BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2013] NZIACDT 11

Reference No: IACDT 017/11

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**Immigration Advisers Authority**
	Authority
Between	**HNL**
	Complainant
AND	**SEC**
	Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 19 March 2013

DECISION

Introduction

[1] Mr HNL engaged Mr SEC, a licensed immigration adviser, to assist with seeking a visa for his fiancée.

[2] Mr HNL paid $920 for that service. However, the matter had not gone very far when Mr HNL told Mr SEC he did not want him to do any more work.

[3] The dispute is primarily over Mr SEC agreeing to refund some money, but treating $576 as non-refundable.

[4] In addition, Mr HNL complains that Mr SEC over-sold his fiancée's immigration prospects.

[5] The complaint has been upheld on the basis that a refund of the whole fee was required, as Mr SEC drafted a contingent agreement. In addition, he was misleading by stating he had a 100% success rate for new applicants. That was misleading, as immigration applications will fail from time to time and the statement created the impression that Mr SEC could alter that reality.

[6] While the complaint has been upheld, it is not on the basis of Mr SEC engaging in intentional wrongdoing, but rather lapses that have not been unknown while the profession has become aware of the full extent of the professionalism demanded by the Act and the Code of Conduct.

The Complaint

Background

[7] Mr HNL's complaint, supported by various documents, presented the following allegations and factual propositions.

[8] Mr HNL engaged Mr SEC to assist with obtaining a visa for his fiancée. Mr HNL was working in New Zealand as the holder of a work visa, and he was contemplating lodging an application for residence. Mr HNL was making arrangements for his marriage and wanted to obtain a visa so his fiancée would be able to come to New Zealand after their marriage.

[9] On 28 March 2011, Mr SEC and Mr HNL met to discuss the potential application for a visa. At this meeting Mr SEC gave some advice on the information required, a written agreement was signed ("the agreement") and Mr HNL paid $920. That was Mr SEC's full fee for the visa application.

[10] On 25 April 2011 Mr HNL indicated to Mr SEC he did not want to proceed with the application, and sought a refund of part of the fees paid. He expected to have some of the payment retained by Mr SEC to cover the service provided.

[11] Mr SEC offered to refund $345 and expected to retain $575.

[12] Mr HNL was not satisfied with that offer, and has complained that:

[12.1] The agreement did not conform to the oral communication at the meeting, in two respects:

[12.1.1] the agreement indicated the services were contingent on Mr HNL gaining residence, whereas orally Mr SEC did not make that qualification; and

[12.1.2] the effect of the agreement was not explained.

[12.2] Mr SEC pressured Mr HNL to sign the agreement.

[12.3] Mr SEC did not evaluate Mr HNL's fiancée's immigration prospects prior to having the agreement signed.

[12.4] The services were minimal, and the fee Mr SEC expected to retain was excessive.

[12.5] The work Mr SEC did was not accurate, and it was based on incorrect information.

The Response

[13] Mr SEC responded to the complaint. He said his first contact with Mr HNL was by telephone on 7 March 2011, and an email exchange followed.

[14] Mr SEC sent Mr HNL a quotation and an agreement for service, along with disclosure material.

[15] There was further contact but Mr SEC was reluctant to do more, as he suspected Mr HNL was gathering information so he could complete the application himself without incurring fees.

[16] Following that, there was a meeting on 28 March 2011, which was some 45 to 60 minutes' duration. At that meeting Mr SEC explained:

[16.1] His professional duties under the Code of Conduct.

[16.2] The fees to be incurred were a "deposit" of $575, which was non-refundable, the total fee being $920.

[16.3] The terms of an agreement to provide services.

[16.4] For Mr HNL's fiancée to get a visitor's visa depended on Mr HNL having residence so he was eligible to sponsor his wife. Accordingly, an application could only proceed once Mr HNL had been issued with a residence visa. Mr HNL said he would lodge his own residence application.

[16.5] Mr SEC then said Mr HNL's fiancée could apply for a work permit, and he took the initial details for an application.

[16.6] Mr SEC provided written notes to Mr HNL that explained the information required to complete the application for a work permit.

