

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

Decision No: [2014] NZIACDT 52

Reference No: IACDT 009/13

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Soteria Valoaga Toilolo

Complainant

AND

Ueite (Itaotemai) Letalu

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: In person

Date Issued: 15 April 2014

DECISION

Preliminary

- [1] The complainant was in a situation where she was in New Zealand unlawfully, she engaged the adviser to lodge an appeal against deportation. The adviser had to lodge the appeal within 42 days of her first being in New Zealand unlawfully, or the ability to appeal would be lost.
- [2] The grounds of complaint are in essence that:
 - [2.1] The adviser accepted his instructions and took fees of \$800.
 - [2.2] He did not complete the client engagement process.
 - [2.3] He did not lodge the appeal, but dishonestly told his client he had done so.
 - [2.4] He did not treat the unearned fee as client funds and instead took the money.
 - [2.5] When his licence expired, he did nothing to protect his client.
- [3] The adviser has not challenged the statement of complaint, which set out these grounds. The Tribunal is satisfied the material before it requires that it uphold the complaint.

The Statement of Complaint

- [4] The Registrar filed a Statement of Complaint. The Registrar identified material that supports the following grounds of complaint:
 - [4.1] The adviser was negligent.
 - [4.2] The adviser engaged in dishonest or misleading behaviour, by giving a false account to the complainant of the immigration work he performed.
 - [4.3] The adviser breached the Immigration Advisers Code of Conduct 2010 (the Code) as:
 - [4.3.1] He breached the client engagement requirements in clauses 1.5(a), (b) and (d) of the Code.
 - [4.3.2] He breached his duties of care, diligence, respect and professionalism under the Code of Conduct, in concluding the client relationship (clause 1.1(c));
 - [4.3.3] He failed to refund fees on completing or ceasing the contract for services (clause 3(d)); and
 - [4.3.4] He also failed to comply with the rules relating to client funds (clause 4).
- [5] In outline, the background was:
 - [5.1] On 23 May 2011, the complainant's application for a work visa failed. As a result, her interim visa, issued while Immigration New Zealand considered the application, expired. From that point, she did not hold a current visa, so she was in New Zealand unlawfully.
 - [5.2] On 31 May 2011, the complainant engaged the adviser to lodge an appeal against her liability for deportation and paid fees of \$800 to him. There was no written agreement.
 - [5.3] The adviser had to file the appeal within 42 days of the complainant becoming unlawful in New Zealand. Unless lodged in that time, the Immigration and Protection Tribunal could not accept the appeal due to a statutory limitation.
 - [5.4] The adviser requested a copy of the complainant's record from Immigration New Zealand on 1 June 2011, and he received it on 1 July 2011.

- [5.5] The adviser did not lodge an appeal, or make any other type of application.
- [5.6] On 28 May 2012, the adviser's licence expired.
- [5.7] In June 2012, Immigration New Zealand told the complainant there was no appeal and the adviser's licence had expired.
- [5.8] The adviser agreed to refund \$800, but has not provided any evidence that he has done so.

[6] The Statement of Complaint provides particulars of the potential infringements of professional obligations:

Negligence (section 44(2)(a))

- [6.1] The complainant engaged the adviser to lodge an appeal. That appeal had a statutory time limit of 42 days. Unless filed in that time, the complainant permanently lost the opportunity to appeal.
- [6.2] The adviser did not lodge the appeal in time and potentially failed to do so negligently.

Dishonest or misleading behaviour (section 44(2)(d))

- [6.3] The adviser told the complainant he lodged her appeal, when that was untrue.
- [6.4] The false statement to his client was potentially dishonest or misleading behaviour.

The Code: clause 1.5 (a), (b), (d) and 8(d) – client engagement

- [6.5] The adviser had duties under the Code in relation to client engagement. These included those relating to written agreements and setting out fees in writing. He took no steps to comply and accordingly potentially breached:
 - [6.5.1] Clause 1.5(a) - it requires an adviser to explain, in writing and plain language, all significant matters to a client before entering into the agreement.
 - [6.5.2] Clause 1.5(b) – it requires a written agreement, containing a full description of the services to be provided.
 - [6.5.3] Clause 1.5(d) - it requires a client to confirm acceptance to the terms of the agreement in writing.
 - [6.5.4] Clause 8(d) – it requires fees and disbursements are set out in writing.

The Code: Clause 1.1(c) – the obligation to terminate a client engagement with due care, diligence, respect and professionalism

- [6.6] The adviser was required to take steps to address his complainant's interests in anticipation of his licence expiring.
- [6.7] He did nothing. His client was not aware he could no longer act until she was told by Immigration New Zealand. He potentially breached his duties.

The Code: Clause 3(d) – obligation to refund fees

- [6.1] The complainant paid \$800 to the adviser for services he did not provide.
- [6.2] When his licence expired, he could no longer lawfully provide those services. He did not refund the fees.
- [6.3] Accordingly, the adviser potentially failed to refund the fees when his engagement ended, as the Code of Conduct required.

The Code: Clause 4 – obligations relating to client funds

- [6.4] The code required the adviser to place fees paid in advance into a separate bank account and only withdraw the money for fees when payments were due.
- [6.5] The adviser did not perform the services to earn the fee. He has not been able to refund the fees, which should be on deposit in a bank account.
- [6.6] It appears the adviser has potentially failed to bank the fee as client funds (clause 4(a)), has taken the fee from the bank account when it was still client funds (clause 4(b)), or used the fee for a purpose for which it was not paid (clause 4(c)).

Reply to the statement of complaint

The complainant

- [7] The complainant did not file a statement of reply and was not required to do so unless challenging it.

