IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 30

Reference No: IACDT 012/17

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**SUSMITH SURESH** Complainant
AND	**JANINE ELIZABETH** Adviser

DECISION
Dated 10 May 2019

REPRESENTATION:

Registrar:	In person
Complainant:	In person
Adviser:	In person

PRELIMINARY

[1] Ms Janine Elizabeth, the adviser, is based in Australia. At the relevant time, she was licensed in New Zealand as an immigration adviser and in Australia as a migration agent. She also describes herself as an immigration lawyer. The complainant was her client, Mr Susmith Suresh, an Indian national living in the United Arab Emirates.

[2] The complainant entered into an agreement with a company associated with Ms Elizabeth's employer in order to obtain residence in New Zealand. That agreement was, however, designed more for Australian rather than New Zealand migration. Furthermore, the complainant was left to work with the company's staff as Ms Elizabeth had no involvement with his file.

[3] Ms Elizabeth concedes that the client agreement was inappropriate for New Zealand. The essential issue to consider is whether Ms Elizabeth's lack of engagement with the complainant and his file is a breach of the relevant legislation and her professional obligations.

BACKGROUND

[4] Ms Elizabeth was a licensed immigration adviser, but her licence expired on 27 May 2017. She was and remains an employee of Best Migration Services Global Pty Ltd (BMS), an Australian company. Ms Elizabeth is still at BMS as a lawyer and licensed Australian agent. BMS works in conjunction with FBP International DWC LLC (FBP), a Dubai based company. The relationship between BMS and FBP is not known.

[5] The complainant and his wife met a staff member of FBP in Dubai with a view to seeking representation for lodging an expression of interest (EOI) with Immigration New Zealand under the skilled migrant category of residence policy.

[6] On 8 April 2016, the complainant signed a written agreement with FBP for the provision of advice for a residence visa. The agreement is on the letterhead of FBP but bears a "BMS-DUBAI" stamp. It was signed by the complainant on 8 April 2016 and by Ms Elizabeth on behalf of FBP on 18 April 2016.

[7] The agreement stated that FBP or an associate office would assist with the presentation of a visa application to Australia's Department of Immigration and Border Protection and/or Immigration New Zealand in accordance with Australian or New Zealand immigration laws and policies. A schedule of fees was attached to the agreement showing that the complainant would pay US$3,330.

[8] The complainant paid to FBP the sum of AED3,300 (US$891) and AED99 on 8 April and AED3,000 on 27 August 2016.

[9] An initial assessment of the complainant's eligibility for Immigration New Zealand's skilled migrant category was made by an employee of FBP on 8 April 2016, showing that he scored 150 points.

[10] An unknown person from FBP advised the complainant on 19 April 2016 that an assessment showed he scored sufficient points and that it would be BMS which would provide professional services to him.

[11] An employee of FBP sent the complainant a "Documentation Pack – Part 1" on 19 April 2016. Since his updated resume was fine, he was sent Part 2 of the Pack by an employee of FBP on 24 April.

[12] Employees of both BMS and FBP continued with work on the complainant's prospective application from time to time, including applying on 27 July 2016 to the New Zealand Qualifications Authority (NZQA) for a pre-assessment of his qualification. From time to time, the complainant sent instructions to BMS and/or FBP. NZQA's assessment was available on 9 August 2016.

[13] On 30 September 2016, an employee of BMS apologised to the complainant for the delays in replying, adding that there had been delays by NZQA due to technical issues with their portal. She hoped to update him within three working days.

[14] Immigration New Zealand changed the policy for the skilled migrant category on 12 October 2016, increasing the number of points for automatic selection from 140 to 160. The complainant was accordingly no longer eligible for automatic selection.

[15] On 12 October 2016, the complainant sent an email to an employee asking for the direct number of the manager and the complaints department. As he received no response, he sent a reminder email the following day.

[16] A telephone discussion between the complainant and an employee must have taken place since on 15 October 2016, an employee sent an email to the complainant referencing the conversation and advising that the issues would be escalated to the immigration lawyer. The employee noted that the complainant wanted to terminate the services of BMS.

[17] The complainant replied on the same day, 15 October. He stated that he had previously explained in detail that the unreasonable delay in service had adversely affected his application and that he had requested a full refund. The employee had promised to speak to the director and immigration lawyer and update him within two to three working days.

[18] There was a telephone discussion between the complainant and a manager on 15 October 2016 in order to hear his complaint. He was told there was a no-refund policy, as stated in the client agreement. He was further advised that his request to terminate their services would be brought to the attention of the immigration lawyer.

