

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

Decision No: [2014] NZIACDT 61

Reference No: IACDT 001/13

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**Syed Muhammad Asad**

Complainant

**AND**

**Dharmendrakumar Patel**

Adviser

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**DECISION**

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**REPRESENTATION:**

**Registrar:** In person

**Complainant:** In person

**Adviser:** In person

Date Issued: 30 April 2014

## DECISION

### Preliminary

- [1] The complainant engaged the adviser's practice to assist with lodging an expression of interest.
- [2] The complainant says the adviser systematically failed to comply with his professional obligations:
  - [2.1] He did not undertake the compulsory steps relating to disclosure and recording in writing the terms of the engagement;
  - [2.2] He delivered the professional services unlawfully using unqualified staff; and
  - [2.3] He failed to refund fees he had not earned.
- [3] The adviser has not challenged the grounds of the complaint, or offered an explanation justifying or excusing his conduct.
- [4] The Tribunal has upheld the complaint.

### The Statement of Complaint

- [5] The Registrar filed a statement of complaint. It says the complainant lodged the complaint on wider grounds, but the Registrar identified material that supports the following grounds of complaint:
  - [5.1] The adviser breached the Licensed Immigration Advisers Code of Conduct 2010, in that he breached his duties:
    - [5.1.1] Of care, diligence, respect and professionalism under the Code of Conduct, in performing his services and his obligation to comply with immigration legislation (clause 1.1(a)) and clause 2.1(b));
    - [5.1.2] To complete the professional engagement processes in relation to written agreements and fees (clauses 1.5(a), (b), (c) and (d); and clauses 8(b), (c) and (d)); and
    - [5.1.3] To refund unearned fees (clause 3(d)).
- [6] In outline, the background was:
  - [6.1] The complainant contacted an immigration practice in the United Kingdom, and signed a "no win, no fee" agreement in relation to applying for an Australian visa. He paid fees of £800 of a total fee of £1,200.
  - [6.2] Then the persons at that practice advised the complainant to apply for a New Zealand skilled migrant visa. They referred him to the adviser's practice, where the adviser is the only licensed immigration adviser.
  - [6.3] An unlicensed employee in the adviser's practice started dealing with the complainant. The complainant paid a further fee. It appears the referring immigration practice remitted the funds they held, and the complainant paid further funds direct to the adviser's practice. The employee in the adviser's practice deposited the funds into their own personal bank account, rather than the adviser's practice account.
  - [6.4] There was no written agreement relating to the professional services provided by the adviser's practice.
  - [6.5] The adviser's practice prepared an expression of interest and submitted it to Immigration New Zealand, on 31 January 2012. The documents identified the adviser

as the licensed immigration adviser but it appears that the documents may have been prepared by unlicensed employees.

- [6.6] The expression of interest claimed 110 points, with no job offer. Accordingly, the expression of interest had no realistic chance of selection from the pool.
  - [6.7] The adviser took over the instructions from the unlicensed employees; they left his practice after lodging the expression of interest.
  - [6.8] The complainant requested updates of information from the adviser, who on 9 July 2012 told him Immigration New Zealand would automatically withdraw his expression of interest from the pool on 31 July 2012, as it would have been in the pool for six months. He advised the complainant not to resubmit as he had a low chance of success.
  - [6.9] The complainant requested that the fees be refunded, under the “no win, no fee” arrangement initiated with the practice which referred him to the adviser’s practice.
- [7] The statement of complaint provides particulars of the potential infringements of professional obligations:

*Clause 1.1(a) – the obligation to perform services and carry out instructions with: due care, diligence, respect and professionalism, and*

*Clause 2(b) – the obligation to act in accordance with immigration legislation, including the Immigration Adviser’s Licensing Act 2007.*

- [8] The adviser was aware or ought to have been aware the complainant was dealing with his practice from November 2011.
- [9] The first practice the complainant dealt with referred him to the adviser’s practice.
- [10] From November 2011, unlicensed employees in the adviser’s practice provided professional services, until July 2012 when the adviser personally engaged with the instructions. The adviser knew or ought to have known his employees were providing services unlawfully.
- [11] The adviser failed to inform the complainant he had little or no chance of success with his expression of interest, until he personally engaged with the instructions.
- [12] The adviser potentially breached his duty to ensure that only licensed immigration advisers provide immigration advice. He relied on unlicensed employees to provide immigration services that only a licensed immigration adviser could lawfully perform.