[17] Mr SEC explained his approach to this professional engagement and his entitlement to fees in these terms:

> "In order to maintain a professional standard of service it is necessary to protect the intellectual property which is my knowledge and experience of Immigration Law and Practice. It is also necessary to keep clients fully informed of the process(es) required for their application but ensure that clients do not withdraw from my service after obtaining all necessary information, to enable their application, but prior to paying a fee for the service rendered. The process of completing the application documents is an administrative function and this part of the process requires knowledge and experience that is typically required by a Licensed Immigration Adviser, but does not, necessarily, entail the giving of Immigration advice.
>
> In the case of HNL it is considered that I have fully provided advice, details and lists of application requirements that would be sufficient for HNL to proceed with the application. The only part of the service which we agreed on and that has not been provided; is the provision of a covering letter that would accompany the application and possibly liaising with [Immigration New Zealand] regarding any queries that may arise in the application. It was agreed with HNL, that the final lodgement of the application may be completed by his wife, after she had attached her relevant documents and signed the application form."

The Tribunal's Minute

[18] On 8 October 2012 the Tribunal issued a Minute. The Minute explained it followed a review of the material then before the Tribunal, and identified apparent issues and potential factual findings. It emphasised that the parties would have the opportunity to respond, as the Tribunal had reached no conclusions at that point.

[19] The key elements of the complaint and the response identified in the Minute were as outlined above.

[20] The Tribunal is an expert inquisitorial body that receives complaints and determines whether the proof before it is adequate to uphold the complaint, and if so, in what respects. The Authority and the complainant do not lay charges and prove them.

[21] Accordingly, the Minute identifies issues and potential conclusions on the material presented to give the parties the opportunity to consider their positions, and provide submissions and further proof if they wish.

Issues identified in the Tribunal's Minute

[22] The Licensed Immigration Advisers Code of Conduct ("the code") was established pursuant to sections 37–39 of the Immigration Advisers Licensing Act 2007.

[23] Clause 1 of the Code requires:

[23.1] A licensed immigration adviser to act with professionalism. In doing so, they must ensure that the terms of professional engagements are fair and appropriate.

[23.2] That a client engagement be established with an agreement that is in writing and accepted in writing, and the client must be made aware of all significant matters relating to the agreement; and a copy of the Code must be supplied to the client.

[24] Clause 3 of the Code requires written records and communications, which ensure both that clients are fully informed and that there is a record of the professional engagement and how it was discharged. It also requires that any refunds of fees are paid on the termination of an engagement.

[25] Clause 8 of the Code prohibits a licensed immigration adviser setting a fee that is not "fair and reasonable". The fees must be set out, including the terms and conditions.

[26] Section 44 of the Act provides that breaches of the Code and misleading behaviour are grounds for complaint.

[27] The issue for the Tribunal was to determine whether it is satisfied Mr SEC breached any of these professional standards. The Minute identified that this was primarily a factual issue.

[28] The parties have not taken issue with this identification of the issues arising.

Potential conclusions identified in the Minute

[29] The Tribunal's Minute went on to identify potential findings on the basis of material then before the Tribunal, and indicated that quite different conclusions may follow if further information was presented or submissions made as to the effect of the material presently held. The potential conclusions identified were as follows.

The agreement did not take effect

[30] The agreement states it is "subject to the approval of [Mr HNL's] residence application".

[31] The Code is clear that before commencing work incurring costs, the fees must be set out (clause 7). Further, a written agreement must be entered into to govern the professional relationship (clause 1.5).

[32] It was not clear why Mr SEC would state that the agreement was subject to approval of Mr HNL's residence application. However, it appeared he chose to use that language. It appeared to have the legal effect of making the agreement conditional on Mr HNL gaining residence, and it appears that Mr HNL cancelled the agreement before that condition was fulfilled.

[33] The consequence appeared to be that Mr SEC had no written agreement in effect with Mr HNL, and he accordingly had no right to any fees paid.

[34] Mr SEC appeared to have chosen to put this surprising condition into the agreement, and it was to his detriment. He would now have to abide by the legal effect of the term he chose to insert.

[35] The view appeared open that Mr SEC was obliged to refund the fees he received in full, and had not done so. Accordingly, he breached clause 3(d) of the Code.

Inappropriate pressure

[36] There was a dispute regarding pressure on Mr HNL to sign the agreement. It was an issue where different perceptions were possible.

[37] The Minute indicated the Tribunal was not satisfied on the material before it at that point that there was any inappropriate pressure exerted by Mr SEC.

[38] The issue appeared to be of little importance, as to a significant extent the agreement was onerous from Mr SEC's point of view. While Mr HNL has complained of the conditional aspect of the agreement, that appears to disentitle Mr SEC to any fee. Further, for reasons that are discussed below, the terms of the agreement make it difficult to justify the fee. The agreement indicated that services extending far beyond those actually provided were to be supplied at a total cost of $920; that gives the appearance of $575 being excessive for the service in fact provided.

