

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

Decision No: [2016] NZIACDT 33

Reference No: IACDT 030/14

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**Rovelyn Pasumala Casas**

Complainant

**AND**

**Rosemarie Navarette-Scholes**

Adviser

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**DECISION**

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**REPRESENTATION:**

**Registrar:** Ms S Blick, Lawyer, MBIE, Auckland.

**Complainant:** Mr P Moses, Barrister, Auckland.

**Adviser:** Mr M Manhire, Manhire and Associates, Lawyers, Auckland.

Date Issued: 28 June 2016

## DECISION

### Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The facts alleged in support of the complaint are, in outline:
- [1.1] Ms Navarette-Scholes is a licensed immigration adviser, and she commenced providing immigration services in the Philippines in late 2011. She did not obtain a written agreement for the provision of immigration services at that point, but provided services and received fees.
- [1.2] In April or May 2013, Ms Navarette-Scholes asked the complainant to sign an agreement for the provision of services, backdated to 20 June 2012. She has since passed it off as correctly dated.
- [1.3] Ms Navarette-Scholes failed to enter into a complying agreement for the provision of professional services before providing those services, and failed to set out the fees she charged.
- [1.4] When Ms Navarette-Scholes's client terminated her employment in New Zealand, Ms Navarette-Scholes failed to give her adequate advice regarding her immigration status particularly that her visa only allowed her to work for a nominated employer.
- [2] Ms Navarette-Scholes disputes the factual allegations and contends she complied with her professional obligations. Accordingly, the Tribunal is required to consider the material before it, reach a view on the facts, and then consider whether Ms Navarette-Scholes met her professional obligations.

### The complaint

- [3] The Registrar's statement of complaint put forward the following background:
- [3.1] In October 2011, the complainant met with Ms Navarette-Scholes in the Philippines. She referred her to Ms Pizarra. Between November 2011 and November 2012, the complainant paid Ms Pizarra a total of PHP401,000 (approximately \$11,797 New Zealand dollars (NZD)) for Ms Navarette-Scholes' services.
- [3.2] On 3 September 2012, Ms Navarette-Scholes wrote to the complainant asking her to sign a written agreement for her services in relation to a work visa application. Ms Navarette-Scholes arranged employment for the complainant in New Zealand and submitted a work visa to Immigration New Zealand. Immigration New Zealand granted the application on 14 September 2012.
- [3.3] In November 2012, the complainant came to New Zealand to work. The following month, the complainant contacted Ms Navarette-Scholes to complain that she was required to work more hours than agreed. Ms Navarette-Scholes agreed to find alternative employment.
- [3.4] In February 2013, the complainant notified Ms Navarette-Scholes that she had resigned from her employment. In April or May 2013, Ms Navarette-Scholes provided the complainant with a written agreement dated 20 June 2012. This agreement related to her services in connection with the initial work visa application (granted some six months earlier in September 2012). The complainant signed the agreement.
- [3.5] In April and May 2013, the complainant completed two paid work trials. On 9 May 2013, Ms Navarette-Scholes submitted a second work visa application to Immigration New Zealand for the complainant.
- [3.6] On 11 June 2013, Immigration New Zealand wrote to Ms Navarette-Scholes noting concerns that the complainant appeared to have worked in breach of her visa conditions. Ms Navarette-Scholes provided a response but later referred the complainant to a lawyer.

