

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

Decision No: [2015] NZIACDT 41

Reference No: IACDT 019/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

N G and N M N

Complainant

AND

Ueite (Itaotemai) Letalu

Adviser

**THE NAME AND ANY INFORMATION IDENTIFYING THE COMPLAINANTS IS NOT TO BE
PUBLISHED**

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: Mr R Small, lawyer, Pacific Legal, Lower Hutt.

Adviser: In person.

Date Issued: 16 April 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal.
- [2] Mr Letalu accepted instructions to assist the complainants to apply for visas. At the time they were in New Zealand unlawfully, as their visas had expired some years before. Mr Letalu agreed to apply under a discretionary provision for visas. The allegations are that he:
 - [2.1] Failed to lodge the request promptly, and then lodged an unsatisfactory request.
 - [2.2] He charged too much for the work he did.
 - [2.3] He issued an invoice, which had the wrong GST rate, and double charged GST.
 - [2.4] He failed to tell his clients when the request failed.
- [3] Mr Letalu 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] The complainants had been in New Zealand without current visas since 2006, and they consulted Mr Letalu regarding their immigration status in early June 2011.
 - [5.2] On 8 June 2011, Mr Letalu issued an invoice to the complainants for \$3,450 for services relating to making a request under section 61 of the Immigration Act 2009.
 - [5.3] The invoice indicated the total comprised a professional fee of \$1,500 (inclusive of GST), \$1,500 for research, preparation of a submission, and obtaining the file from Immigration New Zealand, and GST of \$450.
 - [5.4] Mr Letalu submitted the request in April 2012; for a "visa of any type". The grounds were the complainants' New Zealand resident children cared for the complainants, and they had more children in New Zealand than in their country of origin. The submission said they would suffer dire consequences if they returned to their country of origin, but there was no information to establish that was the case.
 - [5.5] Immigration New Zealand refused the request on 5 April 2012, but Mr Letalu did not tell the complainants.
- [6] The Registrar identified potential breaches of professional standards during the course of Mr Letalu's engagement. The potential infringements were:
 - [6.1] That Mr Letalu breached clause 1.1(a) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). It required that he perform his services with due care, diligence, respect and professionalism. The circumstances were:
 - [6.1.1] Mr Letalu delayed some 10 months from receiving instructions to make a request under section 61 of the Immigration Act 2009, from about 8 June 2011 when he received instructions to 2 April 2012 when he lodged the request with Immigration New Zealand.
 - [6.1.2] The request he lodged was unsatisfactory, as the request was for a visa of any type, and the general and unsubstantiated grounds he relied on were not likely to be successful.

- [6.1.3] Mr Letalu accordingly failed to perform those services with due care and professionalism.
- [6.2] That Mr Letalu breached clause 8(a) of the 2010 Code. It required that he set out fees that were fair and reasonable in the circumstances. The allegation is:
 - [6.2.1] The fee of \$3,450 was excessive for drafting the section 61 request, having regard to the short and unsatisfactory nature of the submission.
 - [6.2.2] Mr Letalu accordingly charged a fee that was not fair and reasonable in the circumstances.
- [6.3] That Mr Letalu breached clause 3 of the 2010 Code. It required that he maintain professional business practices relating to finances and records. The allegation is:
 - [6.3.1] The 8 June 2011 invoice for \$3,450:
 - [6.3.1] Charged GST at the wrong rate (12.5% not 15%);
 - [6.3.1] Charged GST on \$1,500 inclusive of GST, and then charged GST again on that amount (including the GST component) when calculating the total GST.
 - [6.3.2] The errors in the invoice allegedly breached Mr Letalu's duty to maintain professional business practices relating to finances and records.
- [6.4] That Mr Letalu breached clause 3(a) of the 2010 Code. It required that he maintain professional business practices, and provide ongoing timely updates. The allegation is:
 - [6.4.1] On 5 April 2012, Immigration New Zealand refused the request under section 61, and Mr Letalu did not inform the complainants.
 - [6.4.2] In failing to inform his clients, Mr Letalu failed to meet his obligation under the 2010 Code.

The responses

- [7] Mr Letalu 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 complainants did not file a statement of reply. They too were not required to do so if they accepted the contents of the Statement of Complaint. Their complaint was on wider grounds than the Statement of Complaint, however the complainants did not seek to advance grounds beyond those in the Statement of Complaint. Accordingly, the Tribunal will deal only with the grounds in the Statement of Complaint.
- [9] The Statement of Complaint did refer to negligence as a potential issue; however, it did not contain any particulars. The Statement of Complaint did contain particulars relating to the obligations in the 2010 Code to perform services with due care and professionalism. Given the absence of particulars, the Tribunal will address the issues relating to care and professionalism under the Code, not negligence under section 44(2) of the Immigration Advisers Licensing Act 2007.

Discussion

The standard of proof

- [10] 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

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

The facts

- [13] The facts are uncomplicated, and essentially rely on the documentation the Registrar presented to the Tribunal. Mr Letalu has not challenged those facts. It is clear Mr Letalu accepted instructions and lodged an unsatisfactory request under section 61, he delayed in doing so, the fees were excessive, the invoice was defective, and he failed to tell his clients when their application failed. Each of those matters amounted to a breach of Mr Letalu's professional responsibilities.

