

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

Decision No: [2015] NZIACDT 77

Reference No: IACDT 045/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Christiaan Hendrik Muller

Complainant

AND

Sharon Gail Yerman

Adviser

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: In person.

Adviser: In person.

Date Issued: 25 June 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The facts on which the complaint is based are:
- [1.1] The complainant engaged Ms Yerman to assist him and his family to migrate to New Zealand from South Africa. The proposal was to apply for residence visas relying on the skilled migrant category for the principal applicant. To do so successfully, the complainant needed an offer of employment in New Zealand. He had an oral offer, but it has to be a firm written offer to qualify.
- [1.2] When a written employment offer was not forthcoming, Ms Yerman and the complainant developed a different strategy where the initial step was to get employment in New Zealand, subject to obtaining a work visa. Accordingly, Ms Yerman directed most of her services to a work visa application.
- [1.3] When the Registrar investigated this complaint, Ms Yerman could not produce documentation recording the change from seeking a residence visa to seeking a work visa. Nor could she produce records of her advice, or a written agreement to provide services for the work visa.
- [1.4] When the complainant had difficulties finding work in New Zealand, he terminated Ms Yerman's instructions. She refunded him half of the fee he paid, however the Registrar considered that potentially, the refund was insufficient.
- [2] Ms Yerman did not take issue with the essential facts, but she did argue she performed all her services properly, documented them appropriately, and promptly paid a generous refund.
- [3] Accordingly, the Tribunal has to consider the professional obligations on Ms Yerman in relation to:
- [3.1] Her obligations to document her professional interactions with her client;
- [3.2] Whether she had to modify her agreement when her instructions changed; and
- [3.3] Whether the refund she paid was adequate.
- [4] The Tribunal found in each of those respects the complaint has merit, and has upheld each of those grounds of complaint.

The complaint

- [5] The Registrar's Statement of Complaint put forward the following background:
- [5.1] In November or December 2012 Ms Yerman and her husband (Mr Yerman) met with the complainant, in South Africa, where Ms Yerman's practice is located. They advised the complainant he could readily obtain work in New Zealand. Accordingly, Ms Yerman said he could likely claim 115 points under the skilled migrant category if he wished to migrate to New Zealand.
- [5.2] On 8 December 2012, Mr Yerman emailed the complainant a written agreement for the provision of immigration services, and said they would lodge an application, as the complainant had a job offer. The complainant entered into a written agreement on 14 December 2012 for Ms Yerman's services to apply for a New Zealand residence visa, in the skilled migrant category. The fee was 45,000 Rand, approximately \$6,000.
- [5.3] Ms Yerman believed the complainant had a job offer, but by January 2013, that was not the case, as the prospective employer did not provide written confirmation. Ms Yerman did not record any discussions relating to this development.

- [5.4] Ms Yerman began the process of preparing an application for a work visa, and the complainant paid 30,000 Rand for that work. On 13 March 2013, the complainant came to New Zealand seeking employment. In May 2013, the complainant terminated Ms Yerman's services, and she refunded half of the money she received (15,000 Rand).
- [5.5] The complainant could not find work in New Zealand, and returned to South Africa.
- [6] The Registrar identified potential breaches of professional standards during the course of Ms Yerman's engagement, the allegations were that potentially:
- [6.1] Ms Yerman breached clause 3(f) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). The provision required her to maintain professional business practices, including confirming in writing the details of material discussions with clients. The circumstances were:
- [6.1.1] The complainant sought Ms Yerman's assistance to apply for a residence visa for New Zealand, and she advised him he could claim an estimated 115 points. They entered into a written agreement, and settled a fee of 45,000 Rand to lodge an application for a New Zealand residence visa.
- [6.1.2] The complainant may have had a job offer when he first spoke with Ms Yerman, but it was not available to him later.
- [6.1.3] Ms Yerman has not produced written records confirming a change of status regarding the job offer, and her consequent change of approach, when she started working toward applying for a work visa.
- [6.1.4] The 2010 Code required Ms Yerman to confirm details of material discussions with clients, and the absence of records may evidence a breach of her obligations under clause 3(f) of the 2010 Code.
- [6.2] Ms Yerman breached clause 1.5(b) or (e) of the 2010 Code. The provision required her to ensure she had a written agreement for the provision of her professional services, containing: a full description of the services she was to provide; and that she record any changes to the terms in writing. The circumstances were:
- [6.2.1] Ms Yerman entered into an agreement on 14 December 2012, for services relating to an application for residence under the skilled migrant category.
- [6.2.2] Ms Yerman could not proceed with a residence application due to the complainant not having a job offer, she then changed her services to applying for a work visa; and performed some of those services. She provided few of the services contemplated by the written agreement; and did not have a written agreement that contemplated the services relating to a work visa.
- [6.2.3] Accordingly, either:
- [6.2.3] Ms Yerman's written agreement was drafted without an adequate description of the services she was to provide in breach of clause 1.5(b) of the 2010 Code; or
- [6.2.3] She failed to record the change in services when her instructions altered, so breach of clause 1.5(e).
- [6.3] Ms Yerman breached clause 3(d) of the 2010 Code. The provision required her to provide refunds when she completed or ceased a contract for her professional services. The circumstances were:
- [6.3.1] Ms Yerman had a contract for the provision of services relating to applying for a residence visa, the total fee was 45,000 Rand and the complainant paid her 30,000 Rand. She provided few services directed to the residence visa.

