

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

Decision No: [2015] NZIACDT 7

Reference No: IACDT 051/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Lili Mohammadalibeigy

Complainant

AND

Lip Funn (James) Yap

Adviser

DECISION

REPRESENTATION:

Registrar: Mr M Denyer, Lawyer, Ministry of Business, Innovation and Employment, Auckland

Complainant: In person

Adviser: In person

Date Issued: 13 February 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The grounds alleged in the Statement of Complaint are that the adviser breached elements of the Immigration Advisers Code of Conduct 2010 (the Code).
- [2] The complaint is that Mr Yap allowed unlicensed employees to provide advice to the complainant, the advice was wrong. In particular they provided advice that the complainant had enough *points* to expect to successfully lodge an expression of interest and that Immigration New Zealand would likely select her to apply for residence in New Zealand. In fact, she did not have enough points to make selection a realistic outcome. In addition, Mr Yap took money for the cost of an assessment of the complainant's qualifications in excess of what it actually cost, and did not repay the excess.
- [3] Those circumstances that resulted in this complaint; namely, that the advice was wrong, that unlicensed persons provided the advice unlawfully, and Mr Yap did not refund the excess funds he obtained to pay for the assessment of the complainant's qualifications.
- [4] Mr Yap did not challenge the complaint or the material supporting it.
- [5] The Tribunal has upheld the complaint.

The Complaint

- [6] The Registrar filed a statement of complaint, she put forward the following background as the basis for the complaint:
 - [6.1] The complainant engaged Mr Yap's practice to assist with applying for residence in New Zealand under the skilled migrant category.
 - [6.2] In December 2011 the complainant engaged with an unlicensed employee in Mr Yap's practice, she sought advice on her immigration prospects. The unlicensed employee said she should not hesitate to apply to migrate to New Zealand, as she could expect to be able to do so. He said she could claim 120 points including 10 bonus points for work experience in an area of absolute skills shortage.
 - [6.3] Because of the advice, the complainant engaged Mr Yap to assist with an application for residence in New Zealand, and paid an initial fee of US\$2,396. The written agreement also provided for payment of fees of \$1,000 for a New Zealand Qualifications Authority assessment fee.
 - [6.4] On 16 February 2012 an email from Mr Yap's practice provided further assurance of the complainant's immigration prospects; a similar assurance was also sent in May 2012.
 - [6.5] At the material time, the information Immigration New Zealand published regarding pool sections, to which the number of points relate, showed the complainant had very little chance of selection. Accordingly, she did not have a realistic prospect of successfully applying to migrate to New Zealand.
 - [6.6] On 7 November 2012 an unlicensed employee in Mr Yap's practice informed the complainant her prospects of successfully migrating to New Zealand were low. However, on 3 December 2012 an unlicensed employee reported to the complainant Mr Yap's advice was to lodge her expression of interest, as the outcome was unpredictable. Mr Yap had limited involvement in the complainant's instructions.
 - [6.7] The complainant paid US\$800 and MYR 32 for a NZQA assessment, which in fact cost NZ\$787. Mr Yap did not refund the excess disbursement.
- [7] The Registrar identified the potential infringements of professional standards.

Negligence pursuant to section 44(2)(a) of the Act, and unlicensed staff operating in breach of clauses 1.1(a), (b) and 2.1(b) and 3 of the Code.

[7.1] Negligence is alleged in that Mr Yap accepted instructions from the complainant without first providing her with appropriate advice regarding her prospects of successfully migrating to New Zealand.

[7.2] Mr Yap's unlicensed employee provided inadequate advice or information, and accordingly the complainant pursued a course of action which was not likely to be successful. Mr Yap allowed the unlicensed employee to give the complainant advice, unlawfully. Accordingly Mr Yap acted unprofessionally (clause 1.1(a) and (b) of the Code), he failed to act in accordance with the Act (clause 2.1(b) of the Code), and failed to maintain professional business practices and staff management (clause 3 of the Code).

Failure to provide refund, in breach of clause 3(d) of the Code

[7.3] The complainant paid more than the cost of the disbursement for a NZQA assessment, and Mr Yap has not refunded the unexpended balance.

The Responses

[8] Mr Yap filed a statement of reply, which did not dispute the facts or ground for complaint set out in the Statement of Complaint.

[9] The complainant and Mr Yap informed the Tribunal that Mr Yap had refunded fees and the complainant wished to withdraw the complaint. The complainant said this was the result of Mr Yap telling her she would get a full refund if she withdrew her complaint. Later the complainant said there had been difficulties over payment, so she wished to continue with her complaint.

