BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2015] NZIACDT 95

Reference No: IACDT 005/14

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**The Registrar of Immigration Advisers** Registrar
BETWEEN	**O J** Complainant
AND	**Apurva Khetarpal** Adviser

No information identifying the complainant is to be published.

DECISION

REPRESENTATION:

Registrar: Ms S Carr, lawyer, Ministry of Business, Innovation and Employment, Auckland.

Complainant: Mr D J Ryken, Ryken and Associates, Auckland.

Adviser: Mr S Laurent, Laurent Law, Auckland.

Date Issued: 5 November 2015

DECISION

Preliminary

[1] The complainant had been in New Zealand unlawfully without a visa since 2007. He approached Ms Khetarpal, a licensed immigration adviser. She agreed to assist him to get Immigration New Zealand to consider regularising his situation. He paid a fee for her services; paying half immediately, with the balance due if she was successful.

[2] The complainant believed the matter was progressing. However, Ms Khetarpal did not lodge a request with Immigration New Zealand. Ms Khetarpal later left the practice without filing the request. As a result, the Tribunal considered three potential breaches of professional standards. These were:

[2.1] Ms Khetarpal failed to carry out her instructions properly.

[2.2] She was dishonest or engaged in misleading behaviour in her dealings with the complainant.

[2.3] She failed to deal properly with fees.

[3] While Ms Khetarpal accepted the general course of events, she had an explanation. She said she had not been able to complete her work. That, she said, was because the complainant's prospective employer failed to give her the information she needed to do her work. She also said she kept the complainant informed of progress and she dealt with fees in accordance with what was standard practice at the time.

[4] The issue for the Tribunal is to determine the validity of Ms Khetarpal's explanation, and then consider whether she met her professional obligations.

[5] The Tribunal has upheld the complaint.

The Complaint

[6] The Registrar filed a Statement of Complaint. It set out a factual narrative, and identified potential breaches of the Immigration Advisers Licensing Act 2007 (the Act), and the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). The key elements in the narrative were:

[6.1] The complainant had been in New Zealand unlawfully without a visa since 2007. He approached Ms Khetarpal in April 2012. She advised him she could assist with lodging a request for a visa under section 61 of the Immigration Act 2009. That is a discretionary provision where a person who is unlawfully in New Zealand may request a visa from the Minister; a person who is in New Zealand unlawfully is prohibited from applying for a visa under the usual provisions.

[6.2] Ms Khetarpal informed the complainant her fee was $6,000 plus GST, and he had to pay half immediately and the balance if the request was successful. The complainant's prospective employer signed terms of engagement, which provided for a fee of $6,900 (inclusive of GST) and in addition, a lodgement fee of $350 payable to Immigration New Zealand. The complainant paid the sum of $3,450, which Ms Khetarpal did not place in a client funds account.

[6.3] The complainant believed the matter was under control, and in April 2013 Ms Khetarpal said the request was pending with Immigration New Zealand. In fact, Ms Khetarpal had not lodged a request with Immigration New Zealand. In late May 2013, Ms Khetarpal left the practice where she worked, and the complainant engaged counsel to assist with his immigration status in May 2013.

[6.4] The complainant sought a refund of fees and the new owner of the practice where Ms Khetarpal had worked refunded the complainant.

[7] The Statement of Complaint identified three potential breaches of the 2010 Code, and one arising under the Act. In essence these were:

[7.1] Ms Khetarpal failed to provide the complainant with details of the payment terms in the written agreement to provide services.

[7.2] She failed to carry out her instructions.

[7.3] She engaged in dishonest or misleading behaviour in her dealings with the complainant.

[7.4] She failed to deal properly with the fees the complainant paid.

Responses to the Statement of Complaint

[8] It suffices to say that the practice where Ms Khetarpal worked was taken over by another practice and, when she left, there was an element of acrimony. While I give Ms Khetarpal the benefit of assuming information placed before me may reflect that conflict, much of the information regarding those events is not relevant. It became evident to the Tribunal that the complaint was both serious, and turned on conflicting evidence. Accordingly, the Tribunal directed that an oral hearing would take place.

