

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

Decision No: [2013] NZIACDT 24

Reference No: IACDT 043/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

Between

Moses Marcel Kazadi Musese

Complainant

AND

Tae-Soo (Tony) Min

Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 4 April 2013

DECISION

Introduction

- [1] Mr Min worked as a licensed immigration adviser in the Australian office of an immigration practice. The practice also had an office in South Africa where Mr Musese, the complainant, engaged the practice's services.
- [2] As Mr Musese was intending to migrate to New Zealand, his file, after some work had been completed, was transferred to Mr Min in the Australian office.
- [3] Mr Musese's complaint is that Mr Min engaged with the file when he had no instructions from him, did not deal professionally with the South African office having undertaken some of the work unlawfully, failed to comply with the Code of Conduct in establishing a professional relationship, and failed to deal professionally with the termination of the instructions.
- [4] Mr Min has not challenged the factual allegations, and the complaint has been upheld.

The Complaint

- [5] The complaint Mr Musese made against Mr Min is as follows.
- [6] Mr Musese engaged Global Visas Pty Ltd (Cape Town) and paid approximately \$3,500 to get assistance with applying for work visas for Australia.
- [7] Before the Australian visas were progressed Mr Musese decided to look for work in New Zealand. Mr Musese agreed with Global Visas that the fee he had paid would be applied to seeking appropriate visas for New Zealand instead of Australia.
- [8] On 30 June 2011 Mr Musese received a job offer in New Zealand, and Global Visas requested a copy of the relevant documentation to progress the matter. This included personal documents such as medical and police clearances.
- [9] Mr Musese became aware that Global Visas (Cape Town) did not have any personnel who were licensed immigration advisers under the Act. The Act requires persons to be licensed regardless of where immigration advice is given. Mr Musese asked for an explanation from Global Visas, but he was not told what had happened.
- [10] Eventually Mr Musese became aware his file had been transferred to Global Visas' Australian office, without his authority or knowledge; he believes the action was done in secret.
- [11] The contact at Global Visas (Cape Town) eventually admitted to Mr Musese that the firm has "for years" been referring files to another office in that way. On 14 September 2011 the person at Global Visas (Cape Town) admitted that all Mr Musese's personal documents had been sent to Australia and his affairs were being dealt with by Mr Min.
- [12] Mr Musese was offended that Mr Min was examining the personal information in the papers without his consent or knowledge, as he regarded the information as personal.
- [13] Mr Min sent Mr Musese an email on 15 September 2011 introducing himself. Mr Musese replied, and challenged Mr Min for acting unprofessionally and unlawfully, having engaged with his affairs with no authority. Mr Musese sent Mr Min a copy of the Code and pointed out he was not acting in accordance with it.
- [14] On 19 September 2011 Mr Min sent an email to Mr Musese stating that the contract he signed in South Africa would cover his work and the Cape Town office would deal with fees.
- [15] Mr Musese engaged another adviser who was based in New Zealand. He instructed Mr Min to send all the relevant documentation to that adviser.

- [16] Mr Min:
- [16.1] failed to follow the instructions to transfer the documents;
 - [16.2] lost some of the documents; and
 - [16.3] Mr Min was absent for a period, without ensuring that Mr Musese's instructions were carried out (or that anyone would deal with the issues in his absence).
- [17] On 7 October 2011 the documents were transferred, but the delay affected the medical clearances and Mr Musese's offer of employment.
- [18] Mr Musese requested a full refund of the fees he paid.

The Response

- [19] Mr Min responded to the complaint in an email to the Authority dated 7 December 2011. In this email he said Global Visas had been reviewing its processes, accepted there were errors, and had made a full refund of fees paid by Mr Musese.
- [20] On 9 December 2011 Mr Min provided his own statement. The key features were as follows:
- [20.1] The file came to Mr Min after an expression of interest and work visa had been lodged by Global Visas South African office.
 - [20.2] Mr Min was assigned this file along with 10 other New Zealand applications from the South African office.
 - [20.3] On 14 September 2011, Mr Min was reviewing the file and was having difficulty identifying what timeframe would apply. Mr Min was concerned that a work permit was required, as residence (which had been the approach taken) would take too long.
 - [20.4] On 15 September 2011, Mr Min first made contact with Mr Musese by email.
 - [20.5] On 17 September 2011, Mr Musese told Mr Min he was not satisfied with how Global Visas had handled his affairs.
 - [20.6] On 22 September 2011, Mr Min left Global Visas and notified the Authority of that change in circumstance.
 - [20.7] Global Visas sought to have Mr Min return to the firm, and he did so on 7 November 2011. The day after his return, he emailed Mr Musese and explained his absence, and said he would start working on the file again.
 - [20.8] Mr Min discovered Global Visas had returned some of the documents on file, while others remained. Mr Min told the management of Global Visas the documents needed to be returned. They refused, as they expected Mr Musese to pay for that. Mr Min had no control over the situation. Global Visas eventually returned the documents when the South African office intervened.
 - [20.9] Mr Min expressed regret for the circumstances; however he said he had provided correct advice, he did his best, and could do nothing while he was not with Global Visas.

