

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

Decision No: [2014] NZIACDT 71

Reference No: IACDT 007/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Ghulam Yasin & Sibgha Nawaz

Complainants

AND

Osama (Sam) Hammadih

Adviser

DECISION

REPRESENTATION:

Registrar: In person

Complainants: In person

Adviser: In person

Date Issued: 23 June 2014

DECISION

Introduction

- [1] This complaint arises out of events, which occurred in the adviser's practice in the United Arab Emirates (UAE), though at all material times the adviser was located in Australia. The complainants went to the adviser's practice and engaged with a person who was not a licensed immigration adviser. The agreement they signed said the adviser would carry out the immigration work. He was the only person in the practice who held a licence.
- [2] The complainants did not have the necessary educational qualifications to be eligible to migrate to New Zealand under the skilled migrant category. However, the person they first engaged with in the adviser's practice did not tell them that, nor did she say that an assessment was required to advise on immigration prospects. When the Qualification Recognition Service (a division of the New Zealand Qualification Authority) assessed their qualifications it became evident the complainants were not likely to be able to migrate to New Zealand, unless they completed further qualifications.
- [3] When they realised they could not migrate to New Zealand and the professional services they had engaged were of no value, the complainants asked for a refund. The adviser offered a partial refund but the complainants did not accept it, and lodged the current complaint.
- [4] Having read the documentation initially provided, the Tribunal issued an interim decision which put the adviser on notice of the relevant issues:
 - [4.1] The extent of the adviser's responsibilities for his clients,
 - [4.2] Whether he discharged his professional responsibilities to them, and
 - [4.3] What responsibility he had for the unlicensed person who engaged with his clients, including whether the unlicensed person acted lawfully.
- [5] The material facts have been, largely, undisputed. The main issue in addressing the complaint has been the extent of the adviser's responsibilities for the unlicensed person in his office in the UAE, his duties to give his client appropriate advice when commencing the instructions.
- [6] The Tribunal has upheld the complaint.

The Interim Decision

- [7] The Tribunal's interim decision of 11 March 2014 is to be read with the present decision. The interim decision put the parties on notice of potential factual findings based on the information then before the Tribunal. The potential factual findings were:
 - [7.1] The adviser was the sole licensed immigration adviser involved in the practice of Hammadih Consultancy FZ LLC.
 - [7.2] The agreement the complainants signed notified them the adviser, exclusively, would provide immigration services in relation to the engagement.
 - [7.3] A person located in the adviser's UAE office (the employee), who was not a licensed immigration adviser, engaged with the complainants and provided "immigration advice" as defined by the Act. To the extent she provided that advice it was unlawful, as she was neither a licensed immigration adviser nor a person exempt from holding a licence. The adviser was aware this was going on or, knew the person located in the UAE office had commenced the engagement (and would have had to give immigration advice to do so).
 - [7.4] The complainants did not have sufficient "points" to make migration to New Zealand realistic at the time the engagement commenced. They could have expected the adviser to offer a limited engagement to evaluate their qualifications or to receive accurate advice on their qualifications.

- [7.5] They did not receive timely accurate advice, and the engagement failed to provide an effective or useful professional service. The adviser has not refunded fees taken for services he failed to provide in the manner required by the Licensed Immigration Advisers Code 2010 (the Code).
- [8] The interim decision put the parties on notice of the potential view the Tribunal might take of the facts, and the adviser's responsibilities. It gave notice the material then before it may be a basis for concluding:
- [8.1] The adviser acted unprofessionally as he was a party to the employee unlawfully providing immigration advice (clause 1 of the Code).
- [8.2] The adviser failed to commence the instructions properly; instead, he was party to the employee doing so unlawfully (clause 1, 5, 8 and 9 of the Code).
- [8.3] The adviser failed to bank client funds into a client bank account (clause 4 of the Code).
- [8.4] The adviser continued to act with a lack of care, diligence and professionalism in failing to:
- [8.4.1] Take charge of the instructions and client relationship, and
- [8.4.2] Ensure he delivered professional advice, and services meeting those standards to the complainants.
- (clause 1 and 5 of the Code).
- [8.5] The adviser failed to refund fees due when his instructions were terminated (clause 3(d) of the Code).

