

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

Decision No: [2015] NZIACDT 44

Reference No: IACDT 027/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Mary Goher

Complainant

AND

Osama (Sam) Hammadih

Adviser

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person

Adviser: In person

Date Issued: 22 April 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal.
- [2] The complaint is that Mr Hammadieh accepted instructions to lodge an expression of interest, and application for residence. The allegations are that he:
- [2.1] Gave negligent advice, as he told the complainant she could claim skills in an occupational category for which she did not have the qualifications or experience. He then proceeded to lodge an expression of interest with Immigration New Zealand, as the complainant did not qualify, the work he did was wholly wasted.
- [2.2] He claimed additional fees, without having written agreement from the complainant.
- [2.3] He initially refused to return documents until paid the fees to which he was not entitled.
- [3] Mr Hammadieh has not responded to the complaint with an explanation or justification addressing the grounds of complaint.
- [4] The Tribunal has upheld the complaint, as the material before it establishes the allegations against him, and they constitute serious breaches of his professional obligations.

The complaint

- [5] The Registrar filed a statement of complaint, she put forward the following background as the basis for the complaint:
- [5.1] In June 2013 the complainant engaged Mr Hammadieh to submit an expression of interest and residence application, and entered into a written agreement to provide those services for AUD\$4,200, plus disbursements.
- The expression of interest*
- [5.2] Mr Hammadieh submitted an expression of interest, claiming 150 points under the occupational category of "Construction Project Manager (Road and Bridge Construction)".
- [5.3] To qualify for that occupational category the complainant required an engineering qualification at a bachelor's degree level, and a project management qualification at a minimum of New Zealand Qualifications Authority level 5.
- [5.4] Mr Hammadieh submitted the complainant's engineering qualification to New Zealand Qualifications Authority for assessment, but not her project management qualification. The expression of interest recorded that the complainant's project management qualification involved 10 days of study. Level 1 (the lowest) New Zealand Qualifications Authority requires 40 credits, involving 400 hours of learning.
- [5.5] The complainant did not have the project management qualification required for the occupational category Mr Hammadieh relied on in the expression of interest.
- [5.6] Mr Hammadieh also claimed 30 points for recognised work experience in the expression of interest; however, the complainant was not able to claim qualifying work experience.
- [5.7] Immigration New Zealand selected the expression of interest, but Mr Hammadieh did not submit a residence application before the invitation to apply expired.

Additional fees and return of documents

- [5.8] The written agreement provided for a fixed fee of AUD\$4,200, and disbursements of NZD\$1,844 (approximately AUD\$1,624). The agreed total payable was AUD\$5,824, the complainant paid a total of AUD\$5,965.
- [5.9] The complainant requested the return of her documents on 3 April 2014, and Mr Hammadih refused to do so, claiming additional fees of AUD\$2,700. He said the fees related to a residence application he prepared, a second expression of interest, and a fee for following up a New Zealand Qualifications Authority assessment.
- [5.10] Later Mr Hammadih reduced the claimed additional fee to \$800; he returned the documents on 18 May 2014.
- [6] The Registrar identified potential infringement of professional standards during the course of Mr Hammadih's engagement, the allegations were:
- [6.1] Mr Hammadih negligently failed to assess the available points for the expression of interest properly. Negligence is a ground of complaint under section 44(2) of the Licensed Immigration Advisers Licensing Act 2007 (the Act). The circumstances were:
- [6.1.1] Mr Hammadih claimed points based on an occupational category not available to the complainant.
- [6.1.2] Without the points for qualifications and experience in the occupational category, the complainant could not lodge a valid expression of interest.
- [6.2] Mr Hammadih breached clause 20(c) of the Licensed Immigration Advisers Code of Conduct 2014 (the 2014 Code). It required him to ensure that he had written agreement for any additional fees or changes to previously agreed fees. The circumstances were:
- [6.2.1] Mr Hammadih had a written agreement providing for a fixed fee and disbursements; the complainant paid more than the agreed amount.
- [6.2.2] Mr Hammadih claimed additional fees of AUD\$2,700 without informing his client and gaining her agreement in writing.
- [6.3] That Mr Hammadih breached clause 27(b) of the 2014 Code. It required him to return passports and other personal documents on request, without delay, and in a secure manner. The circumstances were:
- [6.3.1] Mr Hammadih claimed overdue fees when the complainant sought the return of her documents.
- [6.3.2] He delayed returning the documents in the period from 3 April 2014 to 18 May 2014, while seeking additional payments, and did ultimately return them using regular post.

