

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

Decision No: [2012] NZIACDT 19

Reference No: IACDT 021/10

**IN THE MATTER**

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

**BY**

**Immigration Advisers Authority**  
Authority

**BETWEEN**

**Jennifer Tully**  
Complainant

**AND**

**Sharon Gail Yerman**  
Adviser

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**DECISION**

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**REPRESENTATION:**

**Adviser**

In person

**Complainant**

In person

Date Issued: 9 May 2012

## DECISION

### Outline

- [1] Ms Yerman was engaged by Ms Tully and her family to assist with applying for residence visas so the family could migrate to New Zealand.
- [2] The application was not successful, and there was a right of appeal to the Residence Review Board. An appeal was lodged. However the Board gave notice the appeal could not proceed, as it was filed out of time.
- [3] It appeared Ms Yerman thought the appeal had been lodged in time, but has had to accept it was filed late. However, she says it is her clients, not her, that are responsible for failing to lodge the appeal on time. She criticises them for lack of commitment.
- [4] The issues to determine are:
  - [4.1] Did Ms Yerman discharge her professional responsibilities in identifying when the appeal had to be lodged, informing her clients of what was required to allow the appeal to be lodged, and undertaking the work required to file the appeal on time?
  - [4.2] If not, did Ms Tully or her family act in a manner that affected Ms Yerman in her endeavours to meet those professional obligations?

### The Complaint

- [5] The events on which the complaint are founded are recorded in the file Ms Yerman kept, and she produced the material parts of her file in response to the complaint.
- [6] Ms Yerman was acting as a licensed immigration adviser for Ms Tully and her family. The family live in South Africa, where Ms Yerman has her practice. The Tully family wished to migrate to New Zealand and Ms Yerman assisted them with a residence application.
- [7] One of the children in the Tully family has autism, and requires special education. For that reason the family did not meet the medical requirements for residence. This issue was identified, and a residence application prepared and lodged. The process involved:
  - [7.1] Lodging an expression of interest.
  - [7.2] The expression of interest being accepted and an application for residence being lodged.
  - [7.3] The application not meeting the medical requirements, due to the child who has autism.
  - [7.4] Applying for a medical waiver. The waiver was not granted, and the application for residence was declined.
- [8] At this point there was a right of appeal. An appeal was prepared and filed, however it was out of time.
- [9] The ground of the complaint was that Ms Yerman failed to prepare and file the appeal in a timely manner, hence causing the deadline for filing an appeal to be missed.

- [10] The material events in relation to the appeal not being lodged were:
- [10.1] **1 March 2010** On this date Immigration New Zealand wrote a letter addressed to Ms Tully. The letter said the application for residence had been declined, due to the child with autism not meeting the medical requirements. The letter gave notice of the right of appeal to the Residence Review Board, and explained it must be lodged with the Board within 42 days, starting from 14 days after that letter was posted.
  - [10.2] **16 March 2010** Ms Yerman sent an email to Ms Tully, and asked whether she wished to pursue an appeal.
  - [10.3] **17 March 2010** Ms Tully replied to Ms Yerman by email, and said she understood Ms Yerman advised that an appeal should be lodged, but expressed some reservations about doing so.
  - [10.4] **18 March 2010** Ms Yerman replied by email and said she could assist, and that Ms Tully had always known “it would be a battle” and it may be necessary to see the process through to have “peace of mind”.
  - [10.5] **30 March 2010** Ms Yerman sent another email to the Tully family, and asked if there had been a decision on appealing. She noted there was a limited time, and it was “ticking by”.
  - [10.6] **31 March 2010** Ms Tully sent an email in response asking what was required for an appeal, what the chance of success was, and noting she had “no new arguments”.
  - [10.7] **31 March 2010** Ms Yerman replied to Ms Tully’s email she received earlier that day. She advised in favour of an appeal, and indicated she would set aside the time required to prepare it.
  - [10.8] **7 April 2010** Ms Tully gave a clear instruction by email that Ms Yerman should proceed with the appeal, and asked what was required from her.
  - [10.9] **8 April 2010** Ms Yerman replied by email to Ms Tully, and indicated she needed the appeal form to be signed and some other matters, and would proceed with preparing the appeal that weekend.
  - [10.10] **15 April 2010** A person in Ms Yerman’s office sent an email requesting some documentation from Ms Tully so the appeal could be prepared.
  - [10.11] **20 April 2010** Ms Tully delivered the material requested in the 15 April 2010 email, including signing the appeal form, and paid the fee to lodge the appeal (recorded in a file note of that date).
  - [10.12] **28 April 2010** Time for lodging the appeal expired.
  - [10.13] **2 May 2010** The appeal was lodged.

