

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

Decision No: [2013] NZIACDT 33

Reference No: IACDT 034/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

Between

Mohamed Muneez

Complainant

AND

Ran Deng

Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: P McPherson, Hesketh Henry, Lawyers, Auckland.

Date Issued: 27 May 2013

DECISION

Introduction

- [1] Ms Deng is a licensed immigration adviser who Mr Muneez engaged.
- [2] Mr Muneez had lodged an expression of interest himself. Ms Deng was engaged to assist with the filing of an application for residence for Mr Muneez and his family.
- [3] There was a question as to whether Ms Deng adequately evaluated the case for applying for residence when lodging the application.
- [4] After the application was lodged, Ms Deng failed to respond to concerns that Immigration New Zealand had identified.
- [5] Ms Deng failed to notify Mr Muneez promptly when his application was declined.
- [6] When Mr Muneez complained he received information that suggested that he could not immediately lodge a complaint with the Authority.
- [7] Ms Deng has admitted she failed to respond to the correspondence from Immigration New Zealand regarding concerns relating to Mr Muneez's application for residence; and that due to failing to clear her mail regularly she was slow in giving Mr Muneez notice his application had been declined.
- [8] Accordingly, the complaint has been upheld in these respects. Ms Deng's failure to notify Mr Muneez of Immigration New Zealand's concerns, and gain instructions to respond is the first ground. The second ground is Ms Deng's failure to deal properly with her mail.
- [9] The Tribunal has had to determine:
 - [9.1] Whether Ms Deng has failed to notify Mr Muneez that his application was declined, in a respect other than the inevitable consequence of failing to clear her mail;
 - [9.2] Whether she failed to put forward the best case in support of the application; and
 - [9.3] Whether information indicating the complaint could not be immediately lodged with the Authority was an aspect of the complaint.
- [10] The Tribunal has concluded that the extent to which the complaint should be upheld is those matters which Ms Deng has admitted.
- [11] In particular:
 - [11.1] Ms Deng's failure to notify Mr Muneez that his residence application was declined was the result of Ms Deng failing to clear her mail, rather than her wilful failure to inform Mr Muneez his application was declined;
 - [11.2] The evidence does not justify a finding that Ms Deng could have, on the information she received, advanced a stronger case.
 - [11.3] The unsatisfactory wording of Ms Deng's complaints procedure was not either drafted to mislead, or used in that way. In the circumstances, it did not reach the threshold for an adverse disciplinary finding.

The Complaint

- [12] Mr Muneez has made a complaint on the following basis.

- [13] Mr Muneez engaged Ms Deng to assist with an application for residence. They entered into an agreement for the provision of professional services on 8 May 2010.
- [14] Mr Muneez was already in New Zealand and held a visa. He had lodged an Expression of Interest and in a letter dated 16 March 2010 Immigration New Zealand invited him to apply for residence. Mr Muneez understands he may have made errors in completing his Expression of Interest.
- [15] Ms Deng prepared and lodged an application. Immigration New Zealand received the application on 1 July 2010. Ms Deng notified Immigration New Zealand that she was the contact for communication regarding the application.
- [16] Immigration New Zealand declined the application, by letter dated 13 April 2011, on the basis that Mr Muneez did not qualify for the bonus points which Ms Deng had claimed, in relation to:
- [16.1] Qualifications in the area of absolute skills shortage; and
- [16.2] Work experience.
- [17] The Immigration New Zealand letter of decline stated that it had previously sent a letter dated 17 March 2011 pointing out these issues and the need for further documentation. The decline letter observed:
- “We confirm that we have not received any response from you/your Immigration advisor ...”
- [18] Even earlier, Immigration New Zealand had sent Ms Deng an email requesting information. This request was dated 15 February 2011 and it too had no response.
- [19] Mr Muneez’s complaint is that:
- [19.1] Ms Deng was tardy in informing Mr Muneez that Immigration New Zealand had declined his application. Ms Deng told him on 28 April 2011 that Immigration New Zealand had sent a letter of decline on 13 April 2011.
- [19.2] Ms Deng failed to obtain relevant information from Mr Muneez. Accordingly, when the residence application was made, Immigration New Zealand was not told about Mr Muneez’s relevant work experience and study in New Zealand.
- [19.3] Mr Muneez relied on Ms Deng to advise him of the information that was relevant to seeking residence, and she failed to do so.
- [19.4] Ms Deng failed to keep Mr Muneez informed of information requests from Immigration New Zealand, and the result was that he could not respond to those requests.
- [19.5] Ms Deng failed to identify that Mr Muneez had used an incorrect job description in his Expression of Interest.
- [19.6] For Mr Muneez to succeed in gaining residence, an offer of appropriate employment was essential, and Ms Deng failed to inform him of this. She told him that his identified work experience and qualifications would be sufficient. Mr Muneez eventually realised the importance of this himself.
- [19.7] Ms Deng’s internal complaints procedure states that complaints cannot be taken to the Authority until 28 days have passed, in order for issues to be resolved. Mr Muneez suspects that this is intended to make it more difficult for people who are obliged to leave New Zealand to advance complaints. Mr Muneez produced a copy of the procedure. It states “in the unlikely event that no response is provided by us within the eight week period you are entitled to refer your complaint to [the Authority]”.
- [19.8] Ms Deng failed to assist when Mr Muneez’s application was declined, using the non-payment of fees as an excuse, when in fact all fees had been paid in advance.