Responses to the Interim Decision

- [9] The adviser and the complainants both responded to the interim decision. Their submissions have been taken into account in the discussion below.

Discussion

The facts

- [10] The adviser accepts that he was the sole licensed immigration adviser involved in the practice of Hammadih Consultancy FZ LLC. An agreement the complainants signed notified them the adviser, exclusively, would provide immigration services in relation to the engagement. However, the adviser accepts that an employee, who was not a licensed immigration adviser, engaged with the complainants.
- [11] The adviser says he first assessed their circumstances, then he had the employee discuss with the complainants:
- [11.1] The terms and conditions of the client agreement;
- [11.2] Payment terms and when payments were due to be made;
- [11.3] General information relating to the process that would be available on Immigration New Zealand's website, and
- [11.4] The documents needed for each step.
- [12] The adviser (through the employee) accepted instructions to seek residence visas under the skilled migrant category for the complainants to migrate to New Zealand. However, it has now become clear that the complainants never had sufficient "points" to make migration to New Zealand realistic at the time the engagement commenced. The adviser has offered a partial refund of fees in full settlement and discharge of all claims, which are or might become the subject of a complaint. He says this was a without prejudice offer.

- [13] In his defence, the adviser has submitted that it is inherently difficult to assess qualifications. That is correct in some cases, potentially in the case of the complainants. However, the adviser was put on notice the Tribunal may take the view that he should have taken a limited engagement to assess that situation, and then taken instructions regarding a residence visa only when he could give advice on whether the complainants could realistically apply for one.
- [14] Those matters are the foundation for the complaint. The adviser has complicated the issues by attempting to place responsibility on the employee. At various times when responding to the complaint he has claimed:
- [14.1] The employee is a “wanted criminal with warrants for her arrest”.
- [14.2] The fees went direct to an account the employee controlled. However, he says this was a client account.
- [14.3] At a later point the employee continued to operate the adviser’s practice, using his name, and unlawfully representing she was a licensed immigration adviser.
- [15] It is not necessary to make findings on those matters. The adviser was responsible for the practice, he was obliged to supervise and take personal responsibility for the instructions and provide all necessary immigration advice, including, and especially, during the engagement process.
- [16] For completeness I refer to the adviser’s allegation the Statement of Complaint improperly refers to a without prejudice settlement offer. Such an offer is confidential in subsequent legal proceedings, in some circumstances.
- [17] However, I am not satisfied the Statement of Complaint does refer to a *without prejudice* offer, furthermore the adviser submitted the document to the Authority in response to this complaint. It is difficult to understand why the adviser would object to the material he presented as a response to the allegation he did not offer to refund fees.

The prohibition on giving immigration advice unless licensed or exempt

- [18] This Tribunal’s decision in *Immigration Advisors Authority v Van Zyl* [2012] NZIACDT 37 sets out the principles relating to the prohibition on giving immigration advice. The interim decision on this complaint referred the adviser to the decision. He responded by admitting the employee took the steps outlined at paragraph [11]. However, he says that conforms to the legislation. In essence, the adviser claims it was in order for the employee to undertake the client engagement process.
- [19] 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. 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. 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 ...”
- [20] There are exceptions. Section 7 provides the definition does not include “clerical work, translation or interpreting services”. The scope of clerical work is important, as otherwise, the very wide definition of immigration advice would likely preclude any non-licence holder working in an immigration practice in any capacity. Clerical work is defined in section 5 of the Act in the following manner:
- “**clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:
- (a) the recording, organising, storing, or retrieving of information:
- (b) computing or data entry:

- (c) recording information on any form, application, request, or claim on behalf and under the direction of another person”

- [21] The definition covers administrative tasks, such as keeping records, maintaining financial records and the like. The natural meaning of paragraph (c) of the definition is that the unlicensed person relying on the “clerical work” exception may type or write out what another person directs. The definition does not give any authority for an unlicensed person to make inquiries, and determine what to record on the form. Under “clerical work” they must do nothing more than “record” information as directed.
- [22] The other exception in section 7 is that immigration advice does not include “providing information that is publicly available, or that is prepared or made available by the Department”. That is not authority to allow an unlicensed person to provide immigration advice simply because it follows from publicly available information. All immigration law is publicly available, that is a fundamental feature of New Zealand’s legal system.
- [23] The Act, understandably, does not make it an offence to provide a copy of legislation, a copy of a webpage, a book or the like to someone. However, it is an offence to use that information to provide advice, such as describing eligibility criteria, unless the person providing that advice is licensed or exempt.