#### **Minute Issued by the Tribunal**

- [11] The Tribunal reviewed the papers before it, and issued a minute giving notice of the potential findings on the papers then before the Tribunal. The parties were given the opportunity to provide further evidence and submissions, and if appropriate to seek an oral hearing.

[12] The minute gave notice that the potential findings were:

*Identification of date for filing appeal*

[12.1] Ms Yerman appeared not to have identified the correct date for filing the appeal.

[12.2] In an email dated 12 May 2010 sent to Ms Tully, Ms Yerman said the Chairperson of the Residence Review Board had indicated the appeal had to be received by 28 April 2010, and expressed surprise as to how the date was calculated.

*Justification for failing to file in time*

[12.3] Ms Yerman had responded to the complaint contending the lateness of Ms Tully committing to the appeal made it impossible for her to file the appeal in time. She noted that Ms Tully committed on 7 April 2010, and that was “some 37 days into the allowed time”.

[12.4] Ms Yerman claimed Ms Tully’s slowness “reflects who the truly negligent party is”. She also said she could not be expected to cancel long term business commitments “because a client does not understand the rules.”

[12.5] Ms Yerman said she had commitments over the two weekends following 7 April 2010, and she was intending to prepare the appeal out of office hours.

[12.6] The minute gave Ms Yerman notice that her justification may potentially be rejected on the basis of the following conclusions that appeared open on the papers:

[12.6.1] Ms Yerman did not accurately identify the day by which the appeal had to be lodged.

[12.6.2] The papers did indicate Ms Yerman and her client were aware of the 14 days plus 42 days identified by Immigration New Zealand. That was not converted to identifying the date on which the last day for lodging the appeal fell. Ms Yerman should have done so by calculating the date herself; and confirming it with the Board, if necessary.

[12.6.3] Accurately identifying the date for lodging an appeal is a matter that a licensed immigration adviser must understand and inform a client of, when the client will potentially appeal, and the time becomes a live issue.

[12.6.4] When Ms Yerman was instructed to pursue the appeal on 7 April 2010, she was obliged to carry those instructions into effect, or make appropriate arrangements for her client to be represented by someone else, if that was not possible.

[12.6.5] Ms Yerman gave no indication to Ms Tully that she was unable to accept her instructions of 7 April 2010 to lodge the appeal. On the contrary, she sent an email the following day saying she would start work on it that weekend.

[12.6.6] After receiving instructions to lodge the appeal on 7 April 2010, the only requirement for Ms Tully was to supply documents, make payment, and sign the appeal form. She was requested to do so on 15 April 2010, and

did so on 20 April 2010. The request said “Anytime before Thursday 22nd would be ok”.

### **Response to the Minute**

- [13] Ms Tully responded to the minute indicating Ms Yerman should accept responsibility for her negligence.
- [14] Ms Yerman also responded to the minute, the central element of her response being to continue her claim that the Tully family were to blame for Ms Yerman not lodging the appeal on time.
- [15] Ms Yerman claimed she had identified when the appeal had to be lodged, and informed her clients, though apparently leaving it to them to calculate the date.
- [16] Ms Yerman said she had been in business for 19 years, and had never failed to lodge an appeal on time, and spoke of her high level of service in relation to other clients, and her exceptional professional standing.
- [17] In addition, she claimed that preparing the appeal required a great deal of work, that the Tully family did not commit themselves to the appeal, and also spoke of potentially using a lawyer in Christchurch, and thereby precluded her filing the appeal on time.
- [18] Ms Yerman suggested the Tully family’s complaint included an “untrue statement”, that they failed to be proactive in dealing with Ms Yerman, did not respond to emails, and instructed her at the last minute. In short, they were very difficult clients who made it impossible for Ms Yerman to perform her professional duties.
- [19] Ms Yerman admitted she failed to identify the date on which the appeal had to be filed, but said that was “irrelevant”, because she would never have had the time for such a detailed and complex matter, as her clients had not committed to the appeal in sufficient time.
- [20] Ms Yerman submitted that the Tully family did not instruct her to pursue the appeal on 7 April 2010. Rather, commitment to an appeal only takes place when Ms Yerman’s client signs the appeal form, as “this is the only clear indication of commitment I have”. She stated:
- “I am not prepared to put many hours of work and research into an appeal application unless the client signs the form and works with me.”
- [21] She did not explain the correspondence on 7 April 2010, when Ms Yerman received an email from Ms Tully which said:
- “We have come so far it would seem crazy not to try this last appeal. Please go ahead and let us know what you need from us. Have been away”
- To which Ms Yerman replied saying:
- “I will look at your file and get back to you. I will need you to sign the appeal form which I will complete. The actual physical legal appeal document I will also put together. I think I must start this on the weekend. I have family visiting on Saturday from Johannesburg but nothing on Sunday so this will be my best opportunity to start.”
- [22] Ms Yerman’s submission questioned why her office was “still calling them during the last few days before the time to lodge the appeal ran out.” She did not explain why the correspondence from her file appears to show routine inquiries, and timely responses from the Tully family, and an absence of any great concern being expressed about lack of time.