[19] The complainant sent further emails to a BMS employee on 21, 25 and 28 October and 2 November 2016 advising that he had still received no update. He stated that despite the no-refund policy, he urged them to factor in BMS's unexplained delays which meant his EOI could not be lodged before the new rules came into effect. The complainant does appear to have had a discussion with an employee on 31 October. He was advised in an email from an employee that day that they could review whether he had any options, following the change in his New Zealand eligibility. The employee sent an email on 5 November to say he was still working on a pathway for the complainant.

[20] An employee of BMS sent an email to the complainant on 10 November 2016 advising that he had looked at his options and found that he could migrate to Australia. The options were set out. BMS was unable to provide a refund in relation to New Zealand, but would be happy to "restrategise" his case for Australia.

[21] A Skype call between the complainant and an employee appears to have gone ahead on 18 November 2016. It is not known what was discussed.

[22] On 6 December 2016, the complainant sent an email to a BMS employee advising that due to poor service and the irresponsible way of handling his complaint, he had decided not to continue business with BMS. He wanted to get in touch with the manager or somebody with the authority to discuss his refund. He would be pursuing other channels of complaint and legal action against BMS.

[23] An employee of BMS sent an email to the complainant on 7 December 2016 advising that the agreement stated that there could be no refund and they were not liable for any changes in government policy affecting his application. They had provided an alternative pathway to migrate to Australia, which he had told them he wanted to discuss with his family before getting back to BMS. As he had constantly requested a refund, his case would be presented to the management and legal department.

COMPLAINT

[24] The applicant made a complaint to the Immigration Advisers Authority (the Authority), headed by the Registrar of Immigration Advisers (the Registrar) on 25 December 2016.

[25] The complainant said that during the entire course of his association with BMS, he had never once been contacted by Ms Elizabeth who was supposed to be the immigration lawyer. The last action taken on his application was on 27 July 2016 when BMS filed the pre-assessment application. The last update he had received from BMS was on 9 August 2016. Apart from advice about Australian migration, he had received no information regarding his complaint or a refund.

[26] The Authority formally advised Ms Elizabeth of the complaint on 17 May 2017 and set out the details. The Registrar had determined that grounds of complaint had been disclosed. These were negligence under the Immigration Advisers Licensing Act 2007 (the Act) and breaches of cls 1, 3(c), 19(e) and (k) and 24 of the Code of Conduct 2014 (the Code). An explanation was sought.

[27] Ms Elizabeth replied to the Authority's notification of the complaint on 16 June 2017. She set out a detailed chronology.

[28] In particular, Ms Elizabeth stated that the migration agents and immigration lawyers work with a documentation team which assists in the collection of documents "under our strict instruction and guidance". The documentation team does not provide immigration advice in relation to immigration matters or assessments for New Zealand. All the materials on a detailed checklist were provided to the team to collect the documents "as per our requirements". Having global offices, her paramount duty was to provide ongoing support and training to all staff.

[29] According to Ms Elizabeth, BMS had initially provided assistance for Australian migration and later decided to expand its services to incorporate New Zealand into the standard client contract. This was "soon separated into individual agreements upon further research into the Code of Conduct". She apologised for not having an agreement tailored to an individual client. As for a refund, the Australian code did not require a refund. She apologised for not having a refund policy for the complainant as a New Zealand client. The standard Australian contract had not been tailored for the New Zealand code.

[30] In the circumstances and noting the breaches of cl 19(e)/(k) and 24 of the Code, Ms Elizabeth advised that BMS wished to settle with the complainant amicably and would offer a partial refund considered reasonable and fair by the Authority. She was happy for the Authority to correspond with the complainant regarding a mutual settlement. As he had threatened legal consequences, she had directed him back to the Authority since the complaint had been filed by then.

[31] The Registrar referred the complaint to the Tribunal on 26 June 2017. It alleges that Ms Elizabeth breached the Code in the following respects:

(1) Failed to have a written agreement tailored to the circumstances of the complainant, in breach of cl 19(e).

(2) Failed to submit the expression of interest to Immigration New Zealand on or before 28 September 2016 while he was eligible for automatic selection, thereby providing services negligently, or services which were not professional, diligent, and done with due care and in a timely manner, in breach of cl 1.

(3) Allowed unlicensed individuals to provide immigration advice in breach of the Act and also in breach of cl 2(e) and 3(c).

(4) Failed to have a refund policy, in breach of cl 19(k).

(5) Failed to provide a refund in breach of cl 24(c).

JURISDICTION AND PROCEDURE

[32] The grounds for a complaint to the Registrar made against an immigration adviser or former immigration adviser are set out in s 44(2) of the Act:

(a) negligence;

(b) incompetence;

(c) incapacity;

(d) dishonest or misleading behaviour; and

(e) a breach of the Code of Conduct.

