

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 17

Reference No: IACDT 007/17

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **SANTOKH SINGH**
Complainant

AND **JIGNESH PATEL**
Adviser

DECISION
Dated 28 March 2019

REPRESENTATION:

Registrar: Self-represented
Complainant: Self-represented
Adviser: Self-represented

PRELIMINARY

[1] Mr Santokh Singh was a client of Mr Patel, the adviser, for the purpose of a residence application. It is alleged that Mr Patel's fees were extravagant and he did not promptly offer a fair refund when his services were terminated. Mr Patel says his fees were reasonable given the volume of work done and refunding only half the fee paid was fair as he had already done the work. Mr Patel admits the additional allegation that he violated his professional obligation to keep a proper client file.

[2] The essential issue to consider is whether the evidence establishes that Mr Patel charged an excessive fee.

BACKGROUND

[3] Mr Jignesh Patel is a licensed immigration adviser. He trades as the Immigration Centre.

[4] Mr Singh contacted Mr Patel on 26 March 2014 and the two met in person the following day.

[5] At the meeting on 27 March 2014, a service agreement was signed by Mr Singh and Mr Patel. It stated that Mr Patel would prepare and complete a retirement category residence application ready for lodgement with Immigration New Zealand. The fee would be \$15,000 (including GST), broken down as follows:

Consultation and review information	\$	5,000
Completion of application ready for lodgement	\$	5,000
Approval of application	\$	5,000
	\$	15,000

[6] The fee was expressed to be for work of a standard nature for the type of application. Extra work would accrue an additional charge of \$240 per hour. The fee did not include Immigration New Zealand's fees. As for a refund, the agreement stated that Mr Patel would undertake a fair and reasonable assessment as to eligibility for a refund on the termination of the agreement for any reason. A complaints procedure was set out in the agreement.

[7] On the same day and possibly at the meeting, Mr Patel gave Mr Singh an invoice for \$5,000. It was paid the next day, 28 March 2014.

[8] A residence application in the parent retirement category was duly prepared by Mr Patel and his staff. The completed application has been produced to the Tribunal. It refers to a submission letter, but this has not been seen. The application recorded that Mr Patel was the immigration adviser representing Mr Singh and would receive all communications in relation to the application. Mr Patel considered it ready for lodgement with Immigration New Zealand, so sent it to Mr Singh for signature. Mr Singh duly signed it on 1 May 2014 and took the signed application to Mr Patel, but a dispute arose between the two of them over the signature of Mr Singh's wife.

[9] A second invoice for \$5,000 was sent by Mr Patel on about 7 May 2014. It was paid by Mr Singh on 13 May 2014.

[10] On about 16 May 2014, according to Mr Singh, he was given a second checklist by Mr Patel's staff identifying five "outstanding documents".

[11] Mr Singh uplifted his file from Mr Patel on 21 May 2014.

[12] Mr Singh complained to his local Citizens Advice Bureau on 19 June 2014 about the fees he had been charged. He alleged Mr Patel had cheated and misguided him. He wanted his money back. The Bureau advised Mr Singh to make a complaint to the Immigration Advisers Authority (the Authority).

[13] On about 23 June 2014, Mr Singh asked Mr Patel to withdraw the application being prepared and for the fees paid to be refunded. On 25 June, he informed Mr Patel that he was not satisfied with his service.

[14] Mr Patel wrote to Mr Singh on 26 June 2014 recording that on 21 May 2014, Mr Singh requested the return of all his documents so that he could make a copy of them. In early June, he had notified Mr Patel that he no longer wished to retain his services and terminated their agreement. The reason given was that he had changed his mind as his wife did not want to come to New Zealand. At no stage had he expressed any concerns about Mr Patel's service. It was noted that Mr Singh had already signed the application form which was the final step before lodgement and had paid the second instalment of the fees.

[15] In his letter, Mr Patel declined to refund the fee because, by the time of termination, he had already undertaken the work required to fulfil his obligations under the agreement. Two of the three stages for the fee had already been completed. Mr Singh was not claiming a refund because of dissatisfaction, but rather due to his personal circumstances. Mr Patel believed that he had acted with the utmost professionalism in dealing with the case.

