

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

Decision No: [2016] NZIACDT 10

Reference No: IACDT 050/15.

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**Michael Carley (Immigration New  
Zealand)**

Complainant

**AND**

**Nadezda (Nadia) Pastushenko**

Adviser

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**DECISION**

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**REPRESENTATION:**

**Registrar:** Ms C Pendleton, lawyer, MBIE, Auckland.

**Complainant:** Ms G Kelly, lawyer, Immigration New Zealand, Auckland.

**Adviser:** In person.

Date Issued: 16 March 2016

## DECISION

### Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The complaint is that Ms Pastushenko had a client who remained in New Zealand when his visa expired, and she engaged him to work with a company she controlled. Ms Pastushenko said this was in order, as he was not an employee, only a casual contractor.
- [2] However, Ms Pastushenko did accept, after the Tribunal questioned her, she had misunderstood the law and the work was unlawful. However, she said her motivation was humanitarian she did not exploit her client or intentionally breach New Zealand's immigration laws.
- [3] The Tribunal has upheld the complaint, and accepted Ms Pastushenko's explanation of the circumstances. However, the Tribunal has noted Ms Pastushenko had a duty to ensure she fully informed herself of the restrictions that apply to work in New Zealand when a person requires a visa.

### The complaint

- [4] The Registrar's statement of complaint put forward the following background as the basis for the complaint:
- [4.1] A person, who was in New Zealand unlawfully, approached Ms Pastushenko to assist with his immigration situation. He had been in New Zealand without a visa for some years.
- [4.2] She agreed to assist him with a request to Immigration New Zealand to try to put his immigration situation in order. To give him some means, she allowed him to work at a rate of \$16.50/hr for a company she controlled.
- [4.3] Ms Pastushenko prepared the request for Immigration New Zealand to issue a visa for her client, the request was unsuccessful and her client left New Zealand.
- [4.4] The Registrar identified potential infringement of professional standards during the course of Ms Pastushenko's engagement, the allegations were that potentially she breached clause 3(a) of the Licensed Immigration Advisers Code of Conduct 2014 (the 2014 Code), which required her to act in accordance with New Zealand law. As:
- [4.4.1] Ms Pastushenko allowed her client who was unlawfully in New Zealand to carry out paid work for her company in exchange for scheduler payments; with knowledge of the circumstances.
- [4.4.2] Section 350(1) of the Immigration Act 2009 prohibits every employer from allowing a person to work in their service knowing that the person is not entitled to do so.
- [4.4.3] Accordingly, Ms Pastushenko was in breach of section 350(1), and accordingly 3(a) of the 2014 Code.

### The responses

- [5] 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.
- [6] Ms Pastushenko filed a statement of reply; the critical element of her response was that her company did not employ the person who was unlawfully in New Zealand. She accepted he did work and was paid hourly remuneration, but said it was a contract for services, not an employment relationship.

## Procedure

- [7] It appeared to the Tribunal that Ms Pastushenko misunderstood the law, as the prohibition in section 350(1) covers any activity provided for gain or reward<sup>1</sup>, regardless of how the parties structure the arrangement.
- [8] The Tribunal requested that Ms Pastushenko appear, so the Tribunal could discuss the issue with her. She appeared, and explained the circumstances. The Tribunal did not conduct a full oral hearing. The nature of the process was to provide an opportunity to ensure that Ms Pastushenko had the opportunity to understand the grounds of the complaint, and respond informed of the relevant legal basis for the complaint. The hearing has otherwise been on the papers.
- [9] After reviewing the legal issues Ms Pastushenko accepted she had been in error and misunderstood the nature of the prohibition; but now accepted she was wrong and had breached section 350(1). It follows the Tribunal will uphold the complaint.

## Discussion

### *Preliminary*

- [10] It is to Ms Pastushenko's credit she has admitted she was in error and did breach section 350(1). It is appropriate that I should set out my findings regarding the circumstances.

### *Findings*

- [11] I uphold the complaint on the grounds contained in the statement of complaint.
- [12] I do not find Ms Pastushenko intended to breach section 350(1), I accept she mistakenly believed she could allow a contractor who was not an employee to undertake some casual work. I also accept that her motivation for providing the opportunity did not have any element of exploitation of her client, her motives were humanitarian. Furthermore, she undertook the immigration work, and her client left New Zealand after Immigration New Zealand declined to issue a visa.
- [13] Ms Pastushenko has a history of public service, including as a trustee of a church. That was how her client's plight came to her attention. She has a history of working in the not for profit sector. Furthermore, Ms Pastushenko is a qualified professional, in more than one field.
- [14] Accordingly, I find that Ms Pastushenko genuinely misunderstood the legal issues relating to employment. However, every licensed immigration adviser is required to understand the restrictions on working in New Zealand without a visa; and furthermore she ought to have addressed the question much sooner than she did after Immigration New Zealand raised the concern and put her on notice her understanding may not have been correct.

## Decision

- [15] The Tribunal upholds the complaint pursuant to section 50 of the Act; Ms Pastushenko breached the 2014 Code in the respect identified, and that is a ground for complaint pursuant to section 44(2)(e) of the Act.

## Submissions on Sanctions

- [16] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [17] 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 Pastushenko is entitled to make submissions and respond to any submissions from the other parties.

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<sup>1</sup> Refer definitions of "employer", "employee" and "work" in section 4 of the Immigration Act 2009.

*Timetable*

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

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

[18.2] 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.

[18.3] 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 16<sup>th</sup> day of March 2016

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**G D Pearson**  
Chair