- [4] The Registrar identified potential breaches of professional standards during the course of Ms Navarette-Scholes's engagement. The allegations were that potentially:
- [4.1] Ms Navarette-Scholes engaged in dishonest or misleading behaviour, which is a ground for complaint under section 44(2)(d) of the Immigration Advisers Licensing Act 2007 (the Act). The alleged circumstances are:
- [4.1.1] Ms Navarette-Scholes agreed to provide immigration services and did so to lodge the first work visa application on 20 June 2012, however, she presented the relevant professional services agreement on or about April or May 2013 to the complainant for signature. When presented, the agreement was pre-dated to 20 June 2012.
- [4.1.2] Ms Navarette-Scholes backdated the agreement to make it appear the agreement was earlier than the date it was signed.
- [4.1.3] If the backdating was not dishonest and misleading, it may have breached clause 3 of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code) which required professional business practices relating to records and contracts.
- [4.2] Ms Navarette-Scholes breached clause 1.5(b) and 8(b) of the 2010 Code. They required that a licensed immigration adviser have an agreement for the provision of professional services, and that it contain a full description of the services to be provided, and set out the fees and disbursement to be charged. The circumstances were that the agreement for providing professional services containing this information did not exist before the services were provided, and costs incurred.
- [4.3] Ms Navarette-Scholes breached clause 8(a) of the 2010 Code as it required that she set fees that are fair and reasonable in the circumstances; and:
- [4.3.1] the complainant paid Ms Pizarra a total of approximately \$11,796 NZD for Ms Navarette-Scholes' services relating to the first work visa application;
- [4.3.2] her fee for recruitment services was approximately \$7,649 NZD, and \$4,148 NZD as payment towards immigration services; and,
- [4.3.3] potentially the fee was not fair and reasonable in the circumstances.
- [4.4] Ms Navarette-Scholes breached clause 1.1(a) of the 2010 Code. The provision required her to perform her services with due care, diligence, respect and professionalism. The circumstances were:
- [4.4.1] In February 2013, the complainant told Ms Navarette-Scholes she had resigned from her employment and Ms Navarette-Scholes did not advise her she could not work for another employer.
- [4.4.2] The complainant did not understand her visa conditions were restricted to working for one employer, and that she breached the condition and this was a matter of concern to Immigration New Zealand.
- [5] The grounds of complaint were wider; 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

- [6] While the Tribunal usually hears complaints on the papers, where necessary it may convene an oral hearing to address any elements of the complaint. The Tribunal proposed to hear Ms Navarette-Scholes's response to the complaint in an oral hearing as she disputed the facts and faced an allegation of dishonesty.

- [7] As matters developed, Ms Navarette-Scholes and the complainant wished to resolve the complaint by agreement. However, the Registrar correctly pointed out that the hearing of the complaint is a statutory process and is not under the control of the complainant. The parties have not been able to agree on the facts.
- [8] The final position is that there is no agreement on the facts. However, the parties wish to have the complaint heard on the papers. Accordingly, the material for the hearing is all the papers before the Tribunal and particularly:
- [8.1] The statement of complaint, with the documents attached to it; and,
- [8.2] A statement filed by counsel for Ms Navarette-Scholes, which asserts:
- [8.2.1] that the professional services agreement was dated and signed on 20 June 2012. It states that the complainant has become confused regarding the agreement and clarifies that in 2013, rather than signing it, Ms Navarette-Scholes showed it to the complainant in relation to making payment arrangements;
- [8.2.2] that the client engagement process was completed in June 2012, and in accordance with the 2010 Code;
- [8.2.3] that the fees were reasonable as the recruitment package was a significant body of work and that Ms Pizarras likely charged referral fees as she acted as the complainant's agent not as Ms Navarette-Scholes's agent; and,
- [8.2.4] that Ms Navarette-Scholes gave advice regarding the complainant only being entitled to work for a specified employer and that the breach was the complainant's responsibility and occurred without Ms Navarette-Scholes knowing of the complainant's actions at the time.
- [8.3] In reply, counsel for the complainant submitted that:
- [8.3.1] the complainant first paid for services on 4 November 2011 and it was for consultation with Ms Navarette-Scholes, not Ms Pizarras. The professional relationship commenced at about that time as Ms Navarette-Scholes was providing advice from then;
- [8.3.2] an initial agreement was signed in the Philippines on 20 June 2012 and no explanation regarding fees or a copy of the contract was supplied to the complainant at that time. Furthermore, another agreement of the same date was signed in Auckland, as alleged in the statement of complaint.
- [8.3.3] the fees were excessive; and,
- [8.3.4] the complainant left her employment as the employer exploited her and Ms Navarette-Scholes did not provide advice regarding the conditions on her visa.
- [8.4] The complainant and Ms Navarette-Scholes filed a notice indicating that they agree that Ms Navarette-Scholes will not resume her career as a licensed immigration adviser, and accordingly, their settlement based on a payment of \$3,000 by Ms Navarette-Scholes to the complainant is a satisfactory outcome. It disposes of the inter-parties issues. Considering that Ms Navarette-Scholes has left the profession, the public interest issues are not significant.
- [8.5] The Registrar filed a memorandum indicating she considered there are public interest issues given the allegations and sought to have the complaint determined on the papers.
- [9] In short, the Registrar takes the position that there is sufficient evidence to establish the complaint on the papers and it is of sufficient gravity that the Tribunal should hear it. I appreciate that there are circumstances that have made it difficult for Ms Navarette-Scholes to