The responses

- [7] Mr Hammadih did not file a statement of reply; he was not required to do so if he accepted the contents of the Statement of Complaint. Mr Hammadih indicated to the Registrar he was taking leave, and modified address details. He was aware of the complaint, and he was required to maintain a current address, and be available to deal with the complaint. He has not made an application to adjourn any of the Tribunal's processes.
- [8] The complainants did file a statement of reply. They too were not required to do so if they accepted the contents of 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 facts

- [10] The Registrar provided a chronology, and supporting documentation. The parties have not disputed this record or added to it.
- [11] The facts are uncomplicated, and essentially rely on the documentary record the Registrar presented to the Tribunal. It is clear Mr Hammadieh:
- [11.1] Claimed points relying on an occupational category the complainant was not entitled to rely on;
- [11.2] Attempted to claim fees he was not entitled to claim (both as he did not provide work of value and did not get agreement in writing), and
- [11.3] Refused to return documents he was obliged to return.

Negligence

- [12] I am satisfied Mr Hammadieh negligently relied on an occupational category the complainant could not use for her expression of interest.
- [13] Immigration New Zealand mandates the categories clearly, and the complainant did not qualify, for reasons that were readily ascertainable. Mr Hammadieh has offered no justification that explains his failure to properly assess the complainant's qualifications and work experience. A competent licensed immigration adviser working in this area is required to have the skill to make an accurate assessment of occupational categories, where necessary referring matters to the New Zealand Qualifications Authority for assessment. Doing so was one of the first steps Mr Hammadieh should have undertaken on receiving instructions; he failed to do so.
- [14] The complainant's ability to migrate to New Zealand depended on her ability to claim points in her expression of interest, which would then apply to a residence application. As Mr Hammadieh made an incorrect evaluation of this, all the work he did was wasted. The complainant could not qualify on the grounds he used. Accordingly, Mr Hammadieh's services were of no value to the complainant. Mr Hammadieh should have understood that; and his client was entitled to know the true position from an early stage. It was obvious her ability to migrate to New Zealand turned on this issue from the outset of Mr Hammadieh's instructions. The steps Mr Hammadieh failed to take were essential, his omission was a critical one and he should have been aware of that throughout the instruction.
- [15] I am satisfied Mr Hammadieh was negligent in his assessment of the complainant's immigration prospects; he negligently proceeded to lodge an expression of interest, which did not qualify and could not lead to a successful outcome for the complainant.

Increase in fees without complying with the 2014 Code

- [16] For the reasons discussed, Mr Hammadieh was negligent, and the work he did was of no value at all to the complainant. If he were acting at the minimum level of care required for a licensed immigration adviser undertaking work of this kind, he would have understood that.
- [17] Notwithstanding this Mr Hammadieh demanded and his client paid fees and disbursements of AUD\$5,965.
- [18] Clause 20(c) of the 2014 Code required that Mr Hammadieh obtain agreement in writing to an increase in fees. He sought a further payment of AUD\$2,700. He knew or ought to have known he was not entitled to further fees as he provided no services of value; and he had not

complied with clause 20(c) of the 2014 Code. He could not have gained his client's consent if he informed her of the true position.

[19] I am accordingly satisfied Mr Hammadieh breached clause 20(c) of the 2014 Code.

Failure to return personal documents

[20] The complainant required Mr Hammadieh to return her personal documents. Clause 27(b) requires that a licensed immigration adviser return passports and other personal documents, on request without delay and in a secure manner. This requirement of the 2014 Code, like the equivalent provisions in the former versions of the Code, is not conditional on a client first paying fees or other matters.

[21] One of the common forms of abusive conduct prior to the Act was withholding passports and documents while demanding unjustified fees. The absence of conditions on the obligation to return personal documents is intended, and unambiguous. This obligation is an elementary obligation every licensed immigration adviser is obliged to understand and must comply with it.

[22] Mr Hammadieh's attempt to claim fees he was not entitled to claim and his refusal to return the documents was an egregious abuse. Mr Hammadieh ultimately returned the documents by regular post, rather than in a secure manner, that added to his non-compliance with the 2014 Code.

[23] I am accordingly satisfied Mr Hammadieh breached clause 27(b) of the 2014 Code.

Decision

[24] The Tribunal upholds the complaint pursuant to section 50 of the Act; Mr Hammadieh's negligence and the identified breaches of the 2014 Code are grounds for complaint pursuant to section 44(2) of the Act.

Submissions on Sanctions

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

[26] 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 Hammadieh is entitled to make submissions and respond to any submissions from the other parties.

[27] 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.

[28] The Tribunal requests that the Registrar pursuant to section 49(4), to report on the extent to which Mr Hammadieh has complied with previous orders the Tribunal has imposed in respect of sanctions, and the steps she has taken to enforce the orders.

Timetable

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

[29.1] The Authority and the complainants are to make any submissions within 10 working days of the issue of this decision. The Registrar is requested to also report in that time, if practicable and if not indicate when she can do so.

[29.2] 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.

[29.3] The Authority and the complainants may reply to any submissions made by the adviser within 5 working days of him filing and serving those submissions.

DATED at Wellington this 22nd day of April 2015

G D Pearson
Chair