Evidence

[9] The Tribunal has a body of written material, some filed with the Statement of Complaint and some filed subsequently by the parties. The Tribunal primarily hears complaints on the papers and, accordingly, the Tribunal will consider all of the written material. However, given the seriousness of the allegations Ms Khetarpal faces, I am not prepared to give any substantial weight to statements (sworn or unsworn) where the person making allegations or providing contentious evidence was not present at the oral hearing for cross-examination. This does not affect any relevant evidence Ms Khetarpal provided. Only four witnesses were present for cross-examination, and this decision turns on their evidence measured against the contemporaneous written record.

[10] The four witnesses were:

[10.1] The complainant;

[10.2] The complainant's prospective employer;

[10.3] Ms Misa, the senior administrator in the practice where Ms Khetarpal worked; and

[10.4] Ms Khetarpal.

Discussion

The standard of proof

[11] The Tribunal determines facts on the balance of probabilities; however, the test must be applied with regard to the gravity of the potential finding: *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [55].

[12] The critical finding in this case concerns allegations of dishonesty. In this respect, the gravity is at the highest end of the scale and I determine the issue accordingly.

The issues

[13] The first ground of complaint was an allegation that Ms Khetarpal failed to set out payment terms and conditions, and breached clauses 8(c) and (d) of the 2010 Code. Prior to the hearing, it became clear the allegation resulted from the Registrar's copy of Ms Khetarpal's file having a page missing. The new owner of the practice was responsible for reproducing the file; therefore, the missing page in the reproduction was not Ms Khetarpal's fault, and it provided a complete answer to this ground of complaint.

[14] The ongoing significance of this aspect of the complaint is that Ms Khetarpal claims that other parts of the file are missing. I address that point when considering her evidence.

[15] The remaining elements in the grounds of complaint form an integrated set of allegations. In short, they amount to a claim that Ms Khetarpal solicited a non-refundable fee without disclosing a high probability she could not lodge a successful request to Immigration New Zealand, she did not provide the services she promised, and she led her client to believe she was earning the fee. That potentially amounts to dishonestly procuring the payment and withholding the services she promised.

[16] Dishonesty and deception of this kind was one of the more common categories of exploitation that led to Parliament passing the Act; and it has founded many of the serious complaints this Tribunal has addressed.[1] The allegation Ms Khetarpal faced is set out in the Registrar's Statement of Complaint, with particulars of three elements:

[16.1] After accepting instructions, Ms Khetarpal had an obligation to perform her services with due care, diligence, respect and professionalism, and carry out her lawful instructions. Clause 1.1(a) and (b) of the 2010 Code placed that obligation on her. However, she potentially failed to do so. The complainant engaged her to request a work visa under section 61 of the Immigration Act 2009 in September 2012. However, she had not done so by May 2013 and, unless explained, that delay of some seven months pointed to a breach of duty.

[16.2] Ms Khetarpal engaged in dishonest or misleading behaviour; she led her client to believe "everything was under control" when it was not under control, as she had not submitted the request to Immigration New Zealand. Further, she told her client his request was "pending" with Immigration New Zealand when that was untrue. Dishonest or misleading behaviour are grounds for complaint under section 44(2)(d) of the Act.

[16.3] Ms Khetarpal received fees of $3,450, did not deposit them into a client funds account, and instead applied them improperly. She was required, pursuant to clauses 4(a), (b) and (c) of the 2010 Code, to establish and maintain a separate client funds account, withdraw funds only when fees and disbursements were due, and use funds only for the purpose she received them.

[17] Ms Khetarpal's answer to the allegations is that she performed her services professionally and properly. She accepts she did not file the request but says this was not her fault, as the difficulty lay with the complainant's employer. Despite her assiduous efforts to have him supply essential documentation, he failed to do so. She says she was completely frank and kept her client informed of what she required, and that she could not take further steps until she had the documents her client and his prospective employer had not provided.

[18] She accepts she should have lodged the fees and disbursements into a client funds account, but offers as an excuse a common misconception in the profession at the time that it was not necessary to do so.

[19] The Tribunal must consider the evidence provided by the complainant and Ms Khetarpal and make factual findings regarding Ms Khetarpal's explanation.