[33] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.[1]

[34] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.[2] It has been established to deal relatively summarily with complaints referred to it.[3]

[35] After hearing a complaint, the Tribunal may dismiss it, uphold it but take no further action or uphold it and impose one or more sanctions.[4]

[36] The sanctions that may be imposed by the Tribunal are set out in the Act.[5] The focus of professional disciplinary proceedings is not punishment but the protection of the public.[6]

[37] It is the civil standard of proof, the balance of probabilities, that is applicable in professional disciplinary proceedings. However, the quality of the evidence required to meet that standard may differ in cogency, depending on the gravity of the charges.[7]

[38] The Tribunal has received from the Registrar a statement of complaint (26 June 2017), together with supporting documents.

[39] The complainant provided a response to the complaint on 28 July 2017. According to the complainant, Ms Elizabeth has deviated from the truth in her response to the Tribunal. Details of the allegation are set out in his submissions.

[40] Ms Elizabeth replied to the complaint on 11 July 2017 with the identical information to that which had been provided to the Authority on 16 June 2017. It is considered later. She did not request an oral hearing.

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[1] Immigration Advisers Licensing Act 2007, s 45(2) & (3).
[2] Section 49(3) & (4).
[3] *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].
[4] Section 50.
[5] Section 51(1).
[6] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).
[7] *Z v Dental Complaints Assessment Committee* at [97], [101]–[102] & [112].

ASSESSMENT

[41] The Registrar relies on the following provisions of the Code:

General

1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.

Client Care

2 A licensed immigration adviser must:

…

e) obtain and carry out the informed lawful instructions of the client, and

…

Legislative requirements

3 A licensed immigration adviser must:

…

c) whether in New Zealand or offshore, act in accordance with New Zealand immigration legislation, including the Immigration Act 2009, the Immigration Advisers Licensing Act 2007 and any applicable regulations.

Written agreements

19 A licensed immigration adviser must ensure that a written agreement contains:

…

e) a full description of the services to be provided by the adviser, which must be tailored to the individual client

…

k) where fees and/or disbursements are to be charged, the adviser's refund policy

…

Refunds

24 A licensed immigration adviser must:

…

c) promptly provide any refunds payable upon completing or ceasing a contract for services.

[42] The most serious head of complaint, the third, will be dealt with first.

(3) Allowed unlicensed individuals to provide immigration advice in breach of the Act and also in breach of cl 2(e) and 3(c)

General principles

[43] The Tribunal has adversely commented in previous decisions on the practice which developed in the immigration advisory industry of what is known as "rubber stamping".[8]

[44] Typically, this occurs where a licensed immigration adviser uses agents or employees sometimes in another country to recruit the clients, prepare the immigration applications and send them to the licensed adviser to sign off and file with Immigration New Zealand. There is little, if any, direct contact between the licensed adviser and the client.

[45] The practice is illegal. A person commits an offence under the Act if he or she provides "immigration advice" without being licensed or exempt from licensing.[9] A person employing as an immigration adviser another person who is neither licensed nor exempt also commits an offence.[10] A person may be charged with such an offence even where part or all of the actions occurred outside New Zealand.[11]

[46] The statutory scope of "immigration advice" is very broad:[12]

7 What constitutes immigration advice

(1) In this Act, **immigration advice**—

(a) means using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter

[8] *Stanimirovic v Levarko* [2018] NZIACDT 3 at [4], [36]–[38]; *Immigration New Zealand (Calder) v Soni* [2018] NZIACDT 6 at [4], [50]–[61].
[9] Immigration Advisers Licensing Act 2007, s 63.
[10] Section 68(1).
[11] Sections 8 & 73.
[12] Section 7.

> relating to New Zealand, whether directly or indirectly and whether or not for gain or reward; but
>
> (b) does not include—
>
> (i) providing information that is publicly available, or that is prepared or made available by the Department; or
>
> (ii) directing a person to the Minister or the Department, or to an immigration officer or a refugee and protection officer (within the meaning of the Immigration Act 2009), or to a list of licensed immigration advisers; or
>
> (iii) carrying out clerical work, translation or interpreting services, or settlement services.
>
> (2) To avoid doubt, a person is not considered to be providing immigration advice within the meaning of this Act if the person provides the advice in the course of acting under or pursuant to—
>
> (a) the Ombudsmen Act 1975; or
>
> (b) any other enactment by which functions are conferred on Ombudsmen holding office under that Act.

[47] The exclusion from the scope of "immigration advice" potentially relevant here is subs (1)(b)(iii) concerning clerical work, translation or interpretation services.