[23] Ms Yerman claimed the email correspondence she produced did “not paint a true picture of the sequence of events”. She said there was other communication (mainly by telephone), and that evidenced a lack of commitment on the part of the Tully family.

[24] It appears Ms Yerman’s explanation is that she expected the Tully family to be driving the process of preparing the appeal. She complained that they needed to show commitment by which she appears to mean:

“... coming in to see me, working with me, giving me input in a complex appeal which rested on their daughter and on whom they were an authority. Discussing the various forms her condition involved, and how independent of them she might become at a later stage – all vital for the successful outcome of the appeal.

... had I been in their position [I would have shown] my commitment to the process and [given] the valuable input required as experts on the condition and long term prognosis of their child’s condition ...”

[25] Ms Yerman said the family failed to provide essential documents in a timely way, but did not explain the file note she produced dated 20 April 2010 which said the documents requested by her office had been delivered before the time requested.

## Decision

[26] I am satisfied the complaint must be upheld.

[27] I reject Ms Yerman’s justification for her failure to lodge the appeal on time.

[28] The inescapable facts on the materials before the Tribunal are that Ms Yerman accepted instructions to lodge an appeal. She did lodge the appeal, presumably believing it was lodged on time. The Board which was to hear that appeal informed her she filed it too late, and she indicated that it was a matter of surprise and concern to her.

[29] There is no record prior to this complaint being made of Ms Yerman saying she could not fulfil her professional obligations due to any action or failure to act on the part of her clients. To the contrary, the record Ms Yerman produced shows:

[29.1] An email dated 8 April 2010 from Ms Yerman to Ms Tully which explains she accepted the instruction, identified what she required to complete the appeal, and suggests Ms Tully come in the following week to sign the appeal form.

[29.2] An email from Ms Yerman’s office dated 15 April 2010 said:

“We are presently collating all your documents for certification that we require go to the Appeal Review Board, ... [Ms Yerman] is away in Joburg for the next couple of days but on arrival back in Capetown needs to submit your Appeal, and we need you to in the meantime pop in and sign the form and complete the section with your credit card details.

Anytime before Thursday 22<sup>nd</sup> would be OK.”

[29.3] Ms Yerman produced what appears to be a file note following that email which recorded:

“20 April 2010

[Ms Tully] physically went to the agent’s office and took above mentioned documents, credit card, and signed appeal documentation.”