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[1] Examples are *LG v Hakaoro* [2013] NZIACDT 23, *McGeorge v Standing* [2012] NZIACDT 48, *Fifita v Tangilanu* [2014] NZIACDT 108; the Tribunal's decisions include examples of complaints of deception by taking fees and failing to perform work in respect of each of those practitioners.

The case for the complainant

[20] The complainant's case included an affidavit from the proprietor who took over the practice where Ms Khetarpal worked. It included purported evidence of cases where Ms Khetarpal had signed contracts, taken money, and failed to carry out instructions. I expressly disregard this evidence, as the proprietor was not available for cross-examination and there were insufficient particulars to provide Ms Khetarpal with an opportunity to answer the allegations. The only evidence I will consider is the evidence relating to this complaint.

[21] I also disregard an affidavit from the manager who took over the practice, which relates to Ms Khetarpal's departure. As noted, its only relevance is that it potentially supports Ms Khetarpal's claims the Tribunal's record does not include all of her file. Ms Khetarpal also provided statements from potential witnesses relating to extraneous matters, however they are not relevant given the Tribunal's approach to the evidence.

[22] The complainant gave evidence. He does not speak or understand the English language, and accordingly, Ms Khetarpal had no direct communication with him. Further, I am satisfied he had a very limited understanding of the immigration process. All significant communications were between Ms Khetarpal and his prospective employer. Although he did attend some meetings between Ms Khetarpal and his prospective employer, it appeared from his evidence the extent of his understanding was dependent on subsequent communications between him and his prospective employer, as they shared a common language. Accordingly, I give no weight to the complainant's evidence regarding his understanding of the circumstances.

[23] The complainant's prospective employer gave evidence. While he used an interpreter at the hearing, Ms Khetarpal said she was able to communicate with him in the English language effectively. I will accept Ms Khetarpal's evidence that this was her perception at the time and it was reasonable for her to have that perception. However, it became apparent that both the complainant and his prospective employer had a very limited understanding of immigration processes; and further, there were serious ambiguities and disparities between their oral evidence and the affidavits they filed. Counsel for the complainant did not draft the affidavits, and he properly accepted there were difficulties with the reliability of their evidence. It is not necessary to make any finding regarding how the discrepancies arose; there are often significant difficulties even with a professional translator when a person does not have a command of the language used.

[24] I accordingly place no reliance on any of the evidence from the complainant or his prospective employer, except to the limited extent expressly discussed in relation to Ms Khetarpal's evidence.

[25] The final witness for the complainant was Ms Misa. She was the senior administrator in the practice where Ms Khetarpal was employed, and subsequently. She gave evidence of copying the complainant's file and explained how an automatic document feeder in the photocopier potentially picked up two pages at once, resulting in the missing page in the Registrar's copy of the file. She also produced some file notes, and explained them. I accept Ms Misa's evidence; however, little turns on it. Ms Khetarpal says there is documentation missing from the Tribunal's record; however, her claim is in conflict with Ms Misa's account only in a minor respect. Ms Khetarpal says there is a missing handwritten list that was not the file, and her diary containing notes is not available. I accept the potential for a document to be detached from a file and Ms Misa's evidence does not remove that possibility. Ms Misa did not have any evidence regarding what happened to Ms Khetarpal's personal diary.

[26] Accordingly, the determination of this complaint essentially turns on Ms Khetarpal's own evidence, measured against the background established by her file and the professional environment created by the Act and the 2010 Code.

Evaluation of the evidence

[27] An important part of Ms Khetarpal's case is that she has nearly two decades of experience undertaking immigration work. Originally, she was an immigration officer employed by Immigration New Zealand. She explained that her skill levels are such that she trained other immigration officers. This is not a case of an adviser lacking knowledge of what was required, or confidence to take any necessary steps.

[28] The essential narrative Ms Khetarpal gave of her work for the complainant is as follows:

[28.1] Her communications were with the complainant's prospective employer, and never directly with the complainant. Communication appeared to be effective, and the instructions to file a section 61 request commenced with a written agreement. At this point, she received the payment of $3,450, and if successful a further $3,450 and a fee of $350 payable to Immigration New Zealand was due. The critical point in time was a meeting on 3 September 2012, when the agreement was signed.

