

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

Decision No: [2016] NZIACDT 8

Reference No: IACDT 048/15

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Liekina Vailea

Complainant

AND

Hakaoro Hakaoro

Adviser

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

Adviser: In person

Date Issued: 2 February 2016

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal.
- [2] The complaint is that Mr Hakaoro accepted instructions to assist the complainants with a request for a visa; their visas were to expire relatively soon after that point:
- [2.1] The Registrar has provided evidence, and Mr Hakaoro has not sought to dispute it before this Tribunal, that:
- [2.1.1] Mr Hakaoro negligently failed to take steps to advise and assist his clients until many months after they were in New Zealand unlawfully;
- [2.1.2] He did not set out his fees in writing with particulars of amounts, terms and conditions;
- [2.1.3] He did not have a written agreement;
- [2.1.4] He stopped providing services after initially taking instructions, and again after doing some work, but did not inform his clients;
- [2.1.5] He did not keep client records.
- [2.2] These respective issues, if made out, are clear breaches of the Immigration Advisers Licensing Act 2007, and the Licensed Immigration Advisers Code of Conduct 2010.
- [3] Mr Hakaoro has not responded to the statement of complaint with an explanation or justification addressing the grounds of complaint. The Tribunal reviewed the material before it, and is satisfied it establishes that Mr Hakaoro has breached his professional obligations in the respects the Registrar identified.
- [4] Accordingly, the Tribunal has concluded it must uphold the complaint, on the grounds the Registrar identified.

The complaint

- [5] The Registrar filed a statement of complaint, she put forward the following background as the basis for the complaint:
- [5.1] The complainant authorised Mr Hakaoro to act for her and her family on immigration issues, this occurred on 9 August 2011. At some point during August 2011, the complainant met with Mr Hakaoro, to discuss the steps he would take.
- [5.2] On 26 August 2011, the complainant and her family's visas expired, and since then they have been in New Zealand unlawfully. Mr Hakaoro wrote to the complainant and said he would prepare a section 61 request for the complainant and her family, and not charge, what he said was his normal fee of \$5,000. The complainant paid Mr Hakaoro \$2,500; he did not issue a receipt.
- [5.3] Mr Hakaoro took no action, and in July 2012 he returned the passports he held, when the complainant require him to do so. After that point, Mr Hakaoro filed three section 61 requests, which Immigration New Zealand declined.
- [6] The Registrar identified potential infringements of professional standards during the course of Mr Hakaoro's engagement. Namely:

Negligence

- [6.1] That Mr Hakaoro was negligent, as he failed to prepare the section 61 requests when he had instructions to do so, and the complainant paid him to do so. His first response

was some 11 months after the complainant and her family had first been in New Zealand unlawfully. Negligence is a ground for complaint under section 44(2)(a).

- [6.2] The negligence lay in:
- [6.2.1] Not preparing the section 61 requests as agreed.
 - [6.2.2] Not taking steps to deal with the complainant and her family's unlawful status in New Zealand.
 - [6.2.3] Not informing the complainant of the section 61 requests, and
 - [6.2.4] Retaining the passports for the complainant and her family for an unreasonable time.
- [6.3] As an alternative, the Registrar put forward the potential for the same facts to amount to a breach of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). For reasons discussed below, I find the primary ground made out, and do not need to consider the 2010 Code further in that respect.

Clause 8 of the 2010 Code - fees

- [6.4] That Mr Hakaoro breached clause 8 of the 2010 Code, as it requires setting fair and reasonable fees, and setting out the amount, terms and conditions, doing so before commencing work incurring fees, and providing invoices. The Registrar alleged Mr Hakaoro potentially failed to comply as:
- [6.4.1] He said he would waive the normal fee of \$5,000 in a letter, but in fact required a payment of \$5,000 though he accepted \$2,500, which the complainant borrowed. She also paid a further \$50 for an initial consultation.
 - [6.4.2] He did not issue a receipt.
- [6.5] The specific breaches of clause 8 of the 2010 Code were:
- [6.5.1] Failing to set out the fee of \$2,500 for preparing the section 61 requests breached clause 8(b);
 - [6.5.2] Failing to set out the payment terms and conditions breached clause 8(c);
 - [6.5.3] Failing to provide an invoice for the fees of \$50 and \$2,500 breached clause 8(e).