The Tribunal's First Minute

- [21] On 20 February 2013, the Tribunal issued a Minute which explained that the Tribunal had conducted a review of the material then before the Tribunal. The Minute identified apparent issues, potential factual findings, and emphasised that the parties would have the opportunity to respond, and that the Tribunal had reached no conclusions at that point.

- [22] The key elements of the complaint, and the response identified in the Minute, were as outlined above.
- [23] The Authority and the complainant do not lay charges, and are not responsible to prove them. The Tribunal is an expert inquisitorial body, which receives complaints, and determines whether the proof before it is adequate to uphold the complaint, and if so in what respects. Accordingly, the Minute identified issues and potential conclusions on the material presented before the Tribunal in order to give the parties the opportunity to consider their positions and provide submissions and further proof if they wish.

The issues to be determined

- [24] The Minute identified the relevant professional standards.
- [25] Clause 1 of the Licensed Immigration Advisers Code of Conduct requires a licensed immigration adviser to:
- [25.1] Commence a professional engagement with a written agreement, after ensuring that the client has been made aware of all significant matters.
- [25.2] Provide clients with a copy of the Code of Conduct.
- [25.3] Act with professionalism, care, and have the client's lawful informed instructions.
- [25.4] Return personal documents on request, without delay.
- [26] Clause 2 requires an adviser to hold written authority from clients to act on their behalf, and uphold the integrity of New Zealand's immigration system.
- [27] Clause 8 requires that the adviser set fees that are fair and reasonable, and set out the payment terms and conditions.
- [28] Clause 9 requires the adviser to provide a copy of their internal complaints procedure.
- [29] Section 44 of the Act provides breaches of the Code, negligence, incompetence, and dishonest or misleading behaviour are grounds for complaint.
- [30] The Minute indicated the issue for the Tribunal is to determine whether it is satisfied Mr Min breached any of these professional standards.

Potential conclusions

- [31] The Minute emphasised its purpose was to identify potential findings on the basis of material presently before it. Quite different conclusions may follow if further information was presented, or submissions made, as to the effect of the material presently held.
- [32] The Minute related the potential factual findings to the professional standards required under the Code and the Act.
- [33] The Minute stated, on the papers before the Tribunal at the time, the following findings below appeared to be open.

Mr Min's professional environment

- [34] The regime in the Act is one where individuals are licensed. It is not possible for a corporate entity or a practice to hold a licence. It follows that individual licensed immigration advisers are the subject of complaints. They personally face disciplinary sanctions and orders for compensation.

[35] The view appeared to be open that Mr Min put himself in a professional environment where he, wrongly but naively, regarded Global Visas as the professional service provider. That could never be the case under the Act, as Mr Min held the licence and was personally responsible for professional obligations.

[36] Mr Min is responsible for what he did. However, he was not responsible for the conduct of others, unless there is some reason to make him responsible, such as delegation or acquiescence in improper conduct.

Unlawful conduct by Global Visas

[37] In the present case Global Visas' South African office appeared to have been unlawfully providing Mr Musese with immigration advice.

[38] Section 63 of the Act provides that a person commits an offence if they provide "immigration advice" without being either licensed or exempt from the requirement to be licensed.

[39] Section 73 provides that a person may be charged with an offence under section 63, whether or not any part of it occurred outside New Zealand.

[40] The scope of "immigration advice" is defined in section 7 very broadly. It includes:

"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 relating to New Zealand ..."

Mr Min's conduct

[41] It appeared on Mr Min's own account that he received a file from the Global Visas' South African office that had been progressed by an unlicensed person unlawfully lodging an expression of interest. This appeared to establish Mr Min knew, or ought to have known, he received a file which evidenced unlawful conduct.

[42] There appeared to be no evidence Mr Min knew of the unlawful actions until he received the file, and he could not be held responsible for what he did not do and did not know about.

[43] However, when he received the file and could apprehend what had occurred, then he was obliged to act professionally and deal with the situation he found.

[44] The material before the Tribunal when the Minute was issued appeared to leave open the view Mr Min:

[44.1] Did not hold written authority to act for Mr Musese (Code of Conduct, clause 2.1(h)).