Misleading behaviour

[39] Mr HNL complained that Mr SEC induced him to enter the agreement without a proper and measured explanation of the issues.

[40] There is an email dated 9 March 2011 which Mr SEC sent to Mr HNL. This preceded their meeting. It contains the representation:

> "My success rate for new applicants applying under any category is 100%"

[41] The Minute observed that whether the claim was correct or not, and it was only likely to be accurate if Mr SEC had dealt with a small number of cases, it created a gravely misleading impression. Immigration applications are never certain and clients are entitled to measured professional advice including the risks of applications failing.

[42] A potential finding was that Mr SEC should be warned regarding promotion of his professional services in this manner.

[43] In other respects, it did appear from the papers before the Tribunal that Mr SEC did identify relevant issues, and his handwritten notes indicate Mr HNL was informed that there was a significant information gathering process required. The view appeared open that Mr SEC was engaging in a process of evaluating the grounds to support the application, and that would have been conveyed adequately to Mr HNL.

Charging and failing to refund excessive fees

[44] Mr SEC said he told Mr HNL that $575 of the fee was “non-refundable”, and maintained that he is entitled to conduct himself on that basis. His view did not appear to be consistent with the requirements of the Code.

[45] Clause 8 of the Code requires that “fees are fair and reasonable”. That requirement overrides any term in an agreement. A licensed immigration adviser is not entitled to contract out of complying with the Code, and to purport to do so is potentially a breach of the requirement of professionalism under the Code, and misleading behaviour under the Act.

[46] Clause 3 of the Code requires refunds to be paid when a professional engagement ends.

[47] Fairness and reasonableness of fees is a protection provided by the Act for the public, and this reflects the privileged position that only licensed or exempt persons can provide immigration services to the public.

[48] Further, the agreement did not state that any element of the fee was non-refundable. It was not acceptable for a written agreement to omit an important element relating to fees, and doing so potentially amounted to a failure to comply with clause 8(c) of the Code which requires that conditions are set out.

[49] Accordingly, the view was open that Mr SEC was not entitled to claim that any element of the fee could be retained as non-refundable on the basis that he set this as a term of his professional engagement.

[50] Mr SEC had endeavoured to justify the fee of $575 on the basis the principal value was delivered in the initial part of the engagement, and the balance is effectively low value work that a client can complete themselves.

[51] There can be no objection to a professional person weighting the cost of work on the basis of complexity and skill required. It is a quite different matter to effectively claim that fees can be weighted to the initial part of an instruction to “lock” a client in.

[52] Further, the Tribunal could reject the claim that completing application forms is not important skilled work. The agreement Mr SEC drafted identifies the work he was to complete for a fee of $920, which was:

[52.1] review all information and documents;

[52.2] provide advice on the appropriate course of action;

[52.3] prepare the application and submit it to Immigration New Zealand;

[52.4] certify copies of documents;

[52.5] prepare letters of submission;

[52.6] report on progress of the application; and

[52.7] attend all meetings, deal with telephone calls and correspondence.

[53] The view was open that for many professional people, strategic advice is a critical element of the service they provide, and clients may choose to implement that advice themselves. Where licensing is required for persons to offer services to the public, it is common for people to be entitled to undertake the work themselves. Licensed immigration advisers do not face a unique situation where their clients may choose to do the work for themselves.

[54] Mr SEC was requested to explain what fair remuneration was for the work he performed.

[55] On the basis of the information that was before the Tribunal, the consultation was for less than an hour. The advice provided did not require research, it was information that a competent practitioner working in the area could provide on the basis of day-to-day knowledge. An hourly

rate of $500 (plus GST) appeared excessive. The total fee of $920 for what appeared to be a far more extensive service supported that potential view.

[56] If that view were reached, the complaint would potentially be upheld on the basis that Mr SEC charged excessive fees, and failed to refund fees pursuant to clause 3 of the Code when his engagement was terminated.

Failure to complete the work with care

[57] Mr HNL has complained that the work was not completed with care.

[58] The material before the Tribunal was consistent with Mr SEC identifying information that was required, and a process having commenced for gathering the relevant information.

[59] It appeared Mr SEC was contemplating reviewing the documentation and finalising it when information came to hand. Accordingly, at that point it did not appear there was a foundation for finding Mr SEC's work lacked care.

Responses to the Minute

Mr SEC's response

[60] Mr SEC provided evidence of his commitment and success in professional development, and his role in supervising provisional licensees.