respond to the complaint and they are potentially grounds for not proceeding with the hearing given the complainant's view of the matter.

- [10] I am satisfied that I should hear the complaint on the papers. The complainant has presented her case supported by a statutory declaration. There is a strong case on the papers. Ms Navarette-Scholes has responded with submissions only. Accordingly, this is not a case where in the absence of further evidence I could simply dismiss the complaint because the competing contentions leave the matter unresolved.
- [11] In these circumstances, I will determine the complaint on the papers, however, I am mindful of the Registrar's submission that if the Tribunal upholds the complaint, the settlement is a matter to consider in relation to the imposition of penalties.

## **Discussion**

### *The standard of proof*

- [12] 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*

- [13] The Registrar provided a chronology and supporting documentation. Ms Navarette-Scholes challenged the facts through submissions from her counsel. Assessing those submissions turns on the support they derive from the written material.
- [14] The narrative provided by the Registrar in the statement of complaint is a starting point for consideration. I will address the contentious facts in relation to each of the four grounds of complaint.

### *Dishonest or misleading behaviour*

- [15] The allegation of dishonest or misleading behaviour turns on whether Ms Navarette-Scholes has presented an agreement dated 20 June 2012 as if it had been executed on that date, when in fact she first presented it to the complainant for signature in April or May 2013.
- [16] The complainant provided a statutory declaration asserting that this is what occurred and that the agreement in issue did not exist on 20 June 2012. It is clear that there is another agreement with that date, and the complainant accepts she executed that agreement on 20 June 2012.
- [17] Ms Navarette-Scholes has not given any sworn evidence. Her counsel has provided a submission to the effect that the complainant executed the documents on 20 June 2012. The complainant's counsel has pointed out that the two agreements purported to be dated 20 June 2012 are witnessed by different persons, and reiterates the complainant's sworn evidence and its coherence with the events and the written record.
- [18] The only sworn evidence is from the complainant. Ms Navarette-Scholes has not provided sworn evidence or taken up the opportunity to test the complainant's evidence or subject herself to cross-examination. The submission her counsel makes appears to be incongruent with the written record, particularly as regards the existence of two agreements with one date and different witnesses.
- [19] I am conscious of the gravity of this ground of complaint and accordingly, apply the standard of proof at the high end. However, I have before me sworn evidence and a coherent written record challenged only by submissions that fail to explain that material in a manner that is consistent with the disputed agreement having been dated on 20 June 2012.
- [20] Accordingly, I find Ms Navarette-Scholes did present the disputed agreement in or about April or May 2013 with a date of 20 June 2012 and has falsely presented it as executed on 20 June 2012. She has presented it to the Registrar and the Authority on the false and misleading basis that it existed on 20 June 2012. Accordingly, I find Ms Navarette-Scholes engaged in dishonest and misleading behaviour and uphold that ground of complaint.