[28.2] Ms Khetarpal regarded the payment of $3,450 as a non-refundable "sign-on fee", which is a fee she required a client to pay to her to accept their instructions. At the time, the profession regarded a sign-on fee as acceptable practice; only later did a decision of this Tribunal find such a fee was in breach of the 2010 Code. Under clause 4 of the 2010 Code, if the $3,450 were not a non-refundable fee, then the fee would be deemed client funds paid in advance and would have to be held in a clients' bank account.

[28.3] At the meeting on 3 September 2012, the complainant and his prospective employer provided some documentation. It included out-of-date evidence regarding demand for an employee with the complainant's qualifications. Ms Khetarpal provided a handwritten list of information she required to prepare an optimal request and had the prospective employer sign the list. The list included more documentation of the complainant's work history, and evidence of advertising the position of employment and making inquiries with Work and Income (WINZ). This material was to prove there were no suitable New Zealand citizens or persons in New Zealand entitled to take up the position available.

[28.4] Ms Khetarpal was aware that the complainant had lived for many years in New Zealand without a visa. In her professional judgement, the best request under section 61 would have evidence to demonstrate that, putting the unlawful status to one side, the complainant would qualify for a work visa. Accordingly, in her view, rather than immediately making an application to Immigration New Zealand with inadequate documentation, the best approach was to get the necessary information before taking action.

[28.5] Ms Khetarpal used diary notes to remind her to make contact with the complainant's prospective employer to check on progress with gathering information. She did so regularly until she left the practice.

[28.6] On 21 December 2012, Ms Khetarpal wrote to Immigration New Zealand informing its Compliance Branch that she acted for the complainant, and requested until the week of 7 January 2013 to submit the section 61 request. The response from Immigration New Zealand allowed the complainant until 11 January 2013 to lodge the section 61 request. Ms Khetarpal then decided not to file the request by the deadline, as she considered the information she had would not result in a successful application. Ms Khetarpal was aware when she notified Immigration New Zealand that, in the years since 2007, while the complainant was in New Zealand unlawfully, there had been no enforcement action taken against him. However, she thought that notifying Immigration New Zealand was in her client's interests as it averted potential enforcement action over the period she was on her Christmas vacation.

[28.7] The complainant's prospective employer delivered some additional material in early 2013 but it was never sufficient to lodge a request under section 61, so Ms Khetarpal could not progress matters further.

[28.8] Accordingly, Ms Khetarpal says that she fulfilled her professional obligations to the complainant; the fault lies with his prospective employer.

[29] I have no reason to reject the essential narrative Ms Khetarpal has provided. However, it raises serious questions about her management of her instructions and her motives for her actions. The approach I have taken is to examine the realities of the complainant's immigration situation, the professional duties on Ms Khetarpal under the 2010 Code, and the implications of her telling Immigration New Zealand she would file the section 61 request and then not doing so. Ms Khetarpal's evidence on these matters is the foundation for my findings.

[30] The first point in time is the meeting of 3 September 2012. This was a critical point in the series of events. The complainant had been in New Zealand for some five years unlawfully. Accordingly, persuading Immigration New Zealand to exercise its discretion favourably was going to be difficult or impossible. In her evidence, Ms Khetarpal did not identify any compelling factor such as an extraordinary humanitarian factor. She did say she needed to demonstrate the complainant could successfully apply for a visa aside from his unlawful status. However, she took instructions from a client who had been in New Zealand unlawfully for five years, apparently without justification or excuse. In those years, he had taken no steps to address his unlawful status. The highest she put matters was that potentially she may have been able to gather evidence to demonstrate that aside from his unlawful status he might qualify for a work visa.

[31] At the meeting of 3 September 2012, Ms Khetarpal was obliged to have a very frank communication with her client. I give Ms Khetarpal the benefit of the doubt and assume she could communicate through the complainant's prospective employer, as she believed his English language skills were adequate.[2]

[32] Clause 1.5(a) of the 2010 Code required Ms Khetarpal to make her client "aware, in writing and in plain language, of the terms of the agreement and all significant matters relating to it". One of the significant matters was the fact that this was a very problematic request with a limited prospect of success; and in Ms Khetarpal's own estimation, one that required a full set of labour market test evidence. Without that evidence, her opinion was that she could not lodge the complainant's request. Her evidence was that she needed evidence of the prospective employer's current national advertising and WINZ inquiries, as well as complete draft work visa documentation.