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 establishes the grounds of complaint alleged.

The grounds of complaint are made out

Ground 1: Negligence pursuant to section 44(2)(a) of the Act, and unlicensed staff operating in breach of clauses 1.1(a), (b) and 2.1(b) and 3 of the Code.

[13] Mr Yap accepted instructions from the complainant; he allowed unlicensed staff to provide advice, on the critical issue of her prospects for successfully migrating to New Zealand. The advice was wrong and there is no justification for not providing correct advice. Immigration New Zealand publishes information that allows accurate prediction of the outcome when the number of points for an expression of interest is known. In this case, the number of points assessed as available were not sufficient for any realistic prospect of selection to apply for residence. This information was critical to the complainant, as it is highly unlikely that she would have given instructions unless she did have reasonable prospects of migrating to New Zealand. Taking steps to migrate involves significant disruption to a person's life and affects family and other relationships, accurate advice at a preliminary point is of great importance to potential migrants. The wrong advice was a matter in respect of which Mr Yap had important duties, and should have paid particular attention to them. Mr Yap was negligent in failing to provide the complainant with accurate advice regarding her prospects of selection.

- [14] Mr Yap's unlicensed employees provided advice and information. Section 6 of the Act prohibits unlicensed persons providing immigration advice. Section 8 gives that provision extra-territorial effect. Mr Yap allowed or encouraged his unlicensed employees to give immigration advice; that is the only available conclusion as he accepted instructions having not provided initial advice himself. That was unprofessional and breached clause 1.1 of the Code, he also failed to act in accordance with the Act and accordingly breached clause 2.1 of the Code, and failed to maintain professional business practices relating to staff management in breach of clause 3 of the Code.

Ground 2: Failure to provide refund, in breach of clause 3(d) of the Code

- [15] Mr Yap received funds from the complainant in excess of the costs of the disbursement for a NZQA assessment, and he has not refunded the unexpended balance. Accordingly, he is in breach of clause 3(d) of the Code.
- [16] I note that it is not ground of the complaint that Mr Yap failed to refund the fees and disbursements, all of which were incurred as a result of the defective advice provided to the complainant. However, that is not the end of the matter as the refund of fees and disbursements are matters to be addressed when dealing with sanctions.

Withdrawing the complaint

- [17] The Tribunal deals with complaints under a statutory process. A complaint which has been lodged with the Tribunal is not solely an *inter partes* matter. Public interest issues arise in many professional disciplinary cases, and that is so in the present case. The complaint, as it is made out, is relevant to Mr Yap's fitness to practice.
- [18] The Tribunal will take account of a request to withdraw a complaint, but it is not the complainant's right to withdraw a complaint from the Tribunal.
- [19] This Tribunal, as is commonly the case for professional disciplinary tribunals, has an inquisitorial function. The Tribunal is not dependent on a complainant to prosecute a complaint. Indeed, in the case of this Tribunal, it is not usual for counsel to represent complainants or for them to actively prosecute their complaint.
- [20] The Act provides for complaints to be put before the Tribunal, and requires the Tribunal to hear the complaint, usually on the papers, and where necessary by exercising powers to seek further information (section 49, Immigration Advisers Licensing Act 2007).
- [21] As it transpires the complainant now wishes to pursue the complaint after earlier seeking to withdraw. It is appropriate to determine the complaint regardless of the complainant's view. This is an example of serious shortcomings on Mr Yap's part accompanied by a failure to remedy. The negligence and the use of unqualified staff are matters where it is in the public interest that the Tribunal address the matters arising.

Decision

- [22] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [23] The adviser breached the Code in the respects identified.

Submissions on Sanctions

- [24] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [25] 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 Yap is entitled to make submissions and respond to any submissions from the other parties.
- [26] The Tribunal will consider ordering that Mr Yap refund all of the fees and disbursements paid by the complainant, as she incurred the costs because of negligent advice. If she had accurate

advice it is unlikely she would have proceeded with her instructions, which provided no benefit to her.

- [27] If the Registrar or the complainant seeks an order for the payment of costs or expenses under section 51(1)(g) they should provide a schedule particularising the amounts and basis for the claim.

Timetable

- [28] The timetable for submissions will be as follows:

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

[28.2] 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.

[28.3] 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 13th day of February 2015

G D Pearson
Chair