

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

Decision No: [2014] NZIACDT 78

Reference No: IACDT 032/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Taya Chaiyapoom

Complainant

AND

Yijun (Alex) Hu

Adviser

DECISION

REPRESENTATION:

Registrar: Ms K England, solicitor, Ministry of Business Innovation and Employment, Auckland.

Complainant: In person

Adviser: In person

Date Issued: 9 September 2014

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The central element in the complaint is the defalcation of the complainant's student course fees by an employee of Mr Hu's practice.
- [2] Mr Hu accepts the employee misappropriated the money and accepts he failed to have a signed agreement relating to his client engagement. However, he says he is not responsible for either the defalcation or accounting for the missing funds.
- [3] Mr Hu also says that while he did prepare an application, he did not put a date on it, so was not responsible for a client relationship and did not require a written agreement.
- [4] He says the employee took the money outside of her employment, so it is a matter between the employee and the complainant.
- [5] The central issues to determine are whether there was a client relationship and whether the defalcation occurred in the course of that relationship.
- [6] The Tribunal has found Mr Hu did have a client relationship, the misappropriation occurred in the course of it, and Mr Hu was responsible for the funds which he has failed to account for. Accordingly, he breached clauses 1.1(a), 1.5(d) and 3 of the Code of Conduct 2010 (the Code). The Tribunal has dismissed an allegation he breached clause 4(c).

The Complaint

- [7] The background for the complaint is set out in the Supplementary Statement of Complaint:
 - [7.1] Mr Hu was at all material times the only licensed immigration adviser in his practice, and he was the only director of a company which administered his practice (the company).
 - [7.2] Mr Hu's practice employed Ms Butkhamdee. She had a business card identify her as a senior consultant in the company, it carried the licensed adviser trademark, had the words *IAA Licensed Immigration Adviser (Full Licence)* on the front, and Mr Hu's licence number on the reverse.
 - [7.3] Ms Butkhamdee and the complainant knew each other. In February 2011, Mr Hu met with the complainant. Ms Butkhamdee participated in the meeting. The complainant engaged Mr Hu to submit a student visa on his behalf.
 - [7.4] Ms Butkhamdee communicated with the complainant regarding his immigration application. On 10 June 2011, the complainant transferred \$10,550 toward his tuition fees into Ms Butkhamdee's personal bank account. Ms Butkhamdee caused that by giving the adviser's practice as the address but her own account number on the bank payment order.
 - [7.5] On 8 July 2011, Mr Hu submitted a student visa application for the complainant to Immigration New Zealand. On 27 July 2011, Immigration New Zealand wrote to Mr Hu approving the application in principle, and asked for a receipt for tuition fees. On 25 August 2011, Mr Hu sought an extension of time to respond, but did not respond, and accordingly Immigration New Zealand declined the application.
 - [7.6] On 5 September 2011, the complainant sought a refund from the Adviser's practice. Ms Butkhamdee said she had used the Complainant's tuition fee for her own purposes, and spent the money.
- [8] Mr Hu said he would refund the money, but later refused and suggested the complainant refer to matter to the police. On 20 January 2012, Mr Hu refunded \$5,000 but refused to refund the remaining \$5,500.

- [9] The Registrar put forward four potential breaches of professional standards for the Tribunal to determine, they are whether Mr Hu:
- [9.1] Breached clause 1.5(d) of the Code, which required him to ensure clients confirm the terms of an agreement to provide professional services in writing.
 - [9.2] Breached clause 1.1(a) of the Code, which required him to perform his services with due care, diligence, respect and professionalism.
 - [9.3] Breached clause 3 of the Code, which required him to maintain professional business practices relating to finances and staff management.
 - [9.4] Breached clauses 4(c), 3(d) and 1.1(a) of the Code, which required that he use funds held on behalf of clients only for the purpose for which they were paid, provide refunds payable on completing or ceasing a contract for services, and perform his services with due care, diligence and professionalism.