*No written agreement with particulars of services and costs*

- [21] Clause 1.5(b) and 8(b) of the 2010 Code required that a licensed immigration adviser ensure that agreements contain a full description of the services to be provided, and set out the fees and disbursement to be charged. Given the finding that the agreement dated 20 June 2012 did not exist when Ms Navarette-Scholes began providing immigration services, this ground of complaint is established.
- [22] Ms Navarette-Scholes produced the second agreement to appear to have complied with these requirements, as otherwise, it is clear she did not do so. I accordingly uphold this ground of complaint.

*Fair and reasonable fees*

- [23] Clause 8(a) of the 2010 Code required that Ms Navarette-Scholes set fees that were fair and reasonable in the circumstances. At the point in time when Ms Navarette-Scholes agreed to provide professional services and began to do so, she did not set out her fees. She did not do so at that point in time, as she did not have an agreement that, if compliant with the 2010 Code, would have set out that information.
- [24] Ms Navarette-Scholes provided recruitment and immigration services and the fees were paid through Ms Pizarra, who apparently also took fees. Clause 8 required that Ms Navarette-Scholes set out fair and reasonable fees, and disbursements, and that she do so before commencing work. In addition, she was required to provide invoices setting out a full description of the services provided.
- [25] In my view, clause 8 required that Ms Navarette-Scholes set out what amounts of money her client paid and how this money was allocated. Ms Navarette-Scholes used her licence to engage with her client but elected to be paid through another person. Accordingly, the starting point was that her client was entitled to know exactly who was paid, how much they were paid, and what services were provided in exchange for those payments.
- [26] I can accept that there may be instances where the agent of a client may provide other services that are quite independent of the licensed immigration adviser. For example, if a chartered accountant was providing business services, and they engaged a licensed immigration adviser to assist their client with immigration; those other services may be quite separate and not a matter for the licensed immigration adviser.
- [27] In the present case, there is no evidence of any transparency in relation to the fees Ms Pizarra and Ms Navarette-Scholes charged. Ms Navarette-Scholes had an obligation to ensure that there was transparency at the time she commenced her professional engagement.
- [28] As Ms Navarette-Scholes engaged with her client as a licensed immigration adviser, she was required to account for all the professional services she provided. While employment services may not be restricted under the Immigration Advisers Licensing Act 2007, the situation is no different from other professionals who will provide both restricted and non-restricted services. She was required to disclose and record all the fees asked for and received.
- [29] Accordingly, I am satisfied that about late 2011 when Ms Navarette-Scholes began to provide services, she had failed to set out the fees that were fair and reasonable in the circumstances. I am satisfied that Ms Navarette-Scholes has never done so. The obligation is on Ms Navarette-Scholes to set fair and reasonable fees and unless and until she has transparently set out what all the fees her client paid to her and Ms Pizarra, and that they are at an appropriate level, she remains in breach of clause 8(b). However, that is not the ground of complaint, only important background.
- [30] Against this background, I must assess whether, on the balance of probabilities, Ms Navarette-Scholes set fees that were "fair and reasonable in the circumstances".. Ms Navarette-Scholes claims the fees were fair and reasonable. She says through her counsel that she operated a high-risk business, which is reflected in the fees charged and that this is well understood by her clients. Ms Navarette-Scholes contends through her counsel that the fees cover:
- [30.1] all reasonable expenses, as well as the upkeep of her immigration consultancy in the Philippines;