[33] Ms Khetarpal is an experienced licensed immigration adviser, who emphasised duties of best practice in the course of her evidence and understood the importance of written communications with clients. Aside from clause 1.5(a), the 2010 Code requires any oral communications of significance to be confirmed in writing, pursuant to clause 3(f).

[34] Ms Khetarpal initially attempted to say she complied with her obligation to communicate in writing by providing the prospective employer with a written list of what she required from him. While the list is not available, I have no reason to reject Ms Khetarpal's claim she did write a list; a copy may have become detached from the file. However, she admits she did not write a letter or report of the kind required to gain informed instructions.[3] She attempted to excuse this because of a lack of an email address; however, she could provide no sensible excuse for failing to write a letter or memorandum to discuss with the complainant and his prospective employer.

[35] I find it implausible that Ms Khetarpal could have been confident the complainant's prospective employer would successfully assemble the labour market test evidence and other documentation. However, I give her the benefit of the doubt at the time of the 3 September 2012 meeting, as there was some documentation of that kind already in existence. Potentially, she may have believed the prospective employer did understand what was required. However, on Ms Khetarpal's evidence, she had to review that perception regularly. She said she was speaking to the complainant's prospective employer monthly, or thereabouts, about his lack of progress in providing information. Ms Khetarpal could not explain why she did not set out in writing what she required, and state that until she had that information she could not progress the request, and that the complainant was at risk if she could not file the request. In the absence of taking that action, the complainant and his prospective employer would likely understand that matters were under control. While I approach the evidence from the complainant's prospective employer with great caution, one point I do take from his evidence is that it appeared he had the simple concern that he and the complainant paid a large sum of money, and they both expected that there would be action taken to assist the complainant to obtain a work visa. There is no basis to think the complainant and his prospective employer (like anyone in the same position) would have not been most concerned if they understood the lack of progress and the implications of it.

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[2] She was obliged, under clause 1.1(f) of the 2010 Code, to facilitate the provision of interpreters and translators where appropriate.

[3] Clause 1.1(b) of the 2010 Code contemplates an obligation to have informed instructions to act professionally in accordance with that clause.

[36] By December 2012, Ms Khetarpal knew:

[36.1] She had taken $3,450 in non-refundable[4] fees.

[36.2] She had a duty to ensure that her client fully understood the risks relating to his prospects of success.

[36.3] She had never set out the risks in writing.

[36.4] The passage of time adversely affected her client. Not only had he (without justification) overstayed for some five years now, he had engaged a licensed immigration adviser who was still not progressing his request.

[36.5] Immigration New Zealand could deport the complainant at any time.

[36.6] The complainant and his prospective employer probably understood "everything was under control", and she had a duty to inform them if that was not the case.

[37] The reality, which Ms Khetarpal as an experienced immigration adviser understood, was that the matter was definitely not under control. On the contrary, on her own estimation, she could not lodge an adequate section 61 request, and there was little progress toward that. Her client was likely to be deported if detected. Ms Khetarpal's failure to set out in writing the realities of her client's position by December 2012 is concerning; she did not meet her obligations under the 2010 Code to inform him when first taking the instructions, and then did not meet her ongoing duty to keep him informed.

[38] The point in time at which I am satisfied the evidence establishes Ms Khetarpal was misleading her client, occurs in December 2012. On 21 December 2012, Ms Khetarpal reported to Immigration New Zealand that her client was in New Zealand unlawfully and that she intended to lodge an application under section 61. She knew her client was at risk of being deported, and drawing attention to his situation would likely result in deportation if his whereabouts were discovered. I accept that Immigration New Zealand would have acted reasonably and responsibly; and they did so, giving the complainant approximately three weeks to lodge his request under section 61 "or face real possibility of deportation and lengthy ban periods". Ms Khetarpal says she discussed these issues with the complainant's prospective employer before notifying Immigration New Zealand; however, she admits she made no written record and failed to confirm the details of the claimed oral discussion as required by clause 3(f) of the 2010 Code. Informing Immigration New Zealand was a critical step; Ms Khetarpal could not provide any sensible explanation for taking such a critical step without written instructions or communications setting out the risk, benefits, and potential consequences. I do not accept that she communicated with the complainant or his prospective employer in the manner required to gain informed instructions before notifying Immigration New Zealand. At the least she had to confirm that discussion in writing, and did not do so on her own admission.