[20] Mr Muneez seeks the refund of fees, and compensation of \$10,000.

The Response

[21] Ms Deng responded to the complaint in a letter dated 19 September 2011 addressed to the Authority. The key points were that:

[21.1] Ms Deng only collects mail fortnightly. She believes that a delay of two weeks in informing a client of their application for residence being declined is acceptable

[21.2] Ms Deng did not receive information regarding Mr Muneez's qualifications, so there was nothing she could do about that;

[21.3] Ms Deng was entitled to a further \$1,000 in fees, but was dropping the claim;

[21.4] Mr Muneez lodged the Expression of Interest and it appeared correct to Ms Deng. However, she cannot guarantee the outcome of a residence application; and

[21.5] Ms Deng fully complied with the Licensed Immigration Advisers Code of Conduct in dealing with Mr Muneez's affairs.

The Tribunal's Minute

[22] On 19 March 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.

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

[24] 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 wished.

[25] The Minute emphasised its purpose was to identify potential findings on the basis of material presently before it, and quite different conclusions may follow if further information was presented, or submissions made as to the effect of the material presently held.

[26] The Minute related the potential factual findings to the professional standards required under the Code, and the Act.

[27] The Minute identified potential conclusions on the papers before the Tribunal at the time, with a view to giving the parties the opportunity to respond.

The response to the minute from Ms Deng

[28] Through her counsel Ms Deng provided:

[28.1] Submissions; and

[28.2] An affidavit from Ms Deng.

[29] Ms Deng's through her counsel accepted that she:

[29.1] Failed to respond to the Immigration New Zealand correspondence of 15 February 2011 to 17 March 2011; and

[29.2] Failed to advise Mr Muneez of that correspondence and take instructions.

[30] The remaining issues were identified as whether:

[30.1] Ms Deng failed to inform Mr Muneez promptly of Immigration New Zealand declining his application.

[30.2] She put forward the best case, and in particular, whether she failed to inform Mr Muneez of the value of gaining a job offer, or putting forward details of his study at the University of Auckland.

[30.3] She managed the complaint properly.

[31] Ms Deng's position in relation to these issues was as follows.

Notification of the Immigration New Zealand letter of decline

[32] Ms Deng accepts she took too long to notify Mr Muneez that his residence application had been declined by Immigration New Zealand. Ms Deng received notification of the decision in a letter dated 13 April 2011, and Mr Muneez was not informed until 28 April 2011.

[33] Ms Deng accepts that was because she failed to clear her mail promptly. However, her counsel submits that the situation fell short of negligence. He points to the consequences of Ms Deng's failure, and in particular the 42 day appeal period. Accordingly, Mr Muneez still had adequate time to protect his interests.

Presenting the best case

[34] Ms Deng accepts she failed to respond to Immigration New Zealand's letters.

[35] However, she says Mr Muneez was informed of the importance of an offer of employment.

[36] In that regard, Ms Deng refers to information that points to Mr Muneez being aware of this information:

[36.1] The EOI application Mr Muneez completed contained that information;

[36.2] Email correspondence addressed the importance of an offer of employment;

[36.3] Mr Muneez has accepted previously that he received this advice; and

[36.4] Ms Deng pointed to service providers who could assist with finding an offer of employment.

[37] Accordingly, this was not a matter that was not pursued, and Ms Deng could have expected Mr Muneez to report any job offer he obtained.

[38] The second aspect of the complaint of inadequate advice was that Ms Deng failed to inform Immigration New Zealand of Mr Muneez's study at the University of Auckland.

[39] Ms Deng's position is that she did convey the material information she had received from Mr Muneez as she reasonably understood it.

Response to the complaint

[40] In relation to the internal complaints process the submission was made that it was not intended that it should cause clients to believe they could not make an immediate complaint to the Authority, rather that they should pursue the desirable course of an agreed resolution.

[41] Ms Deng did not ask for further fees after the complaint, and did provide services without payment being demanded or expected.

Files

[42] Ms Deng has misplaced her files as a result of relocations.

Affidavit

[43] Ms Deng provided an affidavit supporting the position she advanced. She also explained she has ceased practising as a licensed immigration adviser.

Mr Muneez's response to the Minute

[44] Mr Muneez did not respond to the substantive points raised by Ms Deng, he did however say:

[44.1] He would have provided information had Ms Deng asked for it;

[44.2] The delay in informing him his application was declined prevented him from getting a "second opinion";

[44.3] The arrangement was that the \$1,000 which was unpaid was only payable if the application for residence was successful; and

[44.4] Mr Muneez and his family have suffered adverse consequences following the matters giving rise to the complaint.