Clause 1.5(b) and (d) of the 2010 Code – written agreement

- [6.6] That Mr Hakaoro breached clause 1.5(b) and (d) of the 2010 Code, as it required that he have a written agreement for the provision of services, containing a full description, and confirmation in writing that their client accepted the terms. The Registrar alleged Mr Hakaoro:
- [6.6.1] Had instructions before his clients were unlawfully in New Zealand. He sought information, later agreed to prepare section 61 requests, and after an extended period, lodged three section 61 requests. He did those things without having a written agreement, accordingly he breached:
 - [6.6.1] Clause 1.5(b) of the 2010 Code, as he did not have a written agreement relating to his initial instructions when the complainant and her family were in New Zealand lawfully; and
 - [6.6.1] Breached the same provision as he did not have a written agreement relating to his later instructions to take steps after the complainant and her family were in New Zealand unlawfully.

Clause 3(b) of the 2010 Code – termination of services

[6.7] That Mr Hakaoro breached clause 3(b) of the 2010 Code, as it required that he maintain professional business practices, and confirm in writing when work ceased. The Registrar alleged Mr Hakaoro:

[6.7.1] Delayed returning passports,

[6.7.2] Never said services had ended and that he no longer acted.

[6.8] Accordingly, the Registrar alleged Mr Hakaoro failed to provide confirmation in writing that work ceased.

Clause 3(e) of the 2010 Code – client records

[6.9] That Mr Hakaoro breached clause 3(e) of the 2010 Code, as it required that he maintain professional business practices, and maintain complete client records. The Registrar alleged Mr Hakaoro:

[6.9.1] Did not produce full records and files when required by the Registrar,

[6.9.2] Admitted he had no record or file, and

[6.9.3] Had not kept a record of his engagement.

[6.10] Accordingly, the Registrar alleged Mr Hakaoro failed to meet the record keeping obligations of clause 3(e).

The responses

[7] Neither Mr Hakaoro nor the complainant responded to the statement of complaint. The Tribunal issued a minute, which was consistent with earlier notifications. It said if the parties accepted the statement of complaint, they did not need to take any action. They were given time to file any response. Neither of them filed a statement of reply.

Discussion*The standard of proof*

[8] 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 material before the Tribunal

[9] The Registrar provided a chronology, and supporting documentation. The parties have not disputed this record or added to it.

[10] I am satisfied this material supports the grounds of complaint.

[11] Mr Hakaoro has had the opportunity to provide an explanation, and has not filed a statement of response. It is not a complicated complaint, and the Registrar has provided the documentation supporting it.

The facts

[12] The facts are uncomplicated, and essentially rely on the documentation the Registrar presented to the Tribunal. The principal issue is evaluating the material; the Tribunal sits as a specialist Tribunal and is required to evaluate the work of licensed immigration advisers¹.

¹ *Loh & Gu-Chang v IACDT & IAA* [2014] NZHC 1166, at Para.[64]