[39] Ms Khetarpal did claim that it was in her client's interests to inform Immigration New Zealand, as she would be on vacation, as would some sections of Immigration New Zealand. This, she said, meant her client was at risk of deportation without the opportunity for intervention. The notification resulted in Immigration New Zealand suspending potential enforcement for three weeks. Ms Khetarpal could not justify the increased risk of detection, given the complainant had already overstayed for some five years, against the certainty that Immigration New Zealand would commence active enforcement after the suspension period. Accordingly, I am sure that by this point, Ms Khetarpal was not acting in her client's interests and she did not have informed instructions. She must have known her client paid money to her in the belief that she would take care of his interests and let him know of any adverse developments. She never gave him the information required to understand either his situation, or what was required to provide the best chance of a favourable outcome.

[40] Having exposed her client to the risk of notifying Immigration New Zealand, when the deadline expired on 11 January 2013, Ms Khetarpal failed to protect the complainant. When the suspension expired, she knew Immigration New Zealand would be actively looking for the complainant to deport him. However, she did not file a request for a visa, she did not

[4] This was her view of the status of the fees at the time.

communicate with Immigration New Zealand, and she did not give her client written notice of the warning Immigration New Zealand issued on 24 December 2012.

[41] Ms Khetarpal could not point to any information she held on 21 December 2012, when she wrote to Immigration New Zealand saying she would "submit the application in the week of 7th Jan[uary]" 2013, to suggest she could do so. Her evidence was that on 21 December and the week of 7 January she did not have the necessary information, and she could not identify any steps she took in that period that could be expected to result in her receiving the information she required to file the request by the week of 7 January 2013.

[42] By this point, there is a series of grave professional lapses. They are not explicable as the actions of an adviser who is out of her depth making a series of poor decisions. I am sure (in the sense that this term references the highest end of the sliding scale of the balance of probabilities), that Ms Khetarpal took funds from her client, did little or no work, did not inform her client of the peril he was in, and expected that in due course he would be deported. The interaction with Immigration New Zealand was likely to hasten his deportation. She maintained some ineffective communication with her client through his prospective employer to create the impression she was providing services in return for the fees she solicited.

[43] When she gave her evidence, Ms Khetarpal had every opportunity to explain, she could not provide a sensible explanation. The steps taken that, together, prove the case against Ms Khetarpal, are as follows:

[43.1] The non-refundable fee is in itself a neutral element. However, it has a different significance when Ms Khetarpal failed to carry out her instructions, knowing that doing so would likely result in her client forfeiting the fee.

[43.2] Further, she solicited the fee by failing to comply with the mandatory obligation in the 2010 Code to give written information regarding immigration prospects to gain informed instructions.

[43.3] After it became apparent the complainant's prospective employer was not providing the necessary information, Ms Khetarpal failed to assist by setting out in writing what was required, and failed to set out the risks for the complainant.

[43.4] Ms Khetarpal reported her client's situation to Immigration New Zealand, triggering a short deadline and the expectation of enforcement action following. She failed to set out in writing what these risks were or reporting to INZ, and had no reason to expect she could meet the deadline for filing the request with Immigration New Zealand.

[43.5] She allowed the deadline to pass and did nothing in terms of dealing with Immigration New Zealand, or giving her client notice of the consequences.

[43.6] When she left her employment some months later, she had still not filed her client's request.

[44] Accordingly, I find Ms Khetarpal did dishonestly mislead her client, taking fees, causing him to understand his request was managed properly, while knowing she was not progressing it using her professional skills and in accordance with the 2010 Code.

[45] The other particular of the allegation is dishonest and misleading behaviour in representing to the complainant's prospective employer that the request was "pending". To uphold that element of the complaint, I would need to place some reliance on the evidence from the prospective employer regarding what Ms Khetarpal said. I cannot do so; the potential for confused oral communication was significant. Accordingly, I dismiss this element of the complaint.