*Clause 1.5(a), (b), (c), and (d): – client engagement processes.*

*Clause 8(b), (c) and (d) – processes relating to fees.*

- [13] The adviser did not sign a written agreement relating to the services the adviser’s practice provided.
- [14] The relevant provisions of the Code required a written agreement and disclosure, including in relation to fees.
- [15] The adviser potentially failed to comply at all with these requirements.

*Clause 3(d) – providing refunds.*

- [16] The adviser was the only licensed immigration adviser in his practice.
- [17] The complainant paid £800 to the first practice and further money direct to the adviser’s practice. The funds were ultimately deposited into a bank account held by the adviser’s employee.

- [18] The complainant understood the adviser's practice received the initial fee with his instructions, and the employee apparently diverted the money.
- [19] The adviser did not carry out the work.
- [20] Clause 3(d) requires the adviser to provide refunds due when completing or ceasing an engagement. He should have refunded the fees, as he did not carry out the work.

### **Reply to the Statement of Complaint**

#### *The complainant*

- [21] The complainant did not file a statement of reply, and was not required to do so unless challenging the statement of complaint. As there was no challenge, it is only necessary to determine the aspects of the complaint in respect of which the statement of complaint identifies supporting grounds.

#### *The adviser*

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

### **Discussion**

- [23] I have reviewed the statement of complaint, and the documents filed in support. I am satisfied the complaint must be upheld in the respects where the statement of complaint has identified grounds and evidence supporting it.

*Clause 1.1(a) – the obligation to perform services and carry out instructions with: due care, diligence, respect and professionalism, and*

*Clause 2(b) – the obligation to act in accordance with the Immigration Adviser's Licensing Act 2007.*

- [24] The adviser has not challenged the allegations set out in the statement of complaint. I am satisfied the adviser either knew unlicensed employees dealt with the complainant's instructions or he managed his practice in a way which allowed that to occur.
- [25] One of the consequences was the expression of interest had little or no chance of success, and the unlicensed employees filed it regardless. That raised false expectations on the part of the complainant and wasted resources of Immigration New Zealand.
- [26] In many areas of professional and licensed practice, extensive use is made of people who do not hold the professional qualifications required of the person primarily responsible for providing the service. In some cases those persons hold different and complementary qualifications, such as lawyers and legal executives; surgeons, nurses and anaesthetists; pilots and first officers. Often people without formal qualifications provide essential services in these settings too, under delegation from the qualified person who is responsible for the work. Unqualified people successfully provide very important skills in many areas of professional service delivery.
- [27] If there was no legislative direction, a licensed immigration adviser could conduct their practice making extensive use of unqualified people, likely without acting unreasonably or irresponsibly. Any complaint would likely require a demonstration of failure to delegate appropriately, or supervise properly if that were the law. However, there is a legislative directive in the Act and it severely restricts the use of unlicensed persons in the provision of immigration services.
- [28] The Act was, among other things, intended to put an end to a history of a small minority of advisers who exploited vulnerable migrants. The background to the Act is discussed in *ZW v Immigration Advisers Authority* [2012] NZHC 1069, and reflected in section 3 of the Act.