Negligence

- [13] The allegation against Mr Hakaoro is that he was negligent, as he failed to prepare the section 61 requests, when he had instructions to do so, and had received payment. His first response was some 11 months after the complainant and her family had first been in New Zealand unlawfully. He had instructions before they were unlawfully in New Zealand.
- [14] The status of being in New Zealand unlawfully in an invidious one, it precludes a person applying for a visa, and only a request under section 61 is possible. Immigration New Zealand may decline a section 61 request without giving reasons, and has discretionary powers that are wider than they have for other applications. The disadvantages of being in New Zealand also extend to potential long-term adverse consequences for future immigration prospects in New Zealand. Accordingly, if a client is about to lose their lawful status in New Zealand a licensed immigration adviser has a duty to advise of the consequences, and act with urgency. The greater the delay after a client is in New Zealand unlawfully, the more problematic their circumstances become.
- [15] I am satisfied that Mr Hakaoro instead took no significant step until some 11 months after his clients were in New Zealand unlawfully; and then filed three requests, which failed. He was plainly negligent, indeed grossly so. His negligence lay in failing to provide timely written advice on the consequences of being in New Zealand unlawfully, and failing to take urgent action to make a request under section 61. Potentially Mr Hakaoro breached duties to act urgently while his clients were in New Zealand lawfully; however, the Registrar did not make that allegation. Negligence is a ground for complaint under section 44(2)(a), and I am satisfied the complaint is made out in respect of his failure to act after his clients were in New Zealand unlawfully.
- [16] The Registrar did include, as potential negligence, Mr Hakaoro's failure to communicate regarding the section 61 requests, and his failure to return passports. However, they are incidental to his failure to take effective action after gaining informed instructions, and his failures to communicate. Given the absence of records, it is also difficult to identify precisely what communication there was. Accordingly, I make the findings of negligence in relation to the failure to act effectively, alone; and not in respect of these two incidental matters.

Clause 8 of the 2010 Code - fees

- [17] The 2010 Code is prescriptive in relation to fees. The allegation is that Mr Hakaoro breached clause 8 of the 2010 Code, to set out the amount, terms and conditions of fees, and did not provide invoices. Mr Hakaoro simply failed to comply with these obligations, and received \$2,550.
- [18] It inevitably follows he breached the 2010 Code in this respects.

Clause 1.5(b) and (d) of the 2010 Code – written agreement

- [19] Clause 1.5(b) and (d) of the 2010 Code, are similarly prescriptive in relation to written agreements. Mr Hakaoro had instructions, and no written agreement:
- [19.1] Relating to his initial instructions when the complainant and her family were in New Zealand lawfully; and
- [19.2] He also had fees relating to his later instructions to take steps after the complainant and her family were in New Zealand unlawfully.
- [20] Inevitably, I must uphold the complaint in this respect.

Clause 3(b) of the 2010 Code – termination of services

- [21] Clause 3(b) of the 2010 Code required Mr Hakaoro to give written advice when he ceased work. In the present case his clients were in an invidious position, they needed to know what was happening in respect of their unlawful status in New Zealand. Mr Hakaoro failed to communicate with them, about his failure to address their situation, and ultimately when he ceased work. There were repeated failures; Mr Hakaoro ceased work in the period until he first

filed a section 61 request; and later when he ceased taking any steps. His clients were entitled to know Mr Hakaoro was not doing anything to help them, despite him accepting instructions.

- [22] The evidence establishes this ground of complaint; however, it adds little to the negligent failure to provide advice and services.

Clause 3(e) of the 2010 Code – client records

- [23] The evidence shows Mr Hakaoro failed to keep client records, inevitably it follows he breached clause 3(e) of the 2010 Code, as it required that he maintain professional business practices, and maintain complete client records.

Decision

- [24] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [25] Mr Hakaoro was negligent, and breached the 2010 Code in the respects identified; they are grounds for complaint pursuant to section 44(2) of the Act.

Submissions on Sanctions

- [26] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [27] The Authority and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, Mr Hakaoro is entitled to make submissions and respond to any submissions from the other parties.
- [28] 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.
- [29] The Registrar is requested (before the time for Mr Hakaoro to file submissions expires) to report on the extent to which Mr Hakaoro has complied with previous orders the Tribunal has imposed in respect of sanctions, and the steps she has taken to enforce the orders.

Timetable

- [30] The timetable for submissions will be as follows:
- [30.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [30.2] 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.
- [30.3] 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 2nd day of February 2016

G D Pearson
Chair