

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

Decision No: [2015] NZIACDT 39

Reference No: IACDT 016/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Padam Bahadur Tamang

Complainant

AND

Nelchor Orquina Varquez

Adviser

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

Adviser: In person.

Date Issued: 15 April 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal.
- [2] Mr Varquez took over instructions to lodge an expression of interest for the complainant. The allegations are that he:
 - [2.1] Failed to comply with the requirements for commencing a professional relationship. , His client had not accepted a written agreement that met the requirements, and he did not attend to the various disclosure requirements.
 - [2.2] He also failed to document the fees and disbursements properly.
 - [2.3] In addition, he negligently failed to evaluate the points his client could claim when lodging an expression of interest.
- [3] Mr Varquez has not responded to the complaint with an explanation or justification addressing the grounds of complaint.
- [4] The Tribunal has concluded it must uphold the complaint, as the material before it establishes the grounds of complaint.

The complaint

- [5] The Registrar filed a statement of complaint, she put forward the following background as the basis for the complaint:
 - [5.1] Mr Varquez became a licensed immigration adviser on 18 October 2012. At that point, the complainant had engaged with the practice where Mr Varquez worked, but the client engagement process was not complete. The complainant had a written agreement that identified the professional fees, but not the fees payable to Immigration New Zealand; but he had not signed the agreement.
 - [5.2] On 1 November 2012, or thereabouts Mr Varquez took responsibility for the complainant's immigration matters. In February 2013, he submitted an expression of interest to Immigration New Zealand for the complainant, claiming 155 points. Immigration New Zealand assessed the correct points as 35.
 - [5.3] The discrepancy in the points related to Mr Varquez inappropriately claiming points for work qualifications, experience and classifications. He over claimed in a number of categories, and under claimed in one.
 - [5.4] Immigration New Zealand declined the complainant's application on 7 March 2013, and Mr Varquez told the complainant he had resigned from his employment in the practice, and would not continue to represent him.
- [6] The Registrar identified potential infringement of professional standards during the course of Mr Varquez's engagement. They only relate to the period from 18 October 2012, when Mr Varquez first became a licensed immigration adviser. The potential infringements were:
 - [6.1] That Mr Varquez breached clause 1.5(a), (b) and (d), and 8(d) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). Those provisions required Mr Varquez to have written terms of engagement containing a full description of the services, explain all relevant matters, and have his client confirm in writing he accepted the terms. He was also required to set out the fees, disbursements, and payment terms in writing. The circumstances were:
 - [6.1.1] Mr Varquez did not enter into a written agreement regarding the services she was to provide. Further, he did not set out the fees payable to Immigration New Zealand in any document.

- [6.1.2] Mr Varquez accordingly failed:
- [6.1.2] To ensure he had a written agreement containing a full description of the services to be provided (clause 1.5(b) of the 2010 Code);
 - [6.1.2] To have his client confirm acceptance, in writing, of the terms (clause 1.5(d) of the 2010 Code);
 - [6.1.2] To ensure all significant matters were explained to his client (clause 1.5(a) of the 2010 Code); and
 - [6.1.2] Provide the required information in writing regarding fees, disbursements and payment terms (clause 8(d) of the 2010 Code).
- [6.2] That Mr Varquez was negligent, which is a ground for complaint pursuant to section 44(2) of the Licensed Immigration Advisers Act 2007 (the Act). The circumstances were:
- [6.2.1] Mr Varquez submitted an expression of interest claiming 155 points, when his client was eligible for only 35 points.
 - [6.2.2] He over, and under, claimed points in the different categories.
 - [6.2.3] His client required 100 points to be eligible to lodge an expression of interest.
 - [6.2.4] Mr Varquez incorrectly claimed points, through his negligence.
- [6.3] The Registrar raised a potential breach of the duty to take care under clause 1.1(a) of the 2010 Code as an alternative to negligence. It is not necessary to take that further, as I have found negligence established.

The responses

- [7] Mr Varquez did not file a statement of reply; he was not required to do so if he accepted the contents of the Statement of Complaint.
- [8] The complainant did not file a statement of reply. He too was not required to do so if he accepted the contents of the Statement of Complaint. His complaint was on wider grounds than the Statement of Complaint, and he did not seek to advance the grounds beyond those in the Statement of Complaint. Accordingly, the Tribunal will deal only with the grounds in the Statement of Complaint.

Discussion

The standard of proof

- [9] The Tribunal determines 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

- [10] The Registrar provided a chronology, and supporting documentation. The parties have not disputed this record or added to it.
- [11] I am satisfied this material supports the grounds of complaint alleged.

The facts

- [12] The facts are uncomplicated, and essentially rely on the documentation the Registrar presented to the Tribunal. It is clear Mr Varquez took responsibility for instructions and failed to undertake the client engagement process required under the 2010 Code. He needed to ensure that either he did that, or that it had been done and he obtained written authority to continue

with instructions (clause 2.1(h) of the 2010 Code). The record evidences a failure to complete the client engagement process. There is no written agreement confirmed in writing, and no complying written statement regarding disbursements. Mr Varquez has not challenged those facts.

- [13] In relation to the allegation of negligence, the record demonstrates an extensive failure to evaluate the complainant's entitlement to points accurately. The extent and nature of the erroneous claims point to negligence. There is of course potential for reasonable and understandable differences in interpretation and perspective when claiming points for an expression of interest. However, it is a core skill of persons providing immigration advice in this area to evaluate effectively clients' entitlement to points, before lodging an expression of interest. The difference between the 35 points the complainant could claim and the 155 points Mr Varquez claimed is the difference between a hopeless claim, and a strong claim.
- [14] There is nothing in the material before me to suggest this matter was difficult, and Mr Varquez has not suggested there were any special factors that made it difficult. It appears Mr Varquez probably made claims without :
- [14.1] Evaluating the requirements Immigration New Zealand applies for claiming points, and
- [14.2] Effectively reviewing with the client what their qualifications, experience, and job opportunities are (and ensuring they can provide documentary proof).
- [15] That is the process required when advising a client the number of points they can claim relating to skills, and employment, and I am satisfied Mr Varquez negligently failed to undertake that process correctly.

The charges of professional misconduct

- [16] The facts founding the complaint are evident in the record, and Mr Varquez has not disputed the allegations. I accordingly find each of the grounds of complaint made out.
- [17] I am satisfied the complaint that Mr Varquez failed to comply with clauses 1.5(a), (b) and (d), and 8(d) of the 2010 Code is made out. Mr Varquez took over instructions; he was obliged to ensure his engagement complied with the client engagement process under the 2010 Code. He failed to comply with each of those provisions for the reasons already discussed.
- [18] Mr Varquez was also negligent in his evaluation of the points his client could claim, and that is a ground for complaint under section 44(2) of the Act.

Decision

- [19] The Tribunal upholds the complaint pursuant to section 50 of the Act; due to negligence, and the breaches of the 2010 Code identified; they are grounds for complaint pursuant to section 44(2) of the Act.

Submissions on Sanctions

- [20] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [21] 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, Mr Varquez is entitled to make submissions and respond to any submissions from the other parties.
- [22] 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

[23] The timetable for submissions will be as follows:

[23.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.

[23.2] 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.

[23.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of her filing and serving those submissions.

DATED at Wellington this 15th day of April 2015

G D Pearson
Chair