Applying the prohibition on unlicensed persons providing immigration advice to the facts

- [24] The adviser admits he allowed the employee to initiate the professional relationship but appears to claim that this can be done without providing immigration advice. That is clearly wrong. Under the Code, the act of engaging a client is an important professional responsibility. It requires a process of gathering information, identifying immigration options and taking informed instructions, and then setting down in writing the instructions, and the terms of engagement including the fees and disbursements. There are also disclosure requirements that the adviser must undertake.
- [25] Clauses 1, 3, 8 and 9 of the Code mandate the client engagement process. Clause 1.5(a) requires that before a client enters a professional services agreement “a licensed immigration adviser” must make the client aware of “all significant matters relating to it”. In this case, that required advice regarding whether the complainants needed preliminary work to evaluate their qualifications. Their ability to migrate to New Zealand turned on qualifications and work experience.
- [26] The adviser claimed he made a preliminary assessment through a questionnaire, and then briefed the employee. It is evident from the result in this case there was no adequate assessment of the complainants’ ability to migrate to New Zealand. The employee took instructions to apply for residence visas without a foundation for doing so. To carry out the client engagement process in accordance with the Code, an essential step was for the adviser to personally engage with his clients, make relevant inquiries of them and give them accurate advice, including what was required to reach a position of clarity if their migration prospects were not immediately clear.
- [27] The client engagement process necessarily employs knowledge of, or experience in, immigration matters to advise, direct, and assist the prospective client. Accordingly, that comes with the definition of immigration advice as defined in section 7. It was not clerical work; it was important professional work at the centre of a licensed immigration adviser’s professional responsibilities.
- [28] The “publicly available” information exception allows an unlicensed person to provide information. It is a different matter to describe and assess eligibility criteria. Describing eligibility criteria involves giving advice directed to a client’s circumstances; if that were not immigration advice, virtually any immigration advice would be unregulated as the provision of publicly available information.

Breaches of the Code

Client engagement

- [29] The adviser admits he allowed the employee to complete the client engagement process. The complaint is a direct result of allowing a person who lacked the necessary skills and qualifications to perform that work. She failed to recognise the need for adequate evaluation before accepting instructions to apply for a residence visa.
- [30] As a result the adviser accepted instructions and entered into an agreement that extended through to applying for residence visas. At the very least the complainants were entitled to a written statement (clauses 1.5(a) and 3(f) of the Code) explaining that they may or may not be able to seek residence as their qualifications and work experience had to be assessed.
- [31] The circumstances were such that the adviser could not agree to provide immigration services through to applying for residence visas, because he did not know whether that was a realistic immigration option.
- [32] The only service the adviser could offer with any confidence he could achieve it, was to evaluate the complainant's immigration prospects. Anything further had to be contingent on a favourable outcome of the initial process.
- [33] The agreement said: "[The adviser] will perform the following work: "Prepare and Lodge visa applications for Skilled migrant – Residence Visa in New Zealand"; and referred to skills assessment as a part of the services.
- [34] I am left in no doubt the complainants were, as they allege, led to understand they could expect to be able to migrate to New Zealand, and engaged the adviser to complete the compliance processes to do so. They should never have been given that impression as the adviser did not have sufficient information to provide that advice. The adviser was a party to the employee unlawfully putting the complainants into that position, and he is accountable for the employee's conduct.
- [35] The adviser was aware of the instructions; he had a personal, professional, obligation to commence the client engagement in accordance with the Act and the Code. I accept he could have done so by telephone conference or other means. He could not lawfully delegate that work to the employee, and I am satisfied he did so.
- [36] I am satisfied the adviser acted unprofessionally as he was a party to the employee unlawfully providing immigration advice (clause 1.1 of the Code), and he failed to commence the client engagement in accordance with the Code in that:
- [36.1] He failed to set out all significant matters relating to the service delivery agreement, in particular he failed to accurately advise on his client's immigration opportunities (Clause 1.5, and 5(c) of the Code);
- [36.2] He failed to set out fees that were fair and reasonable for the work required to investigate and advise on his client's immigration opportunities (Clause 8(a) of the Code of Conduct), and
- [36.3] Also failed to explain and provide a copy of his internal complaints procedure (Clause 9(b) of the Code).

