BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2016] NZIACDT 5

Reference No: IACDT 023/14

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

DECISION

REPRESENTATION:

Registrar: Mr A Dumbleton, lawyer, MBIE, Auckland.

Complainant: In person.

Adviser: Mr S Laurent, lawyer, Auckland.

Date Issued: 22 January 2016

DECISION

Introduction

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

[1.1] The complainant engaged Ms Khetarpal to provide immigration services for his wife. The agreed fee was $3,000, and the complainant paid $2,200 in instalments, before the arrangements ended.

[1.2] Licensed immigration advisers are required to keep fees paid in advice by clients in a separate clients' funds bank account, and only use the money for the purpose they receive it. Ms Khetarpal neither had a clients' bank account in her practice, nor put the complainant's $2,200 into such a bank account. She instead used the money as general practice revenue.

[2] Ms Khetarpal did not take issue with the essential facts, but claimed she acted properly:

[2.1] She said the Registrar approved taking fees paid in advance and using them, if they were due under a service agreement, notwithstanding that the services had not yet been provided;

[2.2] Ms Khetarpal sought to justify taking the $2,200 contending it was in the nature of a non-refundable retainer, so she was free to take the money when paid.

[3] The Tribunal is required to examine the true nature of the payment of $2,200, and in particular, Ms Khetarpal's contention she regarded it as money her practice was entitled to take, rather than being fees paid in advance.

[4] The Tribunal upheld the complaint, and found Ms Khetarpal had no grounds for treating the payments as a non-refundable retainer.

The complaint

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

[5.1] The complainant engaged Ms Khetarpal to assist with immigration matters, in particular to obtain a work visa under the partnership provisions for his wife.

[5.2] On 29 October 2012, the complainant signed a written agreement for the provision of services (the agreement). The agreement provided for total fees of $3,000 for services, $625 described as a "facilitation fee", and US$225 in disbursements. Only the $3,000 is relevant to this complaint, as the other money was for payment to third parties and the complainant had not made the payments.

[5.3] The complainant paid $1,000 when signing the agreement, $700 on 26 November 2012, and $500 on 13 December 2012; $2,200 in total. Ms Khetarpal's practice (where she was the sole licensee and an employee), did not operate a clients' funds account. Ms Khetarpal left the practice in late April 2013; she had not filed the application when she left.

[5.4] The complainant engaged new representation in May 2013, and the new proprietor of the practice refunded the complainant.

[6] The Registrar identified one potential area of infringement of professional standards during the course of Ms Khetarpal's engagement, the allegations were that potentially:

[6.1] Ms Khetarpal breached clauses 4(a) and (c) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). The provision required her to establish and maintain a separate bank account for client funds paid in advance for fees and/or

disbursements, and use funds held on behalf of clients only for the purpose for which they were paid to the adviser:

[6.1.1] The complainant paid Ms Khetarpal $2,200 in three separate instalments, she had not performed the services to which they related, so she should have deposited the funds into a client funds account.

[6.1.2] She instead used the money for general practice expenses.

[6.2] Ms Khetarpal potentially breached clause 4(a) of the 2010 Code, as she failed to establish and maintain a separate clients' bank account for holding all clients' funds paid in advance for fees and/or disbursements.

[6.3] She potentially breached clause 4(c) of the 2010 Code, as she did not place the complainant's fees into a client funds account, and used them as a practice asset.

[7] 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 have potential support.

The complainant's response

[8] The complainant did not file a statement of reply, after the new proprietor refunded his fees he sought to withdraw his complaint.

[9] The Tribunal deals with complaints under a statutory process. A complaint which has been lodged with the Tribunal is not solely an *inter partes* matter. Public interest issues arise in many professional disciplinary cases, and that is so in the present case.

[10] The Tribunal will take account of a request to withdraw a complaint, but it is not the complainant's right to withdraw a complaint from the Tribunal.

[11] This Tribunal, as is commonly the case for professional disciplinary tribunals, has an inquisitorial function. The Tribunal is not dependent on a complainant to prosecute a complaint.