The issues to be determined

[45] Broadly, the issues to determine are the application of the Code of Conduct and section 44 of the Act to the facts. Section 44 provides that breaches of the Code and misleading or dishonest conduct are grounds for complaint.

[46] In particular, the issues discussed in Ms Deng's submission appropriately identify the outstanding issues, namely:

[46.1] Whether Ms Deng's failure to inform Mr Muneez promptly of Immigration New Zealand declining his application was in itself grounds for a complaint to be upheld;

[46.2] Whether Ms Deng put forward the best case, and if not whether it reached the disciplinary threshold; and

[46.3] Whether grounds for complaint arose out of Ms Deng's internal complaints process.

Discussion*Elements of the complaint that were accepted*

[47] Ms Deng has accepted Mr Muneez's claim that there was no response by Ms Deng to Immigration New Zealand's email of 15 February 2011 and letter of 17 March 2011. Ms Deng agreed that:

[47.1] She was required to inform Mr Muneez of these developments (pursuant to clause 3 of the Code);

[47.2] She needed to assess whether there was an adequate answer to the issues and, if so, put it forward; and

[47.3] Alternatively, she was required to advise Mr Muneez of the implications for his immigration prospects, including whether there were alternative options.

[48] She also accepts her failure to communicate with and properly advise her client was in breach of the service delivery standards in the Code, lacking professionalism, care, diligence, and breaching the standards of negligence and incompetence in the Act.

[49] It follows that these aspects of the complaint are upheld, as breaches of clauses 1 and 3 of the Code; and grounds to uphold the complaint pursuant to section 44(2)(a), (b) and (e) of the Act.

Failure to inform Mr Muneez promptly of Immigration New Zealand declining his application

[50] Ms Deng has claimed the failure was not negligent, as the delay was relatively brief and the consequences redeemable, as Mr Muneez was notified within the appeal period.

[51] The substance of the submission has merit. However, in my view that is because the real fault lay in Ms Deng's admitted failure to deal with her correspondence properly.

[52] The failure to notify Mr Muneez promptly was a consequence of her failure to deal with correspondence properly. This was not a case where Ms Deng intentionally delayed after receiving the mail. The fact that Mr Muneez still had time to appeal the decision suggests that the delay in informing Mr Muneez was due to her failure to collect her mail rather than an intentional failure to inform him of the decision in order to prejudice his opportunity to appeal.

[53] I am thus satisfied that this aspect of the facts does not add to the elements Ms Deng has admitted. Accordingly, no additional adverse finding will be made.

Failure to put forward the best case

[54] Ms Deng submits that the case she put forward to Immigration New Zealand, in relation to Mr Muneez's residence application, was the best she could present with the information she was provided.

[55] She has pointed to documentation that does establish Mr Muneez was aware of the importance of a job offer; I am satisfied she did discharge her professional responsibilities in that regard.

[56] There are differences between Mr Muneez and Ms Deng's submissions regarding the information Mr Muneez provided regarding his work history. I am not satisfied Ms Deng was careless in how she dealt with this information; she is entitled to the benefit of the doubt.

[57] I take this view with some reluctance, given Ms Deng's failure to produce her file. However, she has given a reasonable explanation for that situation; and the evidence must reach the balance of probabilities to uphold the complaint. I cannot be satisfied it does in this respect.

[58] Accordingly, there will be no adverse finding in this regard.

Whether grounds for complaint arose out of the complaint process

[59] The wording of Ms Deng's complaint process was not satisfactory. However, I accept she did not intend that it be a device for misleading clients regarding their statutory rights. I further accept she did not intentionally use it in that way.

[60] In the circumstances, I am not satisfied the matter reached the disciplinary threshold.

Decision

[61] Pursuant to section 50 of the Act, the complaint is upheld. Ms Deng has breached the Code in the respects identified. She failed to deal with mail appropriately. She failed to deal with important correspondence from Immigration New Zealand. She should have responded with informed instructions. Accordingly, she failed to meet the professional standards required by clauses 1 and 3 of the Code, which is a ground for complaint pursuant to section 44(2)(e) of the Act.

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

Submissions on Sanctions

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

[64] The Authority and Mr Muneez have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, and compensation. Whether they do so or not, Ms Deng is entitled to make submissions and respond to any submissions from the other parties.

[65] 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.

[66] The parties should note the Tribunal has not found that Ms Deng could have provided a response to the correspondence dated 15 February 2011 or 17 March 2011 that would have altered the outcome. Accordingly, unless there is further evidence or submissions, the Tribunal will address sanctions, including compensation, on the basis there was no causative connection between Ms Deng's failure to address the correspondence and the application being declined by Immigration New Zealand.

[67] If any party contests that tentative view, they should address the issue.

Timetable

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

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

[68.2] Ms Deng is to make any further submissions (whether or not the Authority or Mr Muneez make submissions) within 15 working days of the issue of this decision.

[69] 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 27th day of May 2013

G D Pearson
Chairperson