[6.3.2] When the complainant terminated Ms Yerman's services, she refunded half the fee she received.

[6.3.3] Ms Yerman failed to pay the refund of fees payable, and breached clause 3(d) of the 2010 Code.

[7] The grounds of complaint were wider; the complainant has not filed a statement of reply seeking to pursue the wider grounds of complaint. Accordingly, the Tribunal will only consider the grounds the Registrar considered to have potential support.

The responses

[8] The complainant did not file a statement of reply, and was not required to do so if he agreed with the contents of the statement of complaint.

[9] Ms Yerman did file a statement of reply with a letter and statements supporting it, the key matters she raised were:

[9.1] At the initial meeting, the complainant had an oral offer of employment; the prospective employer did not make a written offer.

[9.2] Ms Yerman accepts she "was remiss in not changing the contract to reflect the altered government fees", when she altered to applying for a work, rather than a residence, visa.

[9.3] Ms Yerman had a meeting regarding changes of circumstances and fees, and said, "There are of course no records of the meetings and telephone calls that took place."

[9.4] Ms Yerman is "at a loss to understand why a complaint was lodged in the first place".

[9.5] Ms Yerman's clients terminated the contract, and she agreed to a refund. The refund was in excess of the amount that her clients were due. Ms Yerman's contract provided that all client fees were payable, whether or not she provided her services. The Registrar does not understand the costs Ms Yerman incurs when working on a file for six months, and she has a right to enforce her contract.

[9.6] The complaint is based on the fact the complainant could not get employment in New Zealand, which is not Ms Yerman's responsibility. Her client saw hundreds of suitable positions of employment, travelled to New Zealand and he made poor choices regarding seeking employment.

[9.7] Ms Yerman says her clients were dishonest:

"[The complainant and his wife] did not inform me that he intended to lodge a complaint and did not follow the official 'Complaints Procedure' a copy of which had been provided with the contract.

Instead, they thanked us for our service **after** [the complainant] had lodged the complaint. He had every opportunity to voice any concerns about our service, instead we were thanked – surely this shows that [the complainant] is not consistent and lacks honesty."

The Registrar's response

[10] The Tribunal gave the Registrar the opportunity to reply to Ms Yerman's Statement of Reply; however, she was content for the Tribunal to decide the complaint on the material before it.

Discussion

The standard of proof

- [11] 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

- [12] The Registrar provided a chronology and supporting documentation; and Ms Yerman has not generally challenged the information, beyond an overall denial of liability. Indeed, Ms Yerman has mostly failed to engage with the grounds of complaint the Registrar identified; except she admitted some of the conduct the Registrar identified as breaches of professional standards and sought to justify it.
- [13] The factual issues require the Tribunal to identifying each of the grounds of complaint; satisfy itself the Registrar's foundation for the alleged facts is justified on the material before it; then examine Ms Yerman's explanation.

Failure to confirm details of material discussions

- [14] The foundation for this element of the complaint is that Ms Yerman has a written agreement, which relates to an application for residence visas relying on the primary applicant's eligibility in the skilled migrant category. However, after starting on that process, Ms Yerman abandoned it and pursued a work visa application. The Registrar made inquiries of Ms Yerman, and wanted to see her records showing the change in the proposed immigration pathway.
- [15] The reasons for the change are uncomplicated, as without a job offer the complainant had no realistic prospect of qualifying for a residence visa under the skilled migrant category. He required sufficient "points", and he did not have enough points without a job offer. Originally the complainant had an oral job offer, it had to be in writing to qualify. Accordingly, when a written job offer was not forthcoming, a different strategy was necessary.
- [16] In that situation Ms Yerman had a duty to explain to her client what the consequences of not receiving a written job offer were, including, it appears, that she considered applying for residence before coming to New Zealand was not a realistic option. A potential strategy was to come to New Zealand, and seek employment subject to obtaining a work permit. That may have led to residence options later.
- [17] Ms Yerman could not produce records of discussions regarding the change of approach. That appeared, to the Registrar, to potentially point to a breach of Ms Yerman's professional obligations as clause 3(f) of the 2010 Code. It required Ms Yerman to "confirm in writing the details of material discussions with clients". Ms Yerman could not move from providing services related to a residence visa to a work visa without informing her clients of the material considerations in writing, or orally. If she did so orally, then she had to confirm the oral discussions in writing for her clients. Unless she had communicated with her clients regarding the issues; she would not have had informed instructions to abandon the residence visa as a first stage, and then move to a work visa; and she had to have informed instructions to carry out her work to professional standards.
- [18] Ms Yerman says she did have appropriate discussions. She said "we had more than 4 hours of meetings on 4 separate occasions with two licensed advisers". However, she said:
- "It would not be possible to keep records of everything that took place in these meetings. I think it would be unfair to expect this and this is not a dispute with [the complainant and his wife]. They have not disputed the fact that the offer fell through or that the new government fees were explained. Therefore I do not feel that this is the issue here. The issue remains that [the complainant] was not successful because he did not obtain an offer of employment. It was up to him to secure this offer."
- [19] Unfortunately, Ms Yerman's response fails to consider the 2010 Code has the status of statutory regulations of New Zealand. She has the privilege of holding a licence issued by the