Client funds

- [37] I accept the adviser's explanation that he banked client funds into a client bank account (Clause 4(a) of the Code). The adviser has not provided the relevant documentation, and I have some concerns regarding earlier explanations. I note the adviser earlier claimed the account was under the control of the employee, though that may be understandable given the banking laws in the UAE and the remoteness of the office.
- [38] I also note the adviser suggested the complainants should look to the employee for a refund of fees. That is not correct; the adviser was obliged to place the funds into a client account, and was personally responsible to account for and refund fees.

- [39] The adviser is entitled to the benefit of the doubt; his earlier explanations likely resulted from his lack of understanding of his personal obligations. I accordingly make no finding the adviser breached clause 4 of the Code.

Continuing breach of duty

- [40] I am also satisfied the adviser continued to act with a lack of care, diligence and professionalism (clause 1.1 of the Code) in failing to:

[40.1.1] Take charge of the instructions and client relationship, and

[40.1.2] Ensure he delivered professional advice and services meeting those standards to the complainants.

- [41] In essence, this is simply an ongoing failure to engage with the instructions, identify the complainant's real immigration prospects, and give them adequate and proper advice. I uphold these grounds for the same reasons identified as deficiencies in the client engagement process.

Refunding fees

- [42] I am satisfied the adviser failed to refund fees due when his instructions were terminated (clause 3(d) of the Code).

- [43] The adviser acted on instructions taken unlawfully, as the employee initiated the instructions. The foundation for the instructions was a failure to provide adequate advice; with adequate advice, the complainants would likely have not given any instructions, or engaged the adviser for a more limited scope of services.

- [44] The complainants were entitled to understand their circumstances before committing to fees; the adviser instead allowed the employee to mislead them to think they could migrate to New Zealand, and that they had embarked on a compliance process, not a preliminary assessment.

- [45] I am satisfied the foundation for the instructions were wholly lacking, and accordingly a full refund was required; and not offered.

Decision

- [46] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [47] The adviser breached the Code in the respects identified. These are grounds for complaint pursuant to section 44(2)(e) of the Act.
- [48] In other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

- [49] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.

- [50] The Tribunal gives the adviser notice it considers this a serious complaint. In particular:

[50.1] The lack of care evident in his management of a distant office;

[50.2] His attitude to his client's complaint, which has included:

[50.2.1] An attempt to justify his conduct in using an unlicensed employee to undertake client engagement work, even after considering the *Van Zyl* decision; and

[50.2.2] Claiming that funds the adviser banked in a client account were under the control of the employee, and accordingly the complainants should deal with her.

- [51] Together these matters raise concerns regarding the adviser's understanding of New Zealand immigration law, and the professional obligations he has.
- [52] In these circumstances, the Tribunal invites the adviser to provide submissions on whether:
- [52.1] The Tribunal should cancel his full licence and require him to practice under supervision; and
- [52.2] Whether he should be required to undertake the training required of entrants to the profession.
- [53] This does not mean that the Tribunal will not consider the other sanctions available under section 51 of the Act, in addition to, or substitution for, such orders.
- [54] The Authority and the complainants also 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.
- [55] 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

- [56] The timetable for submissions will be as follows:
- [56.1] The Authority and the complainants are to make any submissions within 10 working days of the issue of this decision.
- [56.2] The adviser is to make any further submissions (whether or not the Authority or the complainants make submissions) within 15 working days of the issue of this decision.
- [56.3] 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 23rd day of June 2014.

G D Pearson
Chair