[48] "Clerical work" is narrowly defined in the Act:[13]

> **clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:
>
> (a) the recording, organising, storing, or retrieving of information:
>
> (b) computing or data entry:
>
> (c) recording information on any form, application, request, or claim on behalf and under the direction of another person

[49] The words "advise", "advice" and "assist" are not to be given restrictive meanings.[14]

[50] The obligations set out in the Code are personal to the licensed immigration adviser and cannot be delegated.[15]

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[13] Section 5, "clerical work".

[14] *Yang v Ministry of Business, Innovation and Employment* [2015] NZHC 1307 at [22]–[23]. While the Court was considering s 63(1)(a) of the Act, it is plain it also had in mind the use of the words in s 7(1).

[15] *Sparks*, above n3, at [29], [34] & [47].

[51] Persons who are not licensed (or exempt) are permitted to undertake clerical work only. In essence, such a person can do no more than retrieve and then record or organise information, enter data on a computer database or hard copy schedule, or record information on a form or other like document under the direction of another person, who must be a licensed adviser or a person exempt from licensing, or the client.

[52] Activities which do not meet the narrow definition of clerical work but which involve the use of immigration knowledge or experience to advise or assist another person on an immigration matter, "whether directly or indirectly", amount to providing immigration advice. That is the exclusive domain of the licensed adviser.

The complainant's file

[53] Starting with the initial eligibility assessment by an employee of FBP on 8 April 2016, there were many instances where unlicensed persons (being all the staff of BMS or FBP, apart from Ms Elizabeth) used their knowledge or experience to advise the complainant or assist with his application in some way. They did so on matters concerning NZQA's assessment, Immigration New Zealand's English language requirements, acceptable work experience and the many other information and documentary requirements of Immigration New Zealand.

[54] There are numerous examples in the email exchanges between the complainant and the staff of guidance from the latter and information or documents being sent to them by the complainant for review by the staff.

[55] For example, a staff member advised the complainant on 24 April 2016 that his updated resume was fine, on 26 April as to establishing his identity and on 27 April and 7 June concerning the English language criterion and how it should be established. On 25 May, an employee advised the complainant what work experience would be relevant. On 3 July, the complainant was advised by a staff member as to how his education qualifications could be recognised. These are illustrations of the staff advising the complainant or assisting with his application other than by doing just clerical work. Plainly, they are using their knowledge and experience of New Zealand immigration in doing so.

[56] Ms Elizabeth states that the staff of the documentation team assist in the collection of documents "under our strict instructions and guidance".[16] I am not sure who "our" is, as Ms Elizabeth is the *only* person lawfully able to provide such instruction or guidance to staff. Ms Elizabeth does not appear to be aware that *all* work amounting to immigration advice is exclusively reserved to her under the Act.

[57] Ms Elizabeth also appears to be talking about office practice in general, rather than the complainant's file specifically. She has presented no evidence of any instruction or guidance by her to the staff in relation to the complainant and his application. Aside from signing the client agreement, there is no evidence in the file provided by her to the Authority of any engagement by her whatsoever in the complainant's application, until he raises a complaint. Even then, she does not engage with the application in any meaningful way, only with the complaint but not with the complainant. She provides no evidence to the Tribunal of any engagement with him or his file in advising on eligibility or in compiling the application.

[58] None of the emails from the staff to the complainant state they received instructions or advice from Ms Elizabeth. None were copied to her. The complainant says he had no communication at all from her and the file supports his allegation.

[59] I find that Ms Elizabeth had no involvement in advising or assisting the complainant or in compiling his immigration application.

[60] The company (BMS and/or FBP) have in effect used Ms Elizabeth's licence to attract clients such as the complainant. I do not know what happened to other clients, but the complainant's application was managed entirely by the staff. They may have sought information and supporting documents in accordance with a generic template checklist specific to the particular residence category, which may have been prepared by Ms Elizabeth, but the assessment of the information and documents against the checklist and hence Immigration New Zealand's criteria was done by the staff.

[61] That amounts to providing immigration advice under the Act. It is a breach of the Act by the staff. Ms Elizabeth should personally take charge of the engagement with the complainant and compiling the EOI. Her professional obligations are "hands-on" and cannot be delegated.

[62] Ms Elizabeth has thereby facilitated the unlawful advice or assistance given by the staff. She knew what they were doing. Their work was being done, in effect, in her name.

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[16] Email to Authority, 16 June 2017 and email to Tribunal, 11 July 2017.

[63] The conduct of Ms Elizabeth, like that of the staff, is contrary to the Act. She is therefore in breach of cl 3(c) of the Code.