- [30] The last day for filing the appeal was 28 April 2010. There is no suggestion in the correspondence on the file that Ms Yerman required anything from Ms Tully or her family that they did not provide in the time Ms Yerman requested it. Further, it is not apparent from any of the correspondence that Ms Yerman required the appeal form to be signed before she would start substantive work on the appeal.
- [31] I am satisfied Ms Yerman was exclusively responsible for failing to file the appeal on time. The criticism of her client is wholly unjustified, and unsupported by Ms Yerman's own written record of her professional dealings with the Tully family.
- [32] Ms Yerman states the Tribunal has failed to take into account the telephone correspondence between herself and the Tully family, and the email correspondence before the Tribunal puts Ms Yerman at a disadvantage, as it "[does] not in any way paint a true picture of the sequence of events surrounding this situation". However, there are no file notes or written correspondence Ms Yerman has presented to support this claim. Ms Yerman was required by Clause 3(f) of the Code to confirm details of material discussions with clients in writing. The written record should not be other than accurate, and Ms Yerman has provided no credible evidence it does not present a "true picture".
- [33] As a professional dealing with this potential appeal Ms Yerman was required to:
- [33.1] Identify the date by which the appeal had to be filed.
  - [33.2] Advise her clients of the merits of appealing so they could make an informed decision as to whether to pursue the appeal.
  - [33.3] Inform her clients when she needed to have instructions so she had time to prepare the appeal.
  - [33.4] When instructed to proceed, she needed to inform her clients of what information or other input she required from them.
  - [33.5] If she had any difficulty with lack of response from her clients, she needed to inform them, and record the effect that had. She was required to indicate to her clients that she could not act if her ability to file the appeal on time was compromised.
- [34] In fact, Ms Yerman failed to identify when the appeal had to be lodged. She communicated with her clients in writing in a manner that was calculated to lead them to believe she was preparing the appeal with fully adequate information, and lodging it in time.
- [35] Ms Yerman's justification is founded on shifting what is her responsibility as a licensed professional adviser to her clients. It was not her clients' responsibility to take charge of determining what information was required, arranging meetings with Ms Yerman, or otherwise preparing the appeal. They could do no more than provide what Ms Yerman asked of them, as she was the professional who ought to have known what she needed to prepare the appeal.
- [36] Ms Yerman's endeavour to justify her error is founded on refusing to accept the responsibility a professional person offering services to the public is required to carry. There are of course instances when clients make it impossible to act effectively, or give instructions that the professional adviser considers unwise. When that occurs, the professional person will communicate with the client and document the situation, preferably in writing addressed to the client, but certainly in a file note that can be authenticated as being created at the time. This is an elementary aspect of professional practice.

- [37] In this case, the written record shows no concern about the Tully family's responses. On the contrary, Ms Yerman wrote to them in a manner which indicated they were doing all that was required of them, and they were following Ms Yerman's recommended course of action. Further, when the Board identified Ms Yerman's failure to lodge the appeal on time, she sent emails to the Tully family saying she had been too busy to complete the appeal on time. She did not refer to problems with the Tully family complying with what was asked of them.
- [38] I am satisfied Ms Yerman breached clause 1.1 of the Code as she failed to act with care, diligence and professionalism in performing her services.
- [39] Ms Yerman was careless in failing to identify the date by which the appeal had to be lodged, and that led to the consequence of her failing to file the appeal on time. She was required to understand the critical nature of the date for filing the appeal.
- [40] She was not diligent, as she failed advise her clients, ensure she had instructions, and undertake the necessary work early enough to be in a position to file the appeal in time.
- [41] Her conduct lacked professionalism, as she admits she failed to take responsibility for the appeal, and looked to her clients to ensure she undertook the work. Professionalism requires the professional person to take responsibility for service delivery; and identify to clients clearly what is required from them, and the consequences of any failure on the part of the client.
- [42] A breach of the Code is a ground for a complaint pursuant to section 44(2)(e) of the Act. Accordingly, the Tribunal upholds the complaint on that basis.
- [43] In addition, negligence and incompetence are grounds for upholding a complaint under section 44(2)(a) and (b) of the Act. I uphold the complaint on those grounds also.
- [44] Ms Yerman was negligent in failing to identify the date when the appeal was to be lodged, and ensuring it was lodged on time.
- [45] Ms Yerman's confusion between her role as a professional adviser, and the role of her client who is reliant on her advice and direction, amounts to incompetence. A licensed immigration adviser is required to understand their role, and the obligations it carries.

### **Submissions on Sanctions**

- [46] Given the findings, disciplinary sanctions under section 51 of the Act may be imposed by the Tribunal.
- [47] Section 51 provides:

"Disciplinary sanctions

- (1) The sanctions that the Tribunal may impose are —
- (a) caution or censure:
  - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
  - (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
  - (d) cancellation of licence:

- (e) an order preventing the person from reapplying for a licence for a period not exceeding two years or until the person meets specified conditions:
- (f) an order for the payment of a penalty not exceeding \$10,000:
- (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
- (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
- (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.”

[48] The Authority and Ms Tully have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees, and compensation.

[49] If Ms Tully seeks a refund of fees paid or other compensation, she should provide full particulars.

[50] 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.

[51] Ms Yerman will have the opportunity to respond to any submissions from the Authority and Ms Tully. Whether or not they make submissions, Ms Yerman may provide submissions on penalty.

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

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

[52.2] Ms Yerman is to make any submissions (whether or not the Authority or Ms Tully make submissions) within 15 working days of the issue of this decision.

[53] The parties are notified this decision will be published, with the names of the parties, after five working days, unless any party applies for orders not to publish any aspect.

**DATED** at WELLINGTON this 9<sup>th</sup> day of May 2012

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**G D Pearson**  
Chair