- [30.2] the training and development of staff in a country of high political and economic unrest;
- [30.3] the cost of Ms Navarette-Scholes travelling to the Philippines;
- [30.4] the cost of agents to assist with the provision of immigration services, particularly Ms Pizarra; fees which Ms Navarette-Scholes had only partial control over.
- [31] This is Ms Navarette-Scholes's response to an allegation that the fees she charged were excessive. I do not place an onus of proof on Ms Navarette-Scholes, however, she does face a realistic inquiry from the Registrar. The total fees appear very high for the services provided. That was the Registrar's view and it is also my view. Ms Navarette-Scholes provided an explanation which I regard as unsatisfactory for multiple reasons. She claims that the complainant understood the fees wrong, despite Ms Navarette-Scholes failing to comply with the requirements to properly disclose the fees.
- [32] If Ms Navarette-Scholes charged fair and reasonable fees, then she should be in a position to justify the fees based on standard rates, time, and attendance related to the costs of her practice, or by reference to competitive pricing. A combination of those elements is the routine response to an allegation of excessive charging by a professional person.
- [33] Instead, Ms Navarette-Scholes has failed to provide a reasoned response supported by specific information of that kind. I must infer that is because she is unable to justify the fees by doing so. Further, the justifications provided are not only unsupported by specific evidence, they raise serious concerns regarding how she determined the level of fees. In particular:
- [33.1] Ms Navarette-Scholes apparently chose to operate her practice in a manner that involved travel from New Zealand to the Philippines. She expected her clients to pay for the travel. Unless travel is for the specific purpose of a client's instructions, and disclosed and agreed to, then that is a cost of Ms Navarette-Scholes' style of practice. It is not a justification for charging fees that are higher than fair and reasonable fees in the jurisdiction where she provided services.
- [33.2] I am not satisfied that Ms Navarette-Scholes was required to travel in this case. Other licensed immigration advisers will routinely provide services of this kind from New Zealand using other forms of communication.
- [33.3] There is no evidence that costs of professional services in the Philippines are higher than New Zealand.
- [33.4] At the very least, Ms Navarette-Scholes had to disclose the split between Ms Pizarra and herself in relation to fees; the issue is not so much one of control rather of transparency for her client who could decide whether to accept the fees after the disclosure required under the 2010 Code.
- [34] Accordingly, I am satisfied that, on the balance of probabilities, the fees were excessive and accordingly, were not fair and reasonable. Despite appearing excessive, Ms Navarette-Scholes has provided neither a transparent, nor a satisfactory explanation.
- [35] The extent to which the fees were excessive is a matter to consider when imposing sanctions. Accordingly, I uphold the complaint that Ms Navarette-Scholes did not set fees that are fair and reasonable and so breached clause 8(a) of the 2010 Code.

*Failure to provide proper and adequate advice*

- [36] Clause 1.1(a) of the 2010 Code required Ms Navarette-Scholes to perform her services with due care, diligence, respect and professionalism. In February 2013, the complainant told Ms Navarette-Scholes that she had resigned from her employment. The complainant says that Ms Navarette-Scholes did not advise her she could not work for another employer. She provided sworn evidence of that and Ms Navarette-Scholes has not answered it with her own sworn evidence, or presented herself for cross-examination. Ms Navarette-Scholes was obliged under clause 3(f) of the 2010 Code to confirm in writing the details of material discussions with clients. When a client in New Zealand under a work visa is restricted to one employer and leaves employment, it is a significant event and it is not uncommon for clients to misunderstand their immigration status.

- [37] Ms Navarette-Scholes says she provided advice but cannot produce the record that should have been part of providing that advice..Considering this, I am satisfied on the balance of probabilities, that the complainant's account is correct and consequently, find Ms Navarette-Scholes failed to provide advice.
- [38] Given the significance of leaving employment, and the need to apply for a new work visa to take up other employment, Ms Navarette-Scholes was careless and failed to apply the diligence and professionalism her client was entitled to receive from Ms Navarette-Scholes. Accordingly, I uphold this ground of complaint.

*Observation*

- [39] The grounds of complaint were wider; 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.

**Decision**

- [40] The Tribunal upholds the complaint pursuant to section 50 of the Act. Ms Navarette-Scholes engaged in dishonest and misleading behaviour, and breached the 2010 Code in the respects identified. These are grounds for complaint pursuant to section 44(2) of the Act.
- [41] In other respects, the Tribunal dismisses the complaint.

**Submissions on Sanctions**

- [42] The Tribunal has upheld the complaint. The Tribunal may impose sanctions pursuant to section 51 of the Act.

*Timetable*

- [43] The timetable for submissions will be as follows:
- [43.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [43.2] 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.
- [43.3] 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 28<sup>th</sup> day of June 2016.

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**G D Pearson**  
Chair