sworn evidence. There is no reason to doubt it on the basis of the material before the Tribunal and, for the reasons mentioned, the complainant added some weight to that evidence when he made new allegations by email at the commencement of the hearing.

[20] The remaining matter is the adviser's email quoted above at paragraph [5.3]. The adviser accepts sending the email. It is inescapable that the form does not meet the most elementary of standards required of literate professional communications. The adviser is capable of writing well, and able to understand complex immigration legislation and instructions, and communicate in professional terms with Immigration New Zealand. The email is in such a form that it has the appearance of being a threat and an exhibition of apparent toughness. It is most regrettable.

[21] The adviser's evidence is that he was under threat from his client of false and professionally damaging allegations; in any circumstances, however, this communication was deeply unwise. Professional people will inevitably face allegations of this kind and unfailing professionalism and measured communications is the only sensible and effective response.

Conclusions regarding the grounds of complaint

[22] The adviser should not have demanded payment of the final instalment of his fee before agreeing to refund $450 from a separate instruction. An adviser is only entitled to use client funds "for the purpose for which they were paid" (clauses 25(f) 2014 Code and 4(c) of the 2010 Code). The adviser should have refunded the money, or obtained instructions to put funds towards the other work.

[23] I reject the claim that the adviser swore at the complainant and physically threatened him; the evidence before me is to the contrary.

[24] I find the adviser's email of 28 February 2014 was most inappropriate.

[25] None-the-less, I accept the adviser's evidence, that the complainant made false allegations and threatened to publish them and he had become distressed about those allegations and threats, in mitigation.

Do my conclusions justify an adverse disciplinary finding?

[26] 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."

[27] 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.

[28] 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.

[29] 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.

[30] In the present case, I have found that the adviser was entitled to fees, which exceeded the $450 he had to refund, though that did not justify withholding the refund. I have specifically rejected the allegation he swore and issued physical threats. Ultimately, the complaint turns on one email; it was a serious lapse of judgment, and the adviser was wrong and unwise to send it. I am prepared to accept he drafted in an emotional state, and under the provocation of false allegations. In the particular circumstances I find while there were grounds for complaint, they fall below the threshold for an adverse disciplinary finding.

Decision

[31] The Tribunal dismisses the complaint pursuant to section 50 of the Act

DATED at Wellington this 10th day of August 2015

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G D Pearson
Chair