[61] He also emphasised that elements of the complaint addressed some evolving areas of practice. The question of non-refundable fees is an area of professional practice that has been highlighted recently.

[62] He accepted that he may have misunderstood the scope of his obligation to refund fees in this case, but had believed he was acting appropriately.

[63] Mr SEC said he did not intend to mislead Mr HNL in referring to his record of lodging successful applications, which was accurate. He noted other advisers were promoting themselves in a similar way, and said he had now changed his practices.

[64] In relation to the non-refundable portion of the fee, Mr SEC noted he had used that provision in the standard form he submitted to the Authority on the renewal of his licence. That gave him confidence the provision was appropriate.

[65] Mr SEC emphasised that he was conscious of his obligation to ensure that his clients were informed, and he acted within the scope of fully informed instructions and in accordance with his professional obligations.

[66] Mr SEC considers that the work he performed was to the value of $575, and appropriate for three telephone calls, email communications and a meeting of 45 to 60 minutes.

Mr HNL's response

[67] Mr HNL reviewed the work and considered that Mr SEC had overstated the amount of time engaged in what he did, and the nature of the process.

The Authority's response

[68] The Authority did not respond to the Minute.

Discussion

Refund of fees

[69] Mr SEC is faced with the difficulty that he presented Mr HNL with a contingent agreement; this contingency has never been fulfilled.

[70] He did not refund the fees, despite not having a written agreement giving him authority to take fees. The Code is prescriptive in requiring the terms and conditions for the payment of fees to be set out in writing (clause 8(c)) and emphasis is also placed on the requirement for a written agreement.

[71] As the instructions were in the early phase and there was an unfulfilled contingency, this is not a case where I consider Mr SEC could have been justified in retaining any of the fee.

[72] I am satisfied this left Mr SEC in the position that he should have refunded Mr HNL the full fee pursuant to clause 3(d) of the Code when his instructions were terminated.

Inappropriate pressure

[73] The evidence regarding inappropriate pressure lacks the clarity required to make an adverse finding. This aspect of the complaint will not be upheld.

Misleading behaviour

[74] The representation that a practitioner has a 100% success rate is inevitably calculated to understate the inherent risks in the sort of processes for which professional assistance is required. It implicitly overstates the capacity for the adviser to change the outcome of applications.

[75] Even an adviser operating at the highest level and making no mistakes will have applications that fail, unless acting so conservatively that applications that would succeed are not lodged.

[76] It was an error for Mr SEC to make such a representation. I accept that he did not intend to act improperly, and it may well be that other colleagues made similar representations. I also accept that generally Mr SEC did give advice that identified issues and meaningfully evaluated immigration prospects.

[77] I am satisfied the conduct was misleading behaviour, but at the lowest end of the scale.

Charging and failing to refund excessive fees

[78] I have had regard to Mr SEC's explanation of the work he performed to justify the fee he charged. I have some doubts as to the appropriateness of the fee, and particularly in relation to the total fee for the work contemplated. However, the information before me is not sufficient to discharge the requirement for proof.

[79] The Tribunal is required to determine 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). The relatively modest size of the fee in issue and the uncertainties regarding the actual work do not establish it was more likely than not that the fee was excessive for the work performed.

Failure to complete the work with care

[80] While Mr HNL complained that the work was not completed with care, I am not satisfied that was the case.

[81] Mr SEC appeared to identify information that was required, and a process had commenced to gather relevant information. It appeared Mr SEC was contemplating reviewing the documentation and finalising it when information came to hand. Accordingly, I am not satisfied Mr SEC's work lacked care.

Threshold

[82] There are two areas where I have found the complaint may be upheld:

[82.1] failing to refund fees, due to the agreement being conditional; and

[82.2] misleading conduct through saying that Mr SEC had a 100% success rate.

[83] Nonetheless that does not necessarily mean the complaint will be upheld. It is necessary for a lapse from proper standards to be sufficient to justify an adverse disciplinary finding.

[84] The jurisprudence from various authorities dealing with other professional disciplinary contexts is appropriately applied to understand the threshold, while being mindful that it is necessary to consider the statutory context in each respective situation; they can be quite different.

