

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

Decision No: [2015] NZIACDT 47

Reference No: IACDT 034/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

**Michael Carley (Immigration New
Zealand)**

Complainant

AND

Mijin Kim

Adviser

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

Adviser: In person.

Date Issued: 7 May 2015

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal.
- [2] Immigration New Zealand made the complaint, on the grounds Ms Kim as a licensed immigration adviser:
 - [2.1] Lodged visitor visa applications, treating them as though they were work visa applications.
 - [2.2] She arranged for an unlicensed person to provide immigration services in breach of the legislation regulating licensed immigration advisers.
 - [2.3] She failed to maintain proper records showing the work she did, and the proper client communication.
- [3] Ms Kim did not challenge those allegations. The Tribunal has found the facts on which the allegations rely are established by the material before it, and upheld those grounds of complaint.

The complaint

- [4] The Registrar filed a statement of complaint. Immigration New Zealand is the complainant; and the complaint relates to two clients. Three grounds of complaint arise in respect of one client, and the remaining two relate to the other client. Ms Kim was the licensed immigration adviser. It is not necessary to identify the individuals to whom the files relate. The Tribunal accordingly refers to them using their initials IC, and ML respectively.
- [5] The Registrar put forward the following background as the basis for the complaint:

Complaint matter 1 – Client IC – visitor visa application

- [5.1] Ms Kim entered into a written agreement for the provision of immigration services with IC. That agreement had Ms Kim's name and licence number recorded, but said Mr Brian Lee would provide all immigration assistance. Mr Lee is neither a licensed immigration adviser, nor exempt.
- [5.2] The same day IC accepted an offer of indefinite employment, to commence when she received a visa.
- [5.3] On 5 February 2014, Ms Kim submitted a visitor visa application, under the business category. She submitted it with evidence of IC's employment offer. The application was inappropriate given that IC had an offer of employment, and instruction V 3.5(a) is not consistent with using a visitor visa to take up employment in those circumstances.
- [5.4] Immigration New Zealand informed Ms Kim of the issue regarding the complainant's application. She challenged Immigration New Zealand's view, and Immigration New Zealand accordingly assessed the application as a visitor visa application, it inevitably failed.

Complaint 2 – Client ML – visitor visa application

- [5.5] Ms Kim entered into a written agreement with ML in relation to a visitor visa application. That agreement had Ms Kim's name and licence number recorded, but said Mr Brian Lee would provide all immigration assistance. Mr Lee is neither a licensed immigration adviser, nor exempt.
- [5.6] On 14 February 2014, Ms Kim submitted a visitor visa application to Immigration New Zealand. It was an application for a visitor visa in the business category; but supported with grounds relevant to a work visa application.

- [5.7] Immigration New Zealand issued a visitor visa under the grounds for a general visitor visa application (instructions V 2.5); on the basis, she was a genuine visitor who would apply for a work visa later.

Complaint matter 3 – Client ML – work permit application

- [5.8] In March 2014, Ms Kim submitted a work visa application for ML. On 24 March 2014, Mr Lee telephoned Immigration New Zealand, and said Ms Kim authorised him to act for ML.
- [5.9] In April and May 2014, Mr Lee telephoned Immigration New Zealand four times saying he was authorised to act for ML, and requested information. Twice he provided a false licence number, the number was one digit different from Ms Kim's licence number.

Complaint matter 4– Client ML – client file

- [5.10] Ms Kim provided a client file relating to ML when requested to do so by the Immigration Advisers Authority, however it did not contain:
- [5.10.1] Any emails or client copies of written confirmation of material discussions with ML.
 - [5.10.2] ML's visitor visa application.
 - [5.10.3] Immigration New Zealand's letter declining the application dated 10 March 2014.
 - [5.10.4] A voucher sent to Immigration New Zealand on 26 February 2012, or
 - [5.10.5] Reference letters.
- [5.11] When an officer of the Immigration Advisers Authority informed Ms Kim her file did not appear to comply with the Licensed Immigration Advisers Code of Conduct 2014 (the 2014 Code), Ms Kim provided:
- [5.11.1] An initial consultation report;
 - [5.11.2] Contact sheet,
 - [5.11.3] The voucher sent to Immigration New Zealand on 26 February 2012, and
 - [5.11.4] A document collection form.

Complaint matter 5– Client IC – client file

- [5.12] Ms Kim provided a client file relating to IC then the Immigration Advisers Authority requested it, however it did not contain:
- [5.12.1] Any emails or client copies of written confirmation of material discussions with IC.
 - [5.12.2] The visitor visa application.
 - [5.12.3] Immigration New Zealand's decline letter dated 10 March 2014.
 - [5.12.4] A voucher sent to Immigration New Zealand on 26 February 2012.
 - [5.12.5] Reference letters.
- [5.13] When an officer of the Immigration Advisers Authority informed Ms Kim her file did not appear to comply with the 2014 Code, Ms Kim provided:
- [5.13.1] An email,

[5.13.2] The voucher sent to Immigration New Zealand on 26 February 2012.

[5.13.3] A customer contact sheet. However, it did not contain a record of any events after lodgement of the application, or details of informing IC of the result.

[5.13.4] A document collection form.

[6] The Registrar identified potential infringement of professional standards during the course of Ms Kim's engagements, the allegations were:

[6.1] Ms Kim breached clauses 1 and 2(e) of the 2014 Code. Clause 1 required her to be honest, professional, diligent and respectful; and to conduct herself with due care and in timely manner. Clause 2(e) required her to obtain and carry out the lawful informed instructions of clients. The essential circumstances alleged are that:

[6.1.1] Ms Kim applied for a business visitor visa for IC, when she required a work visa.

[6.1.2] She persisted after Immigration New Zealand pointed out the error.

[6.1.3] The circumstances point to a lack of knowledge of the purpose of a visitor visa. Ms Kim was required to understand the purpose of a visitor visa and its difference from a work visa to perform her services with professionalism, diligence, and to have the informed lawful instructions of her client.

[6.2] Ms Kim breached clauses 2(e) and 3(c) of the 2014 Code. Clause 2(e) required her to obtain and carry out the lawful informed instructions of clients. Clause 3(c) required her to act in accordance with the Immigration Advisers Licensing Act 2007 (the Act), and any applicable regulations. The essence of the allegations are that:

[6.2.1] Ms Kim had agreements with both IC and ML that state Mr Lee would provide immigration assistance. He is the managing director of a company through which Ms Kim conducted her practice. However, he was not licensed or exempt, so could not lawfully provide immigration advice (as defined in the Act).

[6.2.2] The statements in the agreements indicated clients should contact Mr Lee rather than Ms Kim, which was not consistent with a licensed immigration adviser providing immigration advice to them.

[6.2.3] Ms Lee was dealing with ML's work visa application and contacted Immigration New Zealand several times, and used a false licence number in an attempt to facilitate communications.

[6.2.4] Ms Kim had the obligation to ensure she delivered immigration advice to her clients herself, as a licensed immigration adviser and allowing or encouraging Mr Lee to do so was not consistent with her professional obligations.

[6.3] Ms Kim breached clauses 26 (a)(i) & (iii), and 26(e) of the 2014 Code. Clause 26(a), in summary, required her to maintain a file for each client, which included a full copy of the client's application or immigration matter, copies of written communications between the adviser, the client and other parties. Clause 26(c), also in summary, required Ms Kim to confirm in writing to her client details of all material discussions, and maintain the file for 7 years after closing the file, and to provide a copy to the Immigration Advisers Authority for inspection. The essential circumstances alleged are that:

[6.3.1] Ms Kim did not provide client files relating to IC and ML that conformed to those requirements.

[6.3.2] They lacked written confirmation of material discussions, and some of the other information.

- [6.3.3] Accordingly, Ms did not have proper files for IC and ML, and could not to provide them for inspection.

The responses

- [7] Ms Kim did not file a statement of reply; she was not required to do so if she accepted the contents of the Statement of Complaint.
- [8] The complainant did not file a statement of reply and similarly 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.
- [11] The essential facts are uncomplicated, and evidenced by the documentary record:
- [11.1] Ms Kim filed two visitor visa applications treating them as work visa applications.
- [11.2] She documented an arrangement in which an unlicensed person would provide the immigration services. He did so at least to the extent he attempted to engage with Immigration New Zealand in respect of ML, using a false licensee number.
- [11.3] Ms Kim produced files that were not consistent with meeting her professional obligations to IC and ML.

Incorrect visa application

- [12] The difference between a visitor visa and a work visa is fundamental. It is essential that persons holding a visa understand what the visa is. Unless they understand the limitations and obligations that relate to that class of visa, they are likely to break New Zealand law.
- [13] A visitor visa does not allow a person to take up employment in New Zealand. IC had an offer of employment, and sought a visa to take up the employment. Ms Kim applied for a visitor visa. There are different grounds for applying for a visitor visa, the General (tourist) category, the Business category, the Dependent Child category and others. For present purposes, it is sufficient to note that the privileges of a visitor visa regardless of the grounds for issuing it do not allow a person to take up indefinite employment in New Zealand, and it is unlawful to do so.
- [14] If IC took up the position of employment relying on the visa Ms Kim applied for, she would have been in breach of New Zealand law, with potentially serious consequences.
- [15] Not only did Ms Kim apparently fail to understand these elementary elements of immigration policy and law, she challenged Immigration New Zealand when they pointed out the error with IC's application. Accordingly, it failed.
- [16] Ms Kim was required to perform her services for clients with due care, diligence, and professionalism. The uncontested facts are consistent only with Ms Kim failing to take due care; or wholly lacking the essential skills required to operate at the lowest levels of competence required of a licensed immigration adviser undertaking basic work. Her lack of understanding was in respect of information every person holding a visitor visa must understand. Yet, Ms Kim was a licensed professional offering expert services to the public; she not only did not understand, she failed to listen and understand when Immigration New Zealand pointed out her error.

- [17] Accordingly, I am satisfied Ms Kim breached clause 1 of the 2014 Code; it was unprofessional for her to offer services to the public and accept instructions with that lack of knowledge, and it was unprofessional to challenge Immigration New Zealand rather than seek to understand the true position. Further, Ms Kim did not conduct herself with due care as she did not research and get a proper understanding when on notice of her lack of knowledge.
- [18] I am also satisfied she breached clause 2(e), as she could not obtain and carry out lawful informed instructions. She was incapable of informing her client to gain informed instructions, due to her lack of knowledge and skill in respect of the instructions she accepted.

A party to an unlicensed person providing immigration services

- [19] The Act was, among other things, intended to put an end to a history of a small minority of advisers exploiting vulnerable migrants. The background to the Act is discussed in *ZW v Immigration Advisers Authority* [2012] NZHC 1069, and reflected in section 3 of the Act.
- [20] It is evident the legislative scheme has been constructed in a manner designed to exclude unlicensed people being engaged in the delivery of professional services, to a degree that is exceptional in professional service delivery.
- [21] It was foreseeable that some people would seek to have a licensed person “rubber stamp” their activity in the industry. Unfortunately, this Tribunal’s work and criminal prosecutions under the Act demonstrate that was a well-founded apprehension. The courts have imposed sentences of imprisonment for offending; the gravity of this offending is evident in the decisions culminating in the Supreme Court’s refusal to grant leave to appeal in *Hakaoro v R* [2014] NZSC 169. That decision refused leave to appeal against a sentence of one year and eight months imprisonment on charges where a person without a licence provided immigration advice, and held himself out as licensed.
- [22] 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.
- [23] 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 ...”
- [24] The expansive nature of the definition of *immigration advice* leaves no doubt, that for the purposes of this decision, Ms Kim informed her clients Mr Lee was to provide immigration advice, and his attempts to engage with Immigration New Zealand establish he attempted to do so in the case of ML.
- [25] There are exceptions in the legislation. Section 7 provides that 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.
- [26] *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”