[12] I am satisfied the public interest lies in determining the complaint, it is one of a series of complaints, and raises issues beyond the complainant's recovery of the fees he paid.

Ms Khetarpal's response

[13] Ms Khetarpal filed a statement of reply, the key matters she raised were:

[13.1] The agreement provided fees of $3,000 were payable on signing the agreement.

[13.2] Until this Tribunal's decision in *Geldenhuys v Yap* [2013] NZIACDT 27 on 12 April 2013 (after all the material events in this complaint occurred), the Registrar did not express concerns regarding setting fees payable on signing an agreement. During Ms Khetarpal's renewal of her licence, and in other cases, the Registrar received agreements showing fees payable on signing the agreement.

[13.3] In June 2013, the Registrar published a newsletter, which discussed the *Geldenhuys* case. The newsletter said:

> "… up until now the Authority has not questioned the practice of advisers charging sign-on fees and we have noted in our guidance that these are not fees taken in advance …
>
> … up until now the Authority has treated 'money in advance' as being money taken in advance of what was contractually agreed …"

[13.4] Ms Khetarpal said she believed it was appropriate to take fees at sign-on, and this was standard practice. Ms Khetarpal also said she had no control over the practice bank

account; the former proprietor of the practice had control with the office administrator, though Ms Khetarpal did have access to information regarding the bank transactions and did not consider she had to intervene.

The Registrar's reply

[14] The Registrar did not agree with Ms Khetarpal's analysis of either her arrangements with the complainant, or her description of the Registrar's historic approach to fees paid in advice of a licensed immigration adviser providing services.

[15] The Registrar pointed out that the agreement said Ms Khetarpal's practice would comply with the 2010 Code, and she provided a copy of the Code to the complainant. Ms Khetarpal, regardless, had to comply with the 2010 Code.

[16] The agreement provided the total fees were "$3,000 + third party fees & costs". The $3,000 was said to be payable on signing the agreement. The complainant paid $2,200 of the total, and Ms Khetarpal had not performed the work. She did not treat the payments as client funds and apparently used them for general practice expenses. That, the Registrar contended, was sufficient to establish a breach of the 2010 Code.

[17] In relation to Ms Khetarpal's assertions regarding the history of applying clause 4 of the 2010 Code, and Ms Khetarpal's understanding of it, the Registrar's position is:

[17.1] Ms Khetarpal's response to the Tribunal is to be contrasted with what she said to the Registrar when Ms Khetarpal was asked to respond to this complaint. She said at that point:

> "The Service Agreement [the complainant] signed with me (Global Visas) is abundantly clear that he was to pay $3,000 upfront, without which the application will not be prepared or submitted to Immigration New Zealand. This was also verbally explained to [the complainant] …"

[17.2] Further, Ms Khetarpal did not raise the *Geldenhuys* decision, or the Registrar's newsletter as an explanation or justification when she first responded to the Registrar.

[17.3] The Registrar said it was not credible to say the money the complainant paid was for anything other than fees in advance of Ms Khetarpal performing work. The agreement was simply that the complainant had to pay fees in advance, which clearly comes within the scope of clause 4 of the 2010 Code.

[17.4] The Registrar accepted the newsletter's reference to "contractually due" may be unclear, however the provisions of clause 4 were clear and obvious. Further, the newsletter post-dated Ms Khetarpal using the $2,200.

[17.5] The payment of $2,200 was an instalment of the total pre-payment of $3,000 (the total fee being $3,000). The $2,200 was not a non-refundable retainer belonging to Ms Khetarpal's practice. The Registrar's change of view related to non-refundable retainers, and there was no such retainer in this case. Accordingly, the change of view is not relevant.

Discussion

The standard of proof

[18] 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

[19] The Registrar provided a chronology and supporting documentation; and Ms Khetarpal has not generally challenged what happened. The area of dispute relates to the change of practice relating to so called "sign on fees". The issue is relatively simply, it was common practice for licensed immigration advisers to provide that some component of their fee was a non-

refundable payment in the nature of a retainer; and on payment, it immediately became the property of the adviser.