First ground of complaint – carrying out instructions

[46] The first ground of complaint is that Ms Khetarpal failed to perform her services with due care, diligence, respect and professionalism, and carry out the lawful informed instructions of her client, in breach of clauses 1.1(a) and (b) of the 2010 Code.

[47] For the reasons discussed, I am satisfied Ms Khetarpal never had informed instructions. She did take fees and undertake to file a section 61 request, and then failed to do so. I am satisfied she made no adequate effort to obtain the material she required to prepare and lodge the request. Her lack of effort involved an unprofessional failure to inform her client of what was required in the manner required by the 2010 Code, and she did so with a lack of care, diligence and respect, as she solicited fees and then did not provide the services she promised.

[48] I find this ground of complaint established.

Second ground of complaint – dishonest or misleading behaviour

[49] The second ground of complaint concerns dishonest or misleading behaviour, which is a ground for complaint under section 44(2)(d) of the Act. For the reasons discussed, I find that Ms Khetarpal intentionally caused the complainant to pay $3,450 on a non-refundable basis; and she represented that in return she was managing his instructions professionally and properly and the instructions were at all times under control. In fact, she was not acting professionally, in accordance with the 2010 Code, or in her client's interests. She behaved in a dishonest and misleading manner in those respects.

[50] However, I do not find Ms Khetarpal made a specific representation that she had filed the section 61 request with Immigration New Zealand when she had not done so.

Third ground of complaint – client funds

[51] Clauses 4(a), (b) and (c) of the 2010 Code require client funds to be deposited in a separate clients' bank account. Given that Ms Khetarpal accepts the fee could not be non-refundable, the money should have been in a client funds account and, accordingly, Ms Khetarpal is in breach.

[52] I would regard this as a mere technical breach if my findings were that Ms Khetarpal took a non-refundable fee, and then diligently complied with her professional obligations and set about earning the fee. At the time, the Authority regarded this as acceptable practice.

[53] However, I have found Ms Khetarpal initially failed to obtain informed instructions before taking the money. Her client was entitled to understand there was a significant risk she could do little or nothing for him. Then she failed to deliver the service she promised. In these circumstances, this was not a mere technical breach. These circumstances should have made it clear to Ms Khetarpal she could not properly regard the fee as non-refundable. If the fee was not properly non-refundable, it then belonged in a client funds account.

Decision

[54] The Tribunal upholds the complaint pursuant to section 50 of the Act.

[55] Ms Khetarpal breached the Code of Conduct in the respects identified, and she engaged in dishonest and misleading behaviour. Breaches of the 2010 Code are grounds for complaint pursuant to section 44(2)(e) of the Act, and dishonest and misleading behaviour are grounds for complaint under section 44(2)(d).

[56] The complaint included wider grounds. The Tribunal dismisses the complaint to the extent that it is wider than the breaches identified above.

Submissions on Sanctions

[57] The Tribunal has upheld the complaint. Therefore, pursuant to section 51 of the Act, it may impose sanctions.

[58] The Authority and the complainant have the opportunity to provide submissions on appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, the adviser is entitled to make submissions and respond to any submissions from the other parties.

[59] 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

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

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

[60.2] The adviser is to make any submissions (whether or not the Authority or the complainant make submissions) within 15 working days of the issue of this decision.

[60.3] 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.

Order prohibiting publication of the complainant's name or identity

[61] The complainant is in New Zealand unlawfully, and it is important that the complaint process is not undermined by a complaint increasing the risk of enforcement action. Accordingly, this decision is not to be published with information identifying the complainant. The identity of the complainant's prospective employer could potentially identify the complainant; accordingly, information identifying him is not to be published.

[62] The Tribunal reserves leave for the complainant or the Registrar to apply to vary this order. The order does not prevent:

[62.1] The complainant disclosing the decision to his professional advisers, or any authority he considers should have a copy of the decision, or

[62.2] The adviser disclosing the decision to any barrister or solicitor of the High Court of New Zealand in its original form for the purpose of obtaining legal advice regarding this complaint.

DATED at WELLINGTON this 5th day of November 2015

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G D Pearson
Chair