The Responses

- [10] The complainant did not respond to the Statement of Complaint, and was not required do so unless he wished to take issue with it.
- [11] Mr Hu filed a statement of reply. His responses were:
- [11.1] He accepted the complainant did not sign the agreement for the provision of services.
 - [11.2] However, the complainant took the application and lodged it himself with Mr Hu's details on the application. Mr Hu listed himself as *the contact person on [the complainant's] visa application form* and he had signed his name as the licensed immigration adviser. However, he did not put the date on the form, as he expected the complainant to come in and finalise the paper work. He says the complainant could have removed his name before filing the application.
 - [11.3] The complainant's English language ability was limited; he relied on Ms Butkhamdee to communicate with the adviser.
 - [11.4] Ms Butkhamdee told Mr Hu the complainant had failed to arrange sufficient funds for his living costs, and had some difficulty with a medical certificate. Mr Hu communicated with Immigration New Zealand regarding these issues.
 - [11.5] The complainant and Ms Butkhamdee were like brother and sister, and Mr Hu was not surprised money went to her personally. Ms Butkhamdee said the complainant transferred the funds to her bank account unilaterally without her agreement.
 - [11.6] Mr Hu contends that it is unfair for the Tribunal to hold him responsible for Ms Butkhamdee's conduct. His practice did not receive any funds from the complainant.
 - [11.7] Mr Hu suggests the complainant was trying to provide false or misleading information to Immigration New Zealand, questions his *bona fides* as he doubted the complainant reported the matter to the police, and suggests Ms Butkhamdee may have information.

Nature of Legal Liability

- [12] The Registrar requested that the Tribunal delay determining the complaint due to issues raised by the District Court's decision in *Geldenhuys v Yap* DC Christchurch, CIV 2013-009-001684, 28 January 2014. A successful appeal against that decision *Immigration Advisers Authority v Yap* [2014] NZHC 1215 followed. The Tribunal gave the parties the opportunity to make submissions following the High Court's decision. Only the Registrar did so.
- [13] The Registrar's position is:
- [13.1] It is unlawful to provide immigration advice unless licensed or exempt (section 6 of the Act).

- [13.2] Only natural persons can be licensed immigration advisers, and they are personally responsible for providing professional services to their clients.
- [13.3] A company can employ licensed immigration advisers, and they will be personally responsible for the conduct of the practice.
- [14] It is unnecessary to develop the propositions, Mr Hu does not challenge them, and the propositions are correct.
- [15] In relation to this matter, the Registrar submitted Mr Hu:
- [15.1] Knew the complainant engaged him to provide immigration services;
- [15.2] Knew Ms Butkhamdee was employed in the practice, was a senior consultant, was present at the initial meeting with the complainant, and the complainant was enrolling in a course through the practice;
- [15.3] Either knew or ought to have know Ms Butkhamdee had ongoing contact with the complainant; and
- [15.4] That he was required to handle all client funds in accordance with the Code, and maintain professional business practices and staff management.

Discussion

The standard of proof

- [16] The Tribunal is required to determine facts on the balance of probabilities; however, the test must be applied with regard to the gravity of the finding: *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [55].

The material before the Tribunal

- [17] The Registrar provided the written record of the complainant's engagement with Mr Hu's practice. The Code required Mr Hu to maintain a complete record of the professional engagement with the complainant (Clause 3 of the Code).
- [18] It is not in dispute Mr Hu was well aware the complainant was his client. He accepts he met with him and completed his application for a visa. Mr Hu was the only licensed immigration adviser in his practice, and accordingly he was personally responsible for ensuring the professional relationship conformed in all respects with the Code of Conduct.
- [19] The Tribunal accepts that it would be possible for an employee to steal from the clients of a professional practice, where even the most prudent professional would not detect, or detect immediately, the misconduct. In such circumstances, the professional responsible for the employee's conduct is unlikely to breach professional standards if their personal conduct (including their supervision of the employee) met the required standards.
- [20] However, at the point where the responsible professional detects the employee's misconduct, or should have detected it, that professional will have an obligation to act and make good the defalcation. The contractual and professional duties to clients are not restricted to the professional's personal conduct.
- [21] In the present case, I am satisfied the evidence establishes Mr Hu failed in his duties to supervise Ms Butkhamdee, and indeed created the circumstances that led to the defalcation. Further, I am satisfied he wholly failed to accept his professional responsibility to the complainant when it became evident what had happened.
- [22] One of the documents lodged with the Tribunal in support of the complaint is a business card for Ms Butkhamdee, which misrepresents that she is a licensed immigration adviser and uses the logo of the Immigration Advisers Authority. Mr Hu, despite the Statement of Complaint referring to this document, has not explained why Ms Butkhamdee's business card was in this form. He has not suggested it was unauthorised or outside his knowledge. The business card conveys that Ms Butkhamdee was fully authorised to represent the practice, and could, among

other things, provide professional advice on all visa applications. In fact she could not lawfully provide any immigration advice.