New Zealand Government allowing her to provide professional services. It is not for Ms Yerman to decide whether she will comply with the 2010 Code, as failing to comply with it involves breaking the laws of New Zealand. Ms Yerman appears to treat the 2010 Code as something she is free to apply as she sees fit.

- [20] I also reject Ms Yerman's rationale that she was unable to comply with the requirement, as it was "not possible". Clause 3(f) of the 2010 Code only requires that Ms Yerman send a letter or an email recording "material discussions"; that does not require a verbatim record. It did in this instance require something like a brief acknowledgement of the changed circumstances, an explanation as to why it was now appropriate to travel to New Zealand and seek employment, and apply for a work permit; and the consequences of pursuing this different immigration pathway. I am satisfied Ms Yerman breached clause 3(f) of the 2010 Code, as she elected not to comply with clause 3(f) of the 2010 Code.

Ms Yerman's failure to alter her agreement with her client

- [21] I have already discussed the change in circumstances leading to the complainant seeking a work visa rather than a residence visa. Ms Yerman has a written agreement dealing with an application for a residence visa; it refers to the services relevant to that type of visa. It does not refer to the services involved in seeking a work visa, to which Ms Yerman directed most of her effort for her clients.

- [22] Ms Yerman accepts she did not alter the agreement, and says:

"I was remiss in not changing the contract to reflect the altered government fees which would then be indicated ..."

- [23] However, she said that in response to the Registrar pointing out that clause 1.5(b) of the 2010 Code required that Ms Yerman have an agreement that contained a "full description of the services to be provided by the adviser". That requirement does not relate to Immigration New Zealand's fees. The allegation is Ms Yerman had an agreement, which related to an application for residence visas relying on the skilled migrant category; when in fact she abandoned that; and instead provided services relating to a work visa. The services are quite different; Immigration New Zealand's fees are a minor part of the difference.
- [24] Clause 1.5(e) provides that Ms Yerman was required to record changes to the terms of agreements, and secure her client's agreement in writing. I am satisfied Ms Yerman's agreement adequately described the service she was to provide when the agreement was entered into; however, her instructions changed and she failed to comply with clause 1.5(e), which required her to change the terms, and obtain agreement in writing.

Failure to provide a refund

- [25] The final ground of complaint is that Ms Yerman failed to provide a refund when her client terminated her instructions. Ms Yerman's response is to say she had a contract that required her client to pay fees whether or not they received services; but at her election, she chose not to enforce the term. She also says the Registrar does not understand the costs she incurs when working on a file.
- [26] However, Ms Yerman's perspective of the contractual issues is misconceived. As already noted, the 2010 Code is part of the law of New Zealand, and Ms Yerman had to deal with her client in accordance with the law of New Zealand as she holds a licence, and she must meet professional standards.
- [27] The 2010 Code deals with fees, and Ms Yerman was required to set fees that "are fair and reasonable in the circumstances"; the Tribunal has in other cases found contracts that require payments for services the adviser did not provide must be justified. It is not acceptable for a licensed immigration adviser to provide in an agreement that clients must pay more than is proper under the 2010 Code. Ms Yerman's justification of her holding the power of remission at her election aggravates such conduct.
- [28] The Registrar and this Tribunal are well aware of the cost of providing professional services. The difficulty Ms Yerman faces is not that her fees were necessarily unjustified; but that the 2010 Code required her to enter written agreements and attend to disclosure of fees. These

are conventional consumer protection provisions that typically apply to licensed professionals. The bulk of the work Ms Yerman performed was not directed to the services for which she had an agreement; they were directed to work where:

- [28.1] She failed to document that she had informed instructions;
 - [28.2] She failed to have an agreement that complied with the 2010 Code; and
 - [28.3] There is no written record to show how the fee paid can be related to work she agreed to provide.
- [29] Ms Yerman was obliged to refund all or nearly all of the fees, because of her wilful non-compliance with the 2010 Code. I am accordingly satisfied that Ms Yerman failed to provide the full refund due to the complainant, and accordingly breached clause 3(d) of the Code. If Ms Yerman fails to comply with her professional obligations, she cannot reasonably complain when she fails to recover her costs; the Registrar and this Tribunal will have no hesitation in finding she is entitled to fair and reasonable costs where she complies with her professional obligations. When she fails to comply, the financial consequences are a result of her own failure to deliver professional services in accordance with the standards of her profession.

Decision

- [30] The Tribunal upholds the complaint pursuant to section 50 of the Act; Ms Yerman breached clauses 3(f), 1.5(e) and 3(d) of the 2010 Code in the respects identified and that is a ground for complaint pursuant to section 44(2)(e) of the Act.
- [31] In other respects, the Tribunal dismisses the complaint.

Submissions on Sanctions

- [32] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [33] The findings against Ms Yerman potentially open the Tribunal to find her conduct was wilful defiance of the law regulating licensed immigration advisers, or a failure on her part to comprehend elementary professional obligations. I make this observation, in part due to a warning issued to Ms Yerman in relation to a previous complaint on 31 July 2012. The Tribunal formally cautioned Ms Yerman in these terms:
- “Ms Yerman is [c]autioned that her failure to accept responsibility for professional failings, and instead attempting to blame her client, raises the question of her fitness to practice without supervision. She is strongly encouraged to reflect on the circumstances that led to this complaint, and pursue further training and education in relation to professional ethics. Should Ms Yerman have another complaint upheld against her, this caution may be considered in relation to the appropriate sanctions to impose.
- [34] As is evident in the preceding discussion, Ms Yerman has failed to address the grounds of complaint in a manner that shows insight or understanding of the grounds the Registrar set out with clarity in the Statement of Complaint. She has also said her client was dishonest, simply as he chose to make a complaint through formal channels rather than confront Ms Yerman. Given Ms Yerman’s response to the Registrar’s careful articulation of the grounds of complaint, Ms Yerman should potentially reflect on her perceptions. Clients do sometimes find it intimidating to confront professional persons unless they make themselves approachable.
- [35] In these circumstances, Ms Yerman should appreciate that the Tribunal may well determine the appropriate sanctions should be orders that will affect her licence. The Tribunal will, accordingly, request pursuant to section 49(4)(b) of the Immigration Advisers Licensing Act 2007 that Ms Yerman appear in person before the Tribunal to provide an explanation regarding:
- [35.1] The steps she has taken to pursue further training and education in relation to professional ethics following the Tribunal’s warning of 31 July 2012; and

- [35.2] Her attitude to the Tribunal's findings in this matter, and
- [35.3] What steps she can or will take to protect consumers receiving immigration advice from her in the future.
- [36] The Tribunal appreciates that travelling to New Zealand will be onerous; however it is proportionate to the reality that Ms Yerman's licence, and potentially her future participation in the profession is in issue.
- [37] The Tribunal notes Ms Yerman is entitled to legal representation by a barrister or solicitor of the High Court of New Zealand, and invites her to reflect on the observations of the High Court in *ZW v Immigration Advisers Authority* (High Court, [2012] NZHC 1069):
- "I consider it would be foolish for any immigration adviser who contests serious aspects of a complaint not to seek some form of legal advice. The consequences of complaints being upheld may well be severe. In passing the Act, Parliament has clearly intended to provide a system of competency, standards, and a Code of Conduct to clean up an industry which hitherto had been subject to much justified criticism. The Registrar and Tribunal have a Parliamentary mandate to enforce standards."
- [38] It is entirely a matter for the Ms Yerman as to whether she does take legal advice and engage a lawyer to represent her.
- [39] The procedure for the hearing will be as set out in the following timetable.

Timetable

- [40] The timetable for the sanctions hearing is:
- [40.1] The Authority and the complainant may make any submissions within 10 working days of the issue of this decision.
- [40.2] Ms Yerman is to make any further submissions and provide an outline of her explanation referred to in paragraph [35] above (whether or not the Authority or the complainant make submissions); within 20 working days of the issue of this decision.
- [40.3] The Authority and the complainant may reply to any submissions made by the adviser and provide affidavits in reply to Ms Yerman's explanation, within 5 working days of her filing and serving her submissions and outline.
- [41] The sanctions hearing, unless any party applies for an alternative time or location, will be set down for a half-day at a date and place to be arranged.
- [42] The procedure at the hearing will be that:
- [42.1] If any persons other than Ms Yