

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

Decision No: [2013] NZIACDT 60

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
IMPOSITION OF DISCIPLINARY SANCTIONS

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 18 September 2013

DECISION

Introduction

- [1] This complaint was upheld in a decision dated 4 April 2013.
- [2] Mr Min worked as a licensed immigration adviser in an Australian immigration practice. The practice also had an office in South Africa where Mr Musese, the complainant, engaged the practice's services.
- [3] As Mr Musese was intending to migrate to New Zealand, his file was transferred to Mr Min in the Australian office after some work had been completed.
- [4] Mr Musese complained that Mr Min:
 - [4.1] Engaged with the file when he had no instructions from him;
 - [4.2] Did not deal professionally with the South African office;
 - [4.3] Undertook some of the work unlawfully;
 - [4.4] Failed to comply with the Licensed Immigration Advisers Code of Conduct 2010 (Code of Conduct) in establishing a professional relationship; and
 - [4.5] Failed to deal professionally with the termination of the instructions.
- [5] Mr Min did not challenge the factual allegations and the complaint was upheld on those terms.

The parties' positions on sanctions

- [6] As the complaint has been upheld, section 51 of the Immigration Advisers Licensing Act 2007 ("the Act") allows the Tribunal to impose sanctions.
- [7] Mr Min provided a brief response to the decision regarding appropriate sanctions. In explanation, he referred to having ceased his employment and lessened his role in the failure to return the documents.
- [8] Mr Musese made a submission and supported it with a submission from Mr McCall of Psych Recruitment Ltd.
- [9] The submissions indicated Mr Musese sought the following orders:
 - [9.1] Compensation for:
 - [9.1.1] The cost of replacing lost documents.
 - [9.1.2] Compensation for loss of income through not commencing employment when available.
 - [9.1.3] Distress, uncertainty, and delay.
 - [9.1.4] The cost of engaging a new immigration adviser to undertake work that should have been completed.
 - [9.1.5] Travel costs in South Africa.
 - [9.1.6] Having to abandon possessions in South Africa due to having no time to make arrangements without losing a position of employment.

[9.1.7] The cost and inconvenience of Mr Musese and his family having to return to Burundi. Thereafter, travelling from there to Kenya, Dubai and Korea to collect visas and travel documents and avoid visa requirements which could not be complied within the time available.

[9.1.8] The cost of priority processing of visas.

[9.2] Refund of fees paid.

[10] The Tribunal issued a Minute dated 14 June 2013 identifying issues arising from Mr Musese's submissions.

Compensation – causal link with complaint

[11] The Minute noted compensation can only be ordered against Mr Min in relation to losses where there is a causal link between any loss and the grounds of complaint upheld by the Tribunal.

[12] Mr Musese was given the opportunity of identifying why each of the losses he claimed was consequent upon the Tribunal's findings against Mr Min.

Fees – likely refundable

[13] In relation to fees, the Minute observed the Tribunal's preliminary view that Mr Min was responsible for the refund of fees in full. He was obliged to be in control of the practice and accordingly had to ensure Mr Musese's fees were held as client funds until properly expended. It appeared no satisfactory services were provided.

No evidence of amounts of compensation or fees

[14] The Minute noted Mr Musese had not provided evidence of:

[14.1] The amounts he claims as compensation and unrefunded fees, or

[14.2] Evidence of the expenditure.

[15] The Minute explained the Tribunal is required to be satisfied on the balance of probabilities of the facts before making orders. It followed that, unless there is material before the Tribunal to make findings regarding losses and reasons why the losses relate to Mr Min's conduct or neglect, the Tribunal would necessarily determine that the claim for losses has not been established.

[16] Mr Musese and the Authority were given time to provide submissions and evidence on compensation and the refund of fees.

Mr Musese's response to the Tribunal's Minute

[17] Mr Musese responded to the Tribunal's Minute.

[18] In relation to compensation Mr Musese disclosed that his prospective employer had paid him \$15,900 to cover his family's cost of travel, and he had to enter a bond. Mr Musese said he had not had the option of changing his workplace because of the bond. It appears he will likely discharge the bond without having to repay it. Mr Musese did not attempt to relate the grounds on which the complaint was upheld to the expenditure; or quantify the loss resulting from having to "work out" the bond.

[19] Mr Musese produced an email relating to fees; the email is not a clear final position, does not disclose the currency, and does not identify whether there were refunds.

[20] Mr Min did not respond to Mr Musese's submission, and was not required to do so.

Discussion

- [21] It is evident Mr Min's role was limited and he became involved after an inappropriate process in South Africa.
- [22] Mr Min failed to ensure the client engagement process was addressed properly. He then left his employment without ensuring that proper arrangements were in place for continued professional representation and he failed to deal properly with the return of documents.
- [23] It appears most or all of this occurred as Mr Min considered he could leave matters to his employer or accept directions from his employer. That approach is a serious breach of professional responsibility. The Act does not licence companies. Only individuals can be licensed immigration advisers.
- [24] If a licensed immigration adviser chooses to practice as an employee of a company, they personally bear responsibility for both the professional engagement and potential orders under the Act in relation to compensation and fees.
- [25] The Act leaves no room for defending a complaint on the basis a corporate employer rather than the individual holding the licence is responsible.
- [26] I do accept Mr Min was inexperienced and appears to have failed to understand the full nature of his obligations. However, he was required to understand them before being licensed. He holds a full licence and is entitled to provide professional services unsupervised and on his own account.
- [27] The complaint involves a systematic failure to comply with the Code of Conduct. I am satisfied a significant financial penalty and a requirement to undertake training is appropriate.
- [28] Mr Min should note that if he fails to undertake the training directed, any licence he holds under the Act will be cancelled (section 51(d)).
- [29] The evidence before me does not establish that the compensation being sought by Mr Musese relates to events caused by the grounds of complaint. This Tribunal, as the Second Minute noted, is required to be satisfied on the balance of probabilities before making an order. It is a reasoned process, not one in which fault is assumed to have caused loss.
- [30] Furthermore, it appears the expenses were largely met by Mr Musese's employer, and the measure of loss would be having to work out the bond, or result in an order in favour of the employer.
- [31] The evidence does not establish the amount of fees that were paid and not refunded or prove the quantum of compensation claimed.
- [32] It follows there can be no orders for compensation or the refund of fees.

Decision

- [33] Mr Min is censured.
- [34] He is ordered to pay a financial penalty of \$2,500.
- [35] He is required to undertake the following training within 18 months of the issue of this decision:
- [35.1] He is to successfully complete Modules 1, 2 and 10 of the Bay of Plenty Polytechnic course: *Continuing Professional Development in New Zealand Immigration Advice*.
- Or alternatively:
- [35.2] He is to meet the requirements to be issued a Graduate Certificate in New Zealand Immigration Advice Level 7.

[36] The claim for compensation and the refund of fees is dismissed.

DATED at WELLINGTON this 18th day of September 2013

G D Pearson
Chairperson