- [29] It is evident the legislative scheme has been constructed in a manner designed to exclude unlicensed people being engaged in the delivery of professional services, to a degree that is unusual in the regulation of professional service delivery.
- [30] It was foreseeable that some people who had formerly provided immigration services, and failed to gain a licence, would seek to have a licensed person “rubber stamp” their continuing activity in the industry. Unfortunately, this Tribunal’s work demonstrates that this was a well-founded apprehension, and an area where enforcement action has been necessary.
- [31] Against that background, the policy behind the stringent restrictions in the Act on unlicensed persons providing immigration services is evident.
- [32] 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.
- [33] Section 73 provides that a person may be charged with an offence under section 63, whether or not any part of it occurred within New Zealand.
- [34] 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 ...
- [35] The adviser had to understand these restrictions when demonstrating he was entitled to become a licensed immigration adviser.
- [36] I am satisfied the adviser operated his practice in a manner that allowed his employees to provide immigration advice unlawfully.
- [37] He has claimed he did not know of the complainant until July 2012. The employee paid fees to their account, and had most of the emails sent to their personal account.
- [38] The statement of complaint has identified some emails to the practice email account to which the employee always replied, and one email copied to the adviser.
- [39] I give the adviser the benefit of the doubt, and accept he may not have had actual knowledge of what his employees were doing.
- [40] However, I am satisfied the adviser failed to maintain adequate control over his office, and did not protect his client from his employee unlawfully providing immigration advice.
- [41] When the adviser did become aware that his employee provided immigration advice unlawfully, at latest July 2012, he should have inquired into the circumstances to the extent he was not aware of them. He ought to have protected his client, providing advice and taking responsibility for any harm done in the course of dealing with his practice. He did not do that, which is consistent with him failing to control his practice and allowing his employees to act autonomously.
- [42] Further the statement of complaint put the adviser on notice the view was open that he allowed unlicensed persons to perform immigration services and he chose not to file a statement of reply.
- [43] I am satisfied the adviser allowed his employees to act without adequate supervision and did not put in place the necessary safeguards to ensure clients dealt only with a licensed immigration adviser. In this case, that lack of supervision and control led to the complainant receiving immigration advice from the adviser’s employee, unlawfully.
- [44] Accordingly, I am satisfied the adviser acted unprofessionally, breaching clause 1.1(a) of the Code.
- [45] Accordingly, I find the complaint established in relation to breaching those provisions of the Code.

[46] However, I do not find the adviser was knowingly a party to the actual provision of advice at the time that occurred. The materials supporting the statement of complaint do not provide enough evidence to support that. I confine my findings to an unprofessional failure to supervise. I accordingly, make no adverse finding under clause 2.1 of the Code.

*Clause 1.5(a), (b), (c), and (d): – client engagement processes.*

*Clause 8(b), (c) and (d) – processes relating to fees.*

[47] The Code is prescriptive of the steps required to initiate a professional relationship. The relevant provisions include, explanation, a full description of services, advice regarding independent legal advice, confirmation of accepting the agreement in writing, and setting out fees and terms of payment in writing.

[48] The adviser was wholly non-compliant. This occurred in a context where his practice was delivering services unlawfully.

[49] I have already discussed the circumstances that demonstrate the adviser is entitled to have the Tribunal find the deficiencies were the result of inadequate supervision, rather than him personally directing the non-compliance.

[50] I am satisfied the adviser breached these provisions of clauses 1.5, and 8 of the Code. However, I make this finding on the ground that it resulted from a failure to have systems in his practice to ensure a client of his practice did receive services in compliance with the Code.

*Clause 3(d) – providing refunds.*

[51] The adviser was not entitled to any fees as he failed to complete the process required to commence a professional engagement. That included the processes relating to setting out fees in advance, and the steps required to complete the disclosure necessary to protect the complainant. Furthermore, his client received all or nearly all the professional services unlawfully through unlicensed employees. In addition, the work had no value, as the complainant has no realistic prospect of lodging a successful expression of interest.

[52] I am satisfied the adviser's practice received this money. I accept the employee diverted the money. However, the adviser is responsible for maintaining practices to ensure his practice handled all client funds in accordance with the Code.

[53] Furthermore, the circumstances required him to make reasonable attempts to protect his client's interests by inquiring into the circumstances once he became aware of the complainant's instructions. He failed to do that, preferring to deny responsibility for the client's interests and directing him to follow the matter up with the other parties himself.

[54] It is not entirely clear how much the complainant paid, or the total received by the adviser's practice. However, the adviser was obliged to refund those fees when his instructions ended and he has not done so. It appears a misappropriation occurred in the adviser's practice, and the adviser carries the responsibility to account to his client.

[55] He was in breach of the duty in clause 3(d) of the Code. Accordingly, the Tribunal upholds the complaint in that respect.

## **Decision**

[56] The Tribunal upholds the complaint pursuant to section 50 of the Act.

[57] The adviser breached the Code of Conduct in the respects identified. These are grounds for complaint pursuant to section 44(2)(e) of the Act.

[58] In other respects the complaint is dismissed.

**Submissions on Sanctions**

- [59] The Tribunal has upheld the complaint; pursuant to section 51 of the Act it may impose sanctions.
- [60] 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.
- [61] 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*

- [62] The timetable for submissions will be as follows:
- [62.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [62.2] 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.
- [62.3] 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 30<sup>th</sup> day of April 2014.

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**G D Pearson**  
Chair