COMPLAINT

[16] A complaint (dated 7 July 2014) against Mr Patel was lodged by Mr Singh with the Authority on 10 July 2014. The complaint is much broader than that referred by the Registrar to the Tribunal, but since the Tribunal cannot make a decision on matters not referred by the Registrar, Mr Singh's wider criticisms of Mr Patel's work will not be considered.¹

[17] On 18 July 2014, the Authority wrote to Mr Patel requesting his full client file relating to Mr Singh.

[18] Mr Patel provided the file on 22 July 2014. He advised that on 21 May 2014, Mr Singh took the file in order to make a copy, hence some of the paperwork was in the possession of the client. At that time, Mr Singh did not raise any concerns about his service. According to Mr Patel, Mr Singh had notified him that he would not proceed as his wife was not happy to relocate.

[19] An email sent by the Authority to Mr Patel on 25 July 2014 noted that he had not produced to the Authority some emails sent to Mr Singh. He was requested to provide all material on his file. Mr Patel provided more documents on the same day. On 28 July 2014, Mr Patel's staff sent copies of the two invoices to the Authority. The email stated that Mr Singh had taken the physical file on 21 May 2014 to make a copy, so they were unable to scan all the documents they had worked on.

[20] On 1 October 2014, the Authority formally wrote to Mr Patel advising details of the complaint and requesting his explanation.

[21] Mr Patel replied to the letter of complaint in a lengthy letter of explanation on 8 October 2014. Much of the letter concerns the matters which the Registrar has not referred to the Tribunal.

[22] According to Mr Patel, the first meeting with Mr Singh had taken about an hour in order to identify the category which would suit Mr Singh. They discussed the investment category and he explained why the parent retirement category was the best option. He provided Mr Singh with a checklist of 12 points. His firm, on receipt of some of the documents, started the preparation of the application, including legal research and the evaluation of documents from Mr Singh's accountant. This took a substantial amount of time. Mr Singh then made more than five visits to the office, all

¹ *Mizoguchi v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 3198 at [45].

of them without notice, to obtain clarification of the documents, help with the emails and to drop documents off.

[23] Mr Patel conceded there was no record of every time Mr Singh walked into the office and he had learned from that mistake. He said he would implement a compulsory audio recording of every meeting with a client.

[24] Mr Patel explained in the letter that his fee for this type of application was higher than for skilled migrant category applications because more research and work was needed, with a "huge" number of documents being evaluated. Mr Singh had never expressed any dissatisfaction with their services and before requesting the documents back, he happily paid the second instalment of \$5,000 in order to lodge the residence application. Mr Singh later told him that he could not proceed because his wife was against relocation. However, the offer to partially refund the fee still stood. It was not an admission of fault, but an act of good faith.

[25] According to Mr Patel's letter, the market rates for investment and retirement category applications were up to \$35,000, so \$15,000 was fair and reasonable. He sent a table of immigration advisers' fees (excluding GST) for the different types of immigration applications, which appears to have come from the Authority's website in September 2010 following a survey of advisers. For the investor category, the table showed the average fee to be just under \$11,000 and the maximum \$35,000. On the other hand, I note that for the family (parent) category, the average fee was just over \$3,000 and the maximum \$13,000.

[26] It was accepted by Mr Patel that the complaint had identified matters that could be improved in file management, including recording meetings and note-keeping. He would participate in appropriate professional training to ensure his file keeping was consistent with best practice.

[27] The Authority advised both Mr Singh and Mr Patel on 5 November 2014 that it had been decided that the complaint could best be settled by using Mr Patel's own complaints procedure. Mr Singh was asked to advise the Authority of the outcome. His complaint would be reassessed if there was no resolution through the complaints process.

[28] Mr Singh duly made a complaint to Mr Patel under the internal process.

[29] On 6 November 2014, Mr Singh wrote to Mr Patel stating that the offer of a refund of \$5,000 was not acceptable. He said he would accept \$9,500 and a letter of apology.