[64] In failing to engage at all with the client, Ms Elizabeth has failed to take instructions and is therefore in breach of cl 2(e) of the Code. In failing to actively involve herself in the work of advising on eligibility or gathering the necessary information and documents from the complainant and then assessing them in order to complete the EOI, Ms Elizabeth has failed to carry out his instructions. This is also a breach of cl 2(e) of the Code.

(1) Failed to have a written agreement tailored to the circumstances of the complainant, in breach of cl 19(e)

[65] The written agreement the complainant had was with FBP. Ms Elizabeth's relationship to this company is not known. At the time, she was licensed by the Authority as an employee of BMS, not FBP. A client agreement with a company which only has a commercial relationship with an adviser's employer does not meet the requirements of the Code.

[66] Furthermore, this agreement had been written for Australian migration with New Zealand subsequently added, but without the agreement being rewritten specifically for New Zealand and Ms Elizabeth's professional obligations arising out of the Code. The agreement does not identify the visa category appropriate for the complainant. It does not name Ms Elizabeth, as required by the Code. Nor does it contain many of the other mandatory requirements set out in cl 19 of the Code.

[67] In particular, it does not contain a full description of the services to be provided to the complainant, tailored to his circumstances, in breach of cl 19(e) of the Code. Ms Elizabeth admits this breach.

(2) Failed to submit the expression of interest to Immigration New Zealand on or before 28 September 2016 while he was eligible for automatic selection, thereby providing services negligently, or services which were not professional, diligent, and done with due care and in a timely manner, in breach of cl 1

[68] Ms Elizabeth was instructed on 8 April 2016. It does not appear that the application was ever ready for lodgement and, by 12 October, it was no longer worthwhile to pursue due to an immigration policy change. By then, the complainant had raised a complaint with BMS and advised that he wished to terminate the agreement.

[69] A period of at least six months to compile an EOI is unduly long. Ms Elizabeth provides a chronology in her email of 11 July 2017 but does not explain the delay. While considerable information and documentation was required from the complainant, she does not identify any delays by him in providing it. He appears to have been prompt in responding to requests from the staff.

[70] It was claimed by the staff on 30 September 2016 that there had been technical issues with NZQA's portal, but these are unlikely to have been for long.

[71] Ms Elizabeth does not expressly answer the allegation concerning delay in completing the EOI ready for lodgement.

[72] I find the delay unreasonable and unexplained. Ms Elizabeth accepted the complainant's instructions by signing the agreement and is the only licensed person in BMS and/or FBP. She is therefore responsible for the application and hence the delays. The complainant was not provided with a reasonable level of service, as would be expected of a licensed professional adviser. She has been negligent. The statutory ground of complaint of negligence is made out.

[73] Nor has Ms Elizabeth been professional or diligent or conducted herself with due care and in a timely manner. Ms Elizabeth is therefore in breach of cl 1 of the Code.

[74] The fourth and fifth heads of complaint will be dealt with together.

(4) Failed to have a refund policy, in breach of cl 19(k)

(5) Failed to provide a refund in breach of cl 24(c)

[75] It is clear the written agreement has no refund policy, as required by cl 19(k). Ms Elizabeth admits this breach of the Code.

[76] The complainant had sought a refund by no later than 15 October 2016. He was told no refund was available, but they would "restrategise" his case for Australia. On 16 June 2017 after the complaint had been made to the Authority, Ms Elizabeth offered a partial refund at a level considered fair and reasonable by the Authority.

[77] I do not know what happened in relation to that offer. This offer was far too late. Moreover, the responsibility for offering a refund and discussing it with the complainant rested with Ms Elizabeth and not the Authority. She should have personally approached the complainant. This is not only a failure by her to meet her professional

obligation to promptly offer a fair and reasonable refund, but yet another illustration of her complete failure to engage with her client. Ms Elizabeth concedes a breach of cl 24(c) of the Code.

OUTCOME

[78] I uphold all heads of complaint. Ms Elizabeth is in breach of cls 1, 2(e), 3(c), 19(e) and (k), and 24(c) of the Code.

SUBMISSIONS ON SANCTIONS

[79] As the complaint has been upheld, the Tribunal may impose sanctions pursuant to s 51 of the Act.

[80] A timetable is set out below. Any request for repayment of fees or the payment of costs or expenses or for compensation must be accompanied by a schedule particularising the amounts and basis of the claim.

Timetable

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

(1) The Registrar, the complainant and Ms Elizabeth are to make submissions by **3 June 2019**.

(2) The Registrar, the complainant and Ms Elizabeth may reply to the submissions of any other party by **17 June 2019.**

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D J Plunkett
Chair