[85] In a decision of the Health Practitioners Disciplinary Tribunal (HPDT), *Re Tolland* (Decision No 325/Mid10/146P, 9 September 2010) at para [39], the HPDT observed:

> "Negligence, in the professional disciplinary context, does not require the prosecution to prove that there has been a breach of a duty of care and damage arising out of this as would be required in a civil claim. Rather, it requires an analysis as to whether the conduct complained of amounts to a breach of duty in a professional setting by the practitioner. The test is whether or not the acts or omissions complained of fall short of the conduct to be expected of a [practitioner] in the same circumstances[.] This is a question of analysis of an objective standard measured against the standards of the responsible body of a practitioner's peers."

[86] The professional setting is varied, but duties of competence, application of skill, honesty, disclosure and propriety are shared by a wide range of professionals. Immigration advisers have much in common with other professionals. Section 3 of the Act affirms it is intended to protect the interests of consumers receiving immigration advice, which corresponds to the duties other professionals have to the public engaging their services. The issue is properly understood under the Act as whether there has been a breach of duty in a professional setting.

[87] I find it is a necessary element of the test to determine whether any lapse is sufficiently serious to warrant the complaint being upheld as a professional disciplinary matter.

[88] Section 50 contemplates a complaint being upheld without necessarily imposing a sanction. It follows that it is not necessary to find that a disciplinary sanction should be imposed to uphold a complaint. It is important to recognise that not every lapse or manifestation of human frailty should result in an adverse professional disciplinary finding. There will be occasions when advisers are responsible for a lapse from acceptable standards, but that still does not justify upholding a disciplinary complaint.

[89] It is a reality that many errors and mistakes are too trivial to warrant an adverse disciplinary finding, and the Act recognises that. Section 45(1) of the Act provides that the Authority may treat a complaint as trivial or inconsequential and need not be pursued, or treated as a matter that is best settled between the parties.

[90] It is necessary and appropriate for this Tribunal to be mindful that there is a threshold before a complaint of negligence or want of care and diligence is established. Though the statutory context is quite different, there is a discussion of the underlying policy issues in *Orlov v New Zealand Law Society (No 8)* [2012] NZHC 2154.

[91] The Act does not attempt to further prescribe where the boundary lies, and any attempt by this Tribunal to do so is unlikely to be successful. It is necessary to consider the facts of each complaint.

[92] I now apply those principles to the present facts.

[93] I am satisfied this complaint must be upheld, but it is at the lowest end. I find Mr SEC did not intend to engage in wrongful conduct. In relation to both of the points in issue, Mr SEC appears to have taken the view that he was following the practices of others.

[94] However, this Tribunal is required to set standards where sections of the profession are not meeting the required standards.

[95] While Mr SEC has sought to justify the fee and justify retaining the fee on the basis of a "no-refund" entitlement, the Tribunal finds that even on the most favourable view, he was not entitled to the fee.

[96] The representation of 100% success is not the kind of representation that can be accepted from a professional person; the representation is focused on the interests of the professional, not the client. It is the essence of professionalism to have to inform a client of opportunities and risks and allow a client an informed choice when engaging professional services.

[97] The competitive offering of professional services is entirely appropriate, but it is a significant lapse to use marketing devices in a manner that potentially compromises a client's entitlement to be informed in a balanced way.

Decision

[98] Pursuant to section 50 of the Act, the Tribunal upholds the complaint in the following respects:

[98.1] Mr SEC failed to fully refund the fee of $920 as he was required to do, and breached the Code of Conduct. This aspect of the complaint is upheld under section 44(2)(e) of the Act (Code clause 3(d)).

[98.2] Mr SEC engaged in misleading behaviour by representing he had a 100% success rate. He disguised the inherent risks of immigration applications and he breached section 44(2)(d) of the Act.

[99] In other respects, the complaint is dismissed.

Submissions on Sanctions

[100] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions. However, section 50 permits the Tribunal to take no further action.

[101] The Authority and Mr HNL 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 SEC is entitled to make submissions and respond to any submissions from the other parties.

[102] 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.

[103] The Tribunal gives notice to the parties that it would potentially decide to take no further action if Mr SEC has refunded the fees in full within 10 working days of this decision. That is only an indication of a potential view, and any position the parties take on that issue will be fully considered.

Timetable

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

[104.1] Mr SEC is to inform the Tribunal and the parties as to whether he has refunded the fees in full, within 10 working days of the issue of this decision.

[104.2] The Authority and Mr HNL are to make any submissions within 15 working days of the issue of this decision.

[104.3] Mr SEC may make any further submissions (whether or not the Authority or Mr HNL make submissions) within 20 working days of the issue of this decision.

[105] The parties are notified that 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 19th day of March 2013

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G D Pearson
Chair