[30] The Authority wrote to Mr Patel on 17 November 2014. It had noted his willingness to pay a partial refund which is why it had decided the matter could be resolved using his own complaints procedure. It was his obligation to pay a refund, not merely to offer it. In the event that he was unable to settle the complaint, any steps taken to resolve it, including payment of a refund would be taken into account in assessing whether to refer the complaint to the Tribunal.

[31] Mr Patel then wrote to Mr Singh on 17 November 2014 advising that he had refunded \$5,000 by transfer into his bank account. Mr Patel believed this was fair and reasonable as he had already undertaken considerable work, with the application having been ready for lodgement. The request for a letter of apology was unreasonable for the reasons set out in the letter.

[32] Also on 17 November 2014, Mr Patel wrote to the Authority confirming he had refunded \$5,000, which was not acceptable to Mr Singh. Mr Patel had told Mr Singh that the file was well prepared and ready for lodgement. His firm had spent considerable time conducting research and preparing the case, including evaluating financial documents and attending meetings.

[33] Mr Patel acknowledged in his letter the Authority's comments in relation to note taking and had pro-actively enrolled in a course covering the compliance side of their work. He had also implemented a rule that every phone call and meeting would be recorded.

[34] On 26 November 2014, the Registrar of Immigration Advisers (the Registrar), the head of the Authority, wrote to Mr Singh advising that it had been decided that the complaint disclosed only trivial or inconsequential matters and would not be pursued. He was advised that the work undertaken by Mr Patel was of a satisfactory standard, that Mr Patel had acknowledged that his file management practices required improvement and that the refund of \$5,000 was considered fair and reasonable.

[35] The Registrar wrote to Mr Patel on the same day, 26 November 2014. Aside from being notified of the outcome of the complaint, the Registrar required him to maintain hard copy and/or electronic client files, including copies of all written communications and file notes of oral communications. He was also to confirm in writing to clients the details of all material discussions with them.

[36] Mr Singh appealed to the Tribunal against the Registrar's decision not to refer his complaint to the Tribunal.

[37] There is an affidavit (sworn 26 May 2015) from a senior investigator in the Authority, filed on behalf of the Registrar. She concluded that Mr Patel took adequate steps to evaluate Mr Singh's options and to explain them. As to his fees, she concluded that they were at the higher end of the scale but not necessarily unfair or unreasonable given the work done on the file. As for his recording of client interactions, Mr Patel had recognised deficiencies and taken steps to improve this, including enrolling in the online code course. Mr Patel had clearly failed to maintain a comprehensive record of his dealings, but she concluded that this was trivial or inconsequential, given that he had acknowledged the deficiency and taken steps to remedy it.

[38] In the investigator's view, the refund of half the fee was not unfair or unreasonable. During the complaints process, Mr Patel had made unsubstantiated references to Mr Singh's misleading behaviour and had written an unprofessional letter to him. A general warning had been given to him in respect of this.

[39] In response, Mr Singh filed an affirmation (affirmed 11 June 2015) setting out his version of the events. Mr Singh described a wide range of criticisms of Mr Patel as to his competence and honesty. They mirror the breadth of his original complaint to the Authority, but as noted above the Tribunal does not have jurisdiction to investigate them. Relevantly, Mr Singh states that the first meeting lasted only 10 minutes, that the invoices did not properly depict the work carried out, that his application was not ready to lodge, that the relationship broke down when he was asked to pay a \$3,200 lodgement fee which could not be claimed by Mr Patel as it was part of the \$15,000 fee and that retaining \$5,000 was exorbitant given the work done.

[40] The Tribunal (Mr Pearson) issued a decision on 17 May 2016 in *Singh v The Registrar of Immigration Advisers* [2016] NZIACDT 25 overturning the Registrar's decision and directing the Registrar to prepare a complaint for filing with the Tribunal.

[41] The Registrar filed a statement of complaint with the Tribunal on 12 April 2017. He referred to the Tribunal the following possible breaches by Mr Patel of his professional obligations under the Code of Conduct 2014 (the Code):

- (1) failing to make a record of meetings and telephone discussions with the client and failing to confirm in writing material discussions, in breach of cl 26(a)(iii);
- (2) setting a fee of \$10,000 for preparation of a residence application (excluding lodgement), in breach of cl 20(a); and

- (3) failing to refund promptly and keeping \$5,000 in payment for services which did not include lodgement, in breach of cl 24(a) & (c).