- [23] Mr Hu had a personal responsibility to manage the professional relationship with the complainant, and supervise Ms Butkhamdee and her role in the relationship (which could only be very limited). Clause 3 of the Code required Mr Hu to maintain professional business practices relating to staff management. The Code sets out a large number of matters where the adviser must personally fulfil the Code's requirements. They included commencing the professional engagement in accordance with clauses 1, 8, and 9. He was also required to deal with client funds in accordance with the Code. It is clear he failed to discharge these duties. He carried out work and completed an application, despite not having a signed agreement. He says he left the date off the application. That is not a justification, the application required Mr Hu to engage with his client and explain the issues, including the importance of accuracy and the duty to disclose material matters. Mr Hu has failed to explain why he was performing work yet did not have a central element of the client engagement process in place.
- [24] Mr Hu says neither he nor his practice received any funds; however, he must have known that fees and other financial matters arose from his instructions when he accepted those instructions in the initial meeting. He had a positive duty to engage with his client, know what money his practice would receive, and manage the funds in accordance with the Code.
- [25] Immigration New Zealand contacted Mr Hu, and inquired about proof of the complainant's funding for studying in New Zealand, at that point he not only had a duty to inquire, he had a specific event that he needed to investigate. He did no more than leave the matter in Ms Butkhamdee's hands, extend the time, and then allow the application to lapse.
- [26] When Mr Hu discovered Ms Butkhamdee had taken the complainant's money and used it for her own purposes, he failed to accept responsibility.
- [27] The course of conduct is not consistent with the minimum standard required of a licensed immigration adviser. Mr Hu was the only licensed immigration adviser in his practice. He had personal responsibility for the complainant's instructions. Initially trusting Ms Butkhamdee may have been reasonable; however, does not remove the need for supervision and inquiry. I accept Mr Hu was reliant on Ms Butkhamdee in respect of elements of communication; however, that cannot justify Mr Hu's failure to inquire into matters. Ms Butkhamdee did not forge documents and dupe Mr Hu; she duped a client, and had the opportunity due to lack of supervision.
- [28] Mr Hu claims the relationship between the complainant and Ms Butkhamdee absolves him from responsibility. The submission is unpersuasive. The situation is nothing more than the common situation where a person who knows an employee in a professional practice engages the practice. In some instances, it is necessary and appropriate to isolate the employee in that situation from the client's affairs to maintain confidentiality. Any personal connection between Ms Butkhamdee and the complainant should have put Mr Hu on alert that he needed to supervise any involvement Ms Butkhamdee had in the instructions personally and closely. The circumstances did not lessen his professional duties.
- [29] Mr Hu has also claimed the complainant lodged the application himself, Mr Hu had not put a date on the application and accordingly it was not his responsibility. The submission is fundamentally flawed. First, Mr Hu did the work without having an agreement, it was not appropriate to deliver the work until he had an agreement. He has provided no evidence he regarded the application as incomplete, on the contrary, later Immigration New Zealand contacted Mr Hu about the application. If Immigration New Zealand had an unauthorised application lodged with Mr Hu's name as the adviser, he had a duty to inform Immigration New Zealand and take appropriate steps. His actions are only consistent with him preparing the application and intending that someone would file it with Immigration New Zealand.
- [30] Turning to the specific elements of the regulatory provisions, I am satisfied Mr Hu is in breach of the following provisions:
- [30.1] Mr Hu breached clause 1.5 of the Code in that he failed to have his client sign an agreement for the provision of professional services. He carried out work for the complainant; the omission was a significant precursor to what followed. The initial interview was the opportunity when Mr Hu should have identified his role in the

professional engagement and established his relationship with his client. He needed to formally explain he was the service provider and ensure his client understood arrangements relating to funds, and other matters for which Mr Hu was responsible.