The adviser

- [8] The adviser did not file a statement of reply and, like the complainant, was only required to do so if seeking to challenge it.

Discussion

- [9] I have reviewed the Statement of Complaint and the documents filed in support. The adviser was given an opportunity to respond to the allegations and the supporting evidence; he has chosen not to do so. I am satisfied the complaint must be upheld.
- [10] I have considered the adviser's original reply that raised issues relating to his health. He did not provide particulars or supporting evidence. There is no basis to find it amounted to a defence to the allegations against him. He had a further opportunity of putting forward a defence based on health issues when he received the Statement of Complaint, and did not do so.

Negligence (section 44(2)(a))

- [11] The adviser had instructions to lodge an appeal. It is elementary and important that this appeal has a statutory time limit, which any licensed immigration adviser accepting work of this kind must understand. The consequence of not filing the appeal in time is that it permanently deprives a person of the ability to appeal.
- [12] The adviser accepted the instructions to appeal, it follows that he led his client to believe the appeal had merit. He had a duty to lodge the appeal in a proper and adequate form, or get further instructions in the 42-day period.
- [13] The adviser failed to lodge the appeal in time and did not revisit his instructions with his client.
- [14] The adviser provided no explanation to justify his failure. I am satisfied the adviser failed to meet the minimum standards of a licensed immigration advice acting with care in relation to his instructions. He was negligent. This aspect of the complaint must be upheld as it is a ground for complaint under section 44(2)(a) of the Act.

Dishonest or misleading behaviour (section 44(2)(d))

- [15] The allegation against the adviser is uncomplicated. He did not perform the professional work he agreed to undertake. He dishonestly told her that he had lodged her appeal, when that was untrue.
- [16] I am satisfied this unchallenged allegation is supported on the material before me. The only evident explanation is that the adviser dishonestly fabricated an account to hide the fact he had not performed work.

- [17] The issue is at the serious end of the scale of professional offending, first because overt dishonesty of this kind is wholly inconsistent with the standards required in a professional relationship. Second, the issue concerned dealing with a client's unlawful status in New Zealand. She was entitled to know, and needed to know, what steps the adviser was taking. It potentially affected her and her family in important respects.
- [18] I am satisfied the adviser engaged in dishonest and misleading behaviour, and that is a ground for upholding the complaint under section 44(2)(d) of the Act.

The Code: clause 1.5(a), (b), (d) and 8(d) – client engagement

- [19] The adviser had duties under the Code in relation to client engagement. It appears he did not attempt to comply. He has neither claimed to have complied, nor offered an explanation that explains the failure. I am satisfied he breached the following provisions of the Code:
- [19.1] Clause 1.5(a): it required the adviser to explain all significant matters before entering the agreement.
- [19.2] Clause 1.5(b): It required a written agreement, containing a full description of the services.
- [19.3] Clause 1.5(d): it required the complainant to confirm acceptance of the terms of the agreement in writing.
- [19.4] Clause 8(d): it required the adviser to set out fees and disbursements in writing.
- [20] It follows I am satisfied the complaint must be upheld in this respect, as the adviser did not comply with any of those requirements.

The Code: Clause 1.1(c) – the obligation to terminate a client engagement with due care, diligence, respect and professionalism

- [21] The adviser was engaged to lodge an appeal. He did not do that. It was an important instruction given his client's unlawful status in New Zealand and the time limit for an appeal.
- [22] The adviser dishonestly said he had lodged the appeal, when that was untrue.
- [23] When the adviser's licence expired, he could no longer act for his client but she did not know that. She was entitled to know what the true position was, and to seek appropriate professional assistance. Instead, the adviser allowed her to continue to think he had carried out her instructions.
- [24] The adviser failed to meet his duties of care and professionalism, and accordingly breached clause 1.1(c) of the Code of Conduct in this respect.

The Code: Clause 3(d) – obligation to refund fees

- [25] The complainant paid \$800 to the adviser for services he did not provide. Clause 3(d) of the Code required the adviser to pay refunds due on completing or ceasing a contract for services.
- [26] When the adviser's license expired, he could not provide the services, and had not earned the fee of \$800.
- [27] Accordingly, I am satisfied the adviser failed to meet the requirements of clause 3(d) of the Code of Conduct.

The Code: Clause 4 – obligations relating to client funds

- [28] The Code required the adviser to place fees paid in advance into a separate bank account, and only to withdraw the money for fees when payments were due. When he received the \$800, he had not complied with the client engagement process, and he never performed the work. He was never entitled to take the fee; it remained his client's funds not his.

- [29] Clause 4 of the Code required the adviser to keep client funds on deposit in a separate bank account.
- [30] The adviser, after the complaint, offered to refund fees, but said he would have to do so in instalments. The only sensible conclusion is that he has not complied with his obligations, as the money is not in a client funds account where it should be. He has either misappropriated the funds at the outset, or has done so subsequently. I am satisfied the adviser has failed comply with clause 4 of the Code.

Decision

- [31] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [32] The adviser was negligent, engaged in dishonest and misleading behaviour, and breached the Code of Conduct in the respects identified. These are grounds for complaint pursuant to section 44(2) of the Act.

Submissions on Sanctions

- [33] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [34] The Authority and the complainant 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, the adviser is entitled to make submissions and respond to any submissions from the other parties.
- [35] 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

- [36] The timetable for submissions will be as follows:
- [36.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [36.2] The adviser is to make any further submissions (whether or not the Authority or the complainant makes submissions) within 15 working days of the issue of this decision.
- [36.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of him filing and serving those submissions.

DATED at WELLINGTON this 15th day of April 2014.

G D Pearson
Chair