JURISDICTION AND PROCEDURE

[42] 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 Immigration Advisers Licensing Act 2007 (the Act):

- (a) negligence;
- (b) incompetence;
- (c) incapacity;
- (d) dishonest or misleading behaviour; and
- (e) a breach of the Code of Conduct.

[43] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.²

[44] The Tribunal must hear complaints on the papers but may in its discretion request further information or any person to appear before the Tribunal.³

[45] 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

[46] The sanctions that may be imposed by the Tribunal are set out in the Act.⁵ It may also suspend a licence pending the outcome of a complaint.⁶

[47] 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

[48] The Registrar has produced a statement of complaint (12 April 2017), together with supporting documents.

² Immigration Advisers Licensing Act 2007, s 45(2) & (3).

³ Section 49(3) & (4).

⁴ Section 50.

⁵ Section 51(1).

⁶ Section 53(1).

⁷ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [101]–[102] & [112].

[49] The Tribunal has received from Mr Patel a statement of reply (11 May 2017), together with a letter of submissions of the same date. He does not request an oral hearing.

[50] There are no submissions from Mr Singh.

ASSESSMENT

[51] The Registrar relies on the following obligations in the Code:

Fees

20. A licensed immigration adviser must:

- a. ensure that any fees charged are fair and reasonable in the circumstances

Refunds

24. A licensed immigration adviser must:

- a. ensure that refunds given are fair and reasonable in the circumstances.

...

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

File management

26. A licensed immigration adviser must:

- a. maintain a hard copy and/or electronic file for each client, which must include.

...

- iii. copies of all written communications (including any file notes recording material oral communications and any electronic communications) between the adviser, the client and any other person or organisation

...

(1) *Failing to make a record of meetings and telephone discussions with the client and failing to confirm in writing material discussions, in breach of cl 26(a)(iii)*

[52] The Registrar alleges that Mr Patel failed to make a record of meetings and telephone discussions with Mr Singh and failed to confirm material discussions in writing. Mr Patel readily admits this breach of his obligations. He says he has reflected

on this and enrolled in an online refresher course as well as set up policies to ensure that all notes are recorded properly.

[53] It is only “material” oral communications which need to be recorded in writing. Therefore, a brief discussion with the client at the counter when the documents are dropped off would not need to be recorded, though advisers should note that “immigration advice” (as defined in s 7(1)) is very broad.

[54] The initial meeting Mr Patel had with Mr Singh as well as any discussions at which advice was given should have been recorded. Copies of all emails and texts between the adviser or the adviser’s staff, the client and “any other person or organisation”, whether material or not, must also be kept on the file.

[55] As a precaution, advisers should make a record of all discussions with a client, whether they regard it as material or not, to avoid later disputes. It would also be prudent to make a file note listing documents dropped off at the counter. Mr Patel has already implemented such a practice.⁸

[56] Advisers also have an obligation to confirm in writing to the client details of all material discussions with the client.⁹ The Registrar identified this violation by Mr Patel, though overlooked citing the relevant Code provision. If an adviser prudently chooses to make a brief note of all discussions with the client, they do not need to be confirmed in writing to the client unless material.

[57] I find that Mr Patel breached cl 26(a)(iii) and (c) of the Code.

[58] The second and third heads of complaint are linked.

(2) *Setting a fee of \$10,000 for preparation of a residence application (excluding lodgement), in breach of cl 20(a)*

(3) *Failing to refund promptly and keeping \$5,000 in payment for services which did not include lodgement, in breach of cls 24(a) & (c)*

[59] An adviser must only charge a fair and reasonable fee. Furthermore, refunds which are fair and reasonable must be promptly given upon completing or ceasing the services.

⁸ Letter 8 October 2014 to the Authority.

⁹ Code of Conduct 2014, cl 26(c).

[60] Mr Patel says that \$10,000 is fair and reasonable for a residence application which has an investment component. This is because of the need to analyse financial information which is time consuming and can involve instructing an accountant. He charges a standard fee, rather than a fee based on hours worked, because it is so time consuming to review supporting documents. The standard price is “either to our loss or advantage”. According to Mr Patel, most clients appreciate a standard rate as there are no surprises. They know exactly how much they will pay at the time they sign the agreement.

[61] There is nothing unprofessional about a standard fee. Mr Patel is correct in stating they are often appreciated by clients who know in advance how much they will be charged.

[62] There is no evidence before me that \$10,000 (inclusive of GST) is extravagant for a residence application (up to the point of lodgement) which requires an analysis of financial information. I agree with the Authority’s investigator who considered it to be at the higher end of the scale but not unfair or unreasonable.

[63] In terms of the Authority’s comparative table of fees, it is high but not unduly so. At \$15,000 (inclusive of GST) in total, including the work involved in answering queries from Immigration New Zealand during processing, it is higher than the average for investor applications found in the Authority’s survey (expressed to be exclusive of GST), but well within the range charged. No additional fee was payable post-lodgement if the application was not approved, unless Mr Patel regarded the work of a non-standard nature. According to Mr Patel, Mr Singh claimed urgency and work was therefore done at night on the application. I accept that urgency is a factor relevant to setting a fee.

[64] The evidence supports the view of the Authority’s investigator that Mr Patel had done substantial work at the time Mr Singh terminated the agreement and sought a refund. While there is no evidence the submission letter referred to in the signed application had been completed, such a covering letter may have been brief and Mr Patel could not have charged more for this.

[65] It appears that some documents were outstanding at 16 May 2014, but there were only five. Furthermore, the list produced to the Tribunal has annotations which appear to show that all were available. As for the one missing document, Mr Patel says Immigration New Zealand commonly accepts applications from India without that document. This list does not establish that the application still needed substantial work.

[66] According to Mr Singh, the relationship with Mr Patel broke down when he was asked to pay a lodgement fee of \$3,200, which Mr Patel could not claim as it was part of the \$15,000 fee.¹⁰ However, this additional fee was the filing fee of Immigration New Zealand which was not included in the \$15,000 fee.¹¹

[67] Mr Patel did not immediately offer a refund as he considered he had largely completed the work required for the fee. He eventually refunded half the fee, \$5,000, effectively on the initiative of the Authority which referred the complaint back to the parties to resolve through Mr Patel's internal complaints process. He says he made this offer in good faith and not with any admission of fault.

[68] If I accept, as I do, that Mr Patel had largely done the work required to lodge the application prior to his services being terminated, he was under no legal or professional obligation to refund any more than a small part of the fee reflecting the work not yet carried out (notably the submission letter). It is not unprofessional to refuse a refund if the work has been done. I note that the Registrar makes no complaint about the quality of Mr Patel's work.

[69] To the extent that there was a delay between about 23 June 2014 when the refund was requested and 17 November 2014 when the partial refund was paid, I do not consider this possible Code violation of sufficient gravity in the circumstances to uphold this head of complaint. The refund eventually made of \$5,000 was fair, if not generous.

[70] I find no breach of cls 20(a) or 24(a) and (c) of the Code.

OUTCOME

[71] I find that Mr Patel has breached cl 26(a)(iii) and (c) of the Code.

SUBMISSIONS ON SANCTIONS

[72] As the complaint has been upheld, the Tribunal may impose sanctions pursuant to s 51 of the Act. A timetable is set below.

[73] Mr Patel states that he has already enrolled in an online refresher program. He is requested to advise the Tribunal of the particular program and provide evidence of having successfully completed it, if so. Any submission that Mr Patel should undertake

¹⁰ Affirmation Mr Singh (11 June 2015) at [18].

¹¹ Service agreement (27 March 2014) at cl 2.6.

additional training should specify the precise course suggested. I will not consider any further refund of the fees, as that issue has already been dealt with.

Timetable

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

- (1) The Registrar, Mr Singh and Mr Patel are to make submissions by **19 April 2019**.
- (2) The Registrar, Mr Singh and Mr Patel may reply to any submissions by the other party by **3 May 2019**.

D J Plunkett
Chair