- [27] The definition is directed towards administrative tasks, such as keeping business and financial records and the like. Mr Lee's role described in the agreements, and what he attempted to do, do not come within that exception.
- [28] 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 too is not material in this case.
- [29] Accordingly, I am satisfied Ms Kim at the inception of her instructions provided for Mr Lee to unlawfully provide immigration advice, and in the case of ML he attempted to do so using a dishonest deception. I am satisfied on the balance of probabilities Mr Lee did engage with the instructions and provide immigration advice as defined, given Ms Kim provided for that in the agreements, that the work was performed so incompetently that it is difficult to conceive that a licensed immigration advice could have been wholly responsible for it, and that Ms Kim has been unable to provide a file showing she did the work.
- [30] Accordingly, I find Ms Kim breached clauses 2 (e) and 3(c) other 2014 Code. Clause 2(e) required her to obtain and carry out the lawful informed instructions of clients; she did not do so she delegated that to Mr Lee in whole or in part. Clause 3(c) required Ms Kim to act in accordance with the Act. For the reasons discussed, for Mr Lee to perform the work that Ms Kim delegated to Mr Lee involved him engaging in serious criminal offending. Accordingly, she failed to act in accordance with the Act.

Failing to maintain proper client relationship and records

- [31] The 2014 Code, like its predecessors is prescriptive in terms of client communications and the obligations to maintain a record of those communications. When these complaints arose, Ms Kim did not produce a file that evidenced or recorded proper client communications. Ms Kim has provided neither justification nor excuse for that failure; she did provide some additional information when the Registrar pointed out the deficiencies. However, the additional information was far from sufficient to establish compliance, and raises concerns regarding the initial failure to meet the Registrar's request.
- [32] Clause 26(a) required Ms Kim to maintain a file, which included a full copy of client applications and similar matters, and copies of written communications between her and her client and other parties. Clause 26(c), required her to confirm in writing to her client, the details of all material discussions, and maintain the file for 7 years after closing the file, and to provide a copy to the Immigration Advisers Authority for inspection. The material before the Tribunal establishes:
- [32.1] Ms Kim did not provide client files relating to IC and ML meeting those requirements.
- [32.2] They lacked written confirmation of material discussions.
- [33] That establishes non-compliance with clause 26(a) and 16(c), given the evidence of Ms Kim having delegated her responsibilities to an unlicensed person, this element of non-compliance is concerning and far from simple laxness with records.

Decision

- [34] The Tribunal upholds the complaint pursuant to section 50 of the Act; Ms Kim's identified breaches of the 2014 Code are grounds for complaint pursuant to section 44(2) of the Act.

Submissions on Sanctions

- [35] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [36] The Tribunal puts Ms Kim on notice that given the gravity of the offending, a potential outcome is that she will have her licence cancelled, and face a substantial financial penalty. If she wishes to contend she should remain in the profession, the Tribunal expects her to present a case to justify that outcome. She has not provided the Tribunal with facts or submissions in

justification or excuse at this point to cause the Tribunal to consider her conduct was other than wilful, and in defiance of the Act.

- [37] The Registrar 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, Ms Kim is entitled to make submissions and respond to any submissions from the other parties.
- [38] The Tribunal requests pursuant to section 49(4) that the Registrar provide a report on the qualifications and experience that entitled Ms Kim to hold licences under the Act.
- [39] 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

- [40] The timetable for submissions will be as follows:
- [40.1] The Registrar and the complainant are to make any submissions within 10 working days of the issue of this decision. The Tribunal requests that the Registrar provide a report on Ms Kim's qualifications and experience in the same timeframe, or indicate when it will be available.
- [40.2] The adviser is to make any further submissions (whether or not the Registrar or the complainant makes submissions) within 15 working days of the issue of this decision.
- [40.3] The Registrar and the complainants may reply to any submissions made by the adviser within 5 working days of her filing and serving those submissions.

DATED at Wellington this 7th day of May 2015

G D Pearson
Chair