[20] The application of this practice failed, in some cases, to take account of the provisions in clause 8 of the 2010 Code, which has an overarching requirement that fees are "fair and reasonable in the circumstances". In the *Geldenhuys* case the Tribunal observed:

> [153] [It was] satisfied it was neither fair nor reasonable to charge a client for entering into a professional relationship, and doing so involved a breach of clause 8 of the Code. [It accepted] there can be occasions where a 'retainer' can be appropriate, where a fee is paid to ensure that a licensed immigration adviser keeps them self available and forgoes other professional opportunities. There may be other instances where a fee of that kind is appropriate. There was no justification in the present case.
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> [154] Ms Yap attempted to justify the fee in terms of it covering the cost of routine administrative tasks involved in commencing a professional engagement. The explanation is unconvincing. First, it was not supported with any costing information. Second, given the extremely high hourly rates it is not evident why Ms Yap could expect to separately recover the cost of incidental administrative tasks.

[21] The Tribunal made an adverse finding against the adviser in the *Geldenhuys* case. This present complaint involves no issues of that kind. The agreement provides the fee is $3,000, the only reference to the fee being non-refundable was that if the client withdrew the application, there was no refund. However, as the Registrar correctly observes that does not avoid the obligations under clause 8 of the 2010 Code, which Ms Khetarpal also provided to the complainant. Regardless, nothing in the agreement makes the whole fee or instalments of it take on the nature of a non-refundable retainer, or "sign on fee". The evidence is simply that the complainant paid instalments of the whole fee, in advance of receiving services, and the money was to pay for the services when delivered.

[22] Ms Khetarpal was required to establish and maintain a separate clients' bank account. She failed to do so. She received fees from the complainant, in circumstances where not only had she not performed the work; she refused to perform the work until the full $3,000 was paid. She could not deem the $3,000 to be non-refundable without breaching clause 8 of the 2010 Code. The agreement makes no claim the $3,000 was non-refundable, except in a singular and specific respect.

[23] Accordingly, the $2,200 the complainant paid to Ms Khetarpal's practice was paid in advance as fees and disbursements; it was in advance in the sense Ms Khetarpal had no contractual or other basis for treating the money as other than fees paid:

[23.1] In advance of services being provided, and

[23.2] In advance of her practice being entitled to take the fees, when she had provided the services.

[24] Accordingly, Ms Khetarpal failed to establish a client funds account, took the complainant's money did not deposit it in a client funds account, and used the money for a purpose other than the purpose it was paid to her, namely expending it on practice expenses.

[25] I accordingly find Ms Khetarpal breached clauses 4(a) and (c) of the 2010 Code.

[26] Ms Khetarpal has not identified any plausible reason for her to think the Registrar would approve of such conduct. Renewal of a licence may involve the submission of some information, Ms Khetarpal has not provided evidence she disclosed to the Registrar that she took fees in circumstances analogous to the facts in this case, and gained the Registrar's approval. The Registrar's newsletter following the *Geldenhuys* decision gives no reason to suppose the Registrar would have condoned such conduct; as it related to non-refundable sign on fees, and there was no such fee in this case.

Decision

[27] The Tribunal upholds the complaint pursuant to section 50 of the Act; Ms Khetarpal breached clauses 4(a) and (c) of the 2010 Code in the respects identified, and that is a ground for complaint pursuant to section 44(2)(e) of the Act.

[28] In other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

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

[30] 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 Khetarpal is entitled to make submissions and respond to any submissions from the other parties.

[31] The Tribunal notes it appears the new proprietor of the practice is entitled to an order that Ms Khetarpal pay to him the $2,200 he refunded to the complainant. The parties are requested to address that point.

[32] 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

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

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

[33.2] Ms Khetarpal 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.

[33.3] 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 22nd day of January 2016

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G D Pearson
Chair