- [30.2] Mr Hu also breached clause 1.1(a) of the Code, as he failed to perform his services with due care, diligence, respect and professionalism. The allegation set out in the Statement of Compliant is that at the point Immigration New Zealand requested information regarding funding, Mr Hu failed to make adequate inquiries. Instead, he delegated the matter to Ms Butkhamdee, and sought an extension of time. At that point, Mr Hu had a duty to make contact with the complainant, using an interpreter if necessary, and explain to him the importance of the issue. However, Mr Hu's claims of communication difficulties are less than persuasive. The records show the complainant communicating very clearly with Mr Hu regarding the missing funds when he realised what had happened.
- [30.3] Had Mr Hu communicated directly with the complainant when Immigration New Zealand made inquires, there can be little doubt Ms Butkhamdee's defalcation would have been evident. Mr Hu had to be personally in a position to respond to Immigration New Zealand. He failed to engage with the issue raised by Immigration New Zealand, so failed to meet his duties of care and diligence, failed to respect both Immigration New Zealand and his client, and behaved unprofessionally.
- [30.4] Mr Hu also breached clause 3 of the Code of Conduct in failing to maintain professional business practices relating to finances and staff management. Mr Hu permitted an unlicensed employee to be in a position to intercept client funds. He did not have in place systems to prevent that occurring. This could have been as simple as telling the complainant how he managed client funds, confirming this in writing and identifying the appropriate bank account for the deposit of funds (indeed such steps are already required by clauses 8(b)-(d) of the Code). When the complainant told Mr Hu on 31 October 2011 that Ms Butkhamdee had taken his money, Mr Hu took no action. He has suggested the complainant should have engaged the police, the claim is wrong. Mr Hu had a client relationship, and he failed to supervise Ms Butkhamdee, failed to supervise the receipt of funds, and failed to take steps when he knew a defalcation occurred in his practice. The matters were Mr Hu's responsibility, not his client's responsibility; as a responsible professional, he could be expected to report the matter to the police.
- [30.5] Mr Hu also breached 3(d) and 1.1(a) of the Code due to his failure to take responsibility for the defalcation that occurred in his practice and refund to his client all the money paid as a result of his failures to set out a written agreement detailing payment terms and conditions and to manage his staff properly. Clause 4(c) required Mr Hu to use the \$10,550 paid for an authorised purpose. I accept Mr Hu did not have actual knowledge of Ms Butkhamdee misappropriating the funds when paid, and accordingly do not find a breach of clause 4(c). However, when he found out Ms Butkhamdee had misappropriated the money he was responsible to account for the funds. Ms Butkhamdee intercepted the funds as an employee of the practice and Mr Hu had presented her as a person authorised to receive funds on behalf of his practice. When the instruction terminated, clause 3(d) of the Code obligated Mr Hu to account for the funds, the obligation also follows from clause 4, which has the effect of putting Mr Hu in the position of being a trustee in relation to the funds. Accordingly, his failure to make good the funds stolen by Ms Butkhamdee breached his duties of professionalism in clause 1.1(a) of the Code, and his duty to refund the fees in clause 3(d).

Decision

- [31] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [32] The adviser breached the Code in the respects identified; clauses 1.1(a), 1.5(d) and 3.

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] The Tribunal puts Mr Hu on notice that the Tribunal regards the complaint establishes a sustained and persistent refusal to accept the responsibilities of a licensed immigration adviser and a failure to manage his practice to a standard required of a licensed immigration adviser operating independently. This level of non-compliance could potentially attract significant sanctions including a requirement that Mr Hu meet the requirements for the issue of a Graduate Certificate in New Zealand Immigration Advice Level 7, and cancellation of his full licence restricting him to holding a provisional licence until completing that qualification.
- [36] Any application for an order for the payment of costs or expenses under section 51(1)(g) should have a schedule particularising the amounts and basis for the claim.

Timetable

- [37] The timetable for submissions will be as follows:
- [37.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [37.2] 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.
- [37.3] 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 9th day of September 2014

G D Pearson
Chair