Lack of care, diligence and professionalism

- [14] I am satisfied Mr Letalu failed to comply with clause 1.1(a) of the 2010 Code, in two respects.
- [15] The delay from June 2011 until April 2012 in lodging the request, unless explained, is *prima facie* due to a lack of care, diligence and professionalism. Mr Letalu's clients were in New Zealand unlawfully, they were potentially subject to enforcement action and any additional delay made their circumstances increasingly problematic. Accordingly, prompt and effective action was required. Mr Letalu did not act promptly, and has not given any explanation or excuse to justify that.
- [16] Furthermore, the request Mr Letalu lodged with Immigration New Zealand was far below minimum professional standards. On the face of it, Mr Letalu had to make a case for the exercise of the discretion under section 61 when his clients were in New Zealand unlawfully for some years; and he had to make a compelling case if it were to have any chance of success.
- [17] Mr Letalu failed to identify what sort of visa his clients sought. That was important, as if they received a temporary visa there was no long-term resolution of the issue. The reasons Mr Letalu gave were most unlikely to persuade Immigration New Zealand to grant any relief. Mr Letalu also failed to provide evidence to substantiate the grounds he advanced.
- [18] Section 61 is a discretionary provision where Immigration New Zealand is not required to give reasons for the exercise of the discretion. In the circumstances, the request should have either requested a temporary visa:
- [18.1] With a plan to leave New Zealand on a basis that the complainants were not adversely affected in relation to returning to New Zealand; or
- [18.2] With a plan to apply for residence visas. In which case, Mr Letalu should have provided information that demonstrated the applications would have merit.
- [19] Alternatively, and less likely, Mr Letalu could have made a case for the issue of residence visas, which would certainly have required a compelling case.
- [20] If none of that could be achieved, Mr Letalu had to tell his clients an application under section 61 was unrealistic.

- [21] In reality, Mr Letalu simply alerted Immigration New Zealand to the complainants' circumstances, and made a general request for consideration. That did not meet minimum standards, and I am satisfied his actions lacked care, and professionalism.
- [22] I am accordingly satisfied Mr Letalu failed to meet the requirements of clause 1.1(a) of the 2010 Code. His delay lacked due care, diligence and professionalism. The lack of substance in the request was the result of a lack of care and professionalism.

Excessive fees

- [23] I have no difficulty accepting that Mr Letalu, if he dealt with the complainant's affairs with care and professionalism could have justified a fee of \$3,450 and likely more. That is assuming, there were any effective steps open.
- [24] It would be essential to research the complainants' immigration history, their current circumstances, identify a strategy for the complainants to obtain visas; and then provide proof of the grounds relied on. It would of course also be necessary to ensure the complainants fully understood the issues, and gain their informed instructions to any course of action.
- [25] However, that is not what Mr Letalu did. His fee was for a simple and unsatisfactory request. The work he actually performed would have taken little time, and had no value at all, as it was obviously going to fail. He has provided no justification that establishes the fee was fair or reasonable.
- [26] Accordingly, I am satisfied Mr Letalu breached his obligation to set out fees that were fair and reasonable in the circumstances, and Mr Letalu breached his obligations in clause 8 of the 2010 Code.

The defective invoice

- [27] The invoice is patently unsatisfactory; GST is at the wrong rate, GST is double charged, and the double charge includes GST on GST.
- [28] Mr Letalu has not provided any explanation that justifies the errors. There is no doubt that invoicing errors can occur, and they do not necessarily amount to a professional disciplinary matter. However, the multiple and manifest errors in this case are such that I am satisfied Mr Letalu failed to maintain proper business practices; and accordingly breached clause 3 of the 2010 Code.

Failure to notify the complainants

- [29] The complainants were in New Zealand unlawfully, and the request Mr Letalu lodged notified Immigration New Zealand of the situation. When the request failed, there was a high likelihood of enforcement action following.
- [30] The complainants had family in New Zealand, and accordingly a potential interest in endeavouring not to further compromise their ability to visit New Zealand in the future.
- [31] When Immigration New Zealand declined the request, Mr Letalu had a duty to inform his clients, they needed to both know what had happened, and receive advice as to the consequences and options available to them. Mr Letalu breached his duty to provide timely updates, and accordingly clause 3(a) of the 2010 Code.

Decision

- [32] The Tribunal upholds the complaint pursuant to section 50 of the Act; due to the identified breaches of the 2010 Code identified; they 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 complainants 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 Letalu 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 complainants are to make any submissions within 10 working days of the issue of this decision.
- [36.2] Mr Letalu is to make any further submissions (whether or not the Authority or the complainants makes submissions) within 15 working days of the issue of this decision.
- [36.3] The Authority and the complainants may reply to any submissions made by Mr Letalu within 5 working days of him filing and serving those submissions.

Order prohibiting publication of the complainant's name or identity

- [37] As the complainants were in New Zealand unlawfully, the Tribunal orders that their names and any information that may identify them is not to be published.
- [38] This order recognises that persons seeking advice regarding their unlawful status in New Zealand are entitled to complain regarding professional misconduct, without fear of publication that may adversely affect them.
- [39] Leave is reserved for the complainant or the Registrar to apply to vary this order. The order does not prevent **the complainants** disclosing the decision to their professional advisers, or any authority **they** consider should have a copy of the decision.

DATED at Wellington this 16th day of April 2015

G D Pearson
Chair