[44.2] Knew he had not gone through the process of setting a fee and entering into a written agreement after making Mr Musese aware of "all significant matters relating to it", or dealt with the other preliminary requirements of the Code in relation to establishing a professional instruction (Code of Conduct, clauses 1.5, 8, and 9).

[44.3] Breached the requirement of professionalism (Code of Conduct, clause 1). In particular:

[44.3.1] He engaged himself in examining Mr Musese and his family's personal information, when he had no right to do so without first establishing a professional relationship. He breached Mr Musese's expectation of confidentiality.

[44.3.2] Mr Min furthered the unlawful conduct in the South African office by dealing with Mr Musese's affairs and dealing with the file despite there being no professional engagement in conformity with the Code.

[44.3.3] He then left Global Visas without ensuring that the professional service delivery was put on a proper footing by handing it over to a licensed immigration adviser (or telling Mr Musese of the need to do so).

[44.3.4] Mr Min then failed to deal with the return of documents when required. It appears he allowed himself to be in a position where unlicensed persons unlawfully refused to return documents.

Potential conclusions

[45] The Minute notified Mr Min that unless Mr Min answered the allegations, the Tribunal would potentially uphold the complaint and find:

[45.1] He acted without instructions.

[45.2] He furthered unlawful conduct by unlicensed persons.

[45.3] He failed to deal professionally with Mr Musese's affairs by not attempting to inform his client of the true circumstances, get proper instructions, and ensure his relationship with Mr Musese conformed to the Code.

[45.4] He then failed to ensure he dealt with Mr Musese's documents and the handover of professional responsibility in accordance with the Code.

Response to the Minute

[46] Mr Musese did not respond to the Minute, and was not required to do so.

[47] Mr Min responded by email, and said he had resigned from his employment on 3 September 2012, provided a list of New Zealand cases he handled, and emphasised he has was away for 6 weeks, and was not involved in the unlawful handling of Mr Musese's file.

Discussion

[48] Mr Min's response to the Minute has not altered the conclusions that are to be drawn from the material before the Tribunal. Mr Min was certainly absent for a period as he resigned and later returned, before his most recent resignation. However, none of the issues which the Minute attributed to Mr Min occurred while he was absent.

[49] It is inescapable that Mr Min found himself in the difficult position of receiving a file from his employer when they had insofar dealt unlawfully with Mr Musese's affairs. However, Mr Min failed to identify what had been done incorrectly with Mr Musese's file, failed to inform Mr Musese of the situation, and failed to seek further instruction from Mr Musese as to what to do next. Mr Min ought to have taken such steps.

[50] Accordingly the conclusions notified in the Minute are the conclusions that must be reached. In particular the Tribunal finds the following established:

[50.1] Mr Min did not hold written authority to act for Mr Musese (Code of Conduct, clause 2.1(h)).

[50.2] He knew he had not gone through the process of setting a fee and entering into a written agreement after making Mr Musese aware of "all significant matters relating to it", or dealt with the other preliminary requirements of the Code in relation to establishing a professional instruction (Code of Conduct, clauses 1.5, 8, and 9).

[50.3] He breached the requirement of professionalism – Clause 1 of the Code of Conduct. In particular:

[50.3.1] He engaged himself in examining Mr Musese and his family's personal information, when he had no right to do so without establishing a professional

relationship. Therefore, he breached Mr Musese's expectation of confidentiality.

[50.3.2] Mr Min furthered the unlawful conduct in the South African office by dealing with Mr Musese's affairs and dealing with the file despite there being no professional engagement in conformity with the Code.

[50.3.3] He then left Global Visas without ensuring that the professional service delivery was put on a proper footing by handing it over to a licensed immigration adviser (or telling Mr Musese of the need to do so).

[50.3.4] Mr Min then failed to deal with the return of documents when required. He allowed himself to be in a position where unlicensed persons unlawfully refused to return documents.

Decision

[51] The Tribunal upholds the complaint pursuant to section 50 of the Act, on the basis Mr Min breached the Code of Conduct.

Submissions on Sanctions

[52] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions.

[53] The Authority and the Mr Musese 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 Min is entitled to make submissions and respond to any submissions from the other parties.

[54] 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.

Timetable

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

[55.1] The Authority and the Mr Musese are to make any submissions within 10 working days of the issue of this decision.

[55.2] Mr Min is to make any further submissions (whether or not the Authority or Mr Musese make submissions) within 15 working days of the issue of this decision.

DATED at WELLINGTON this 4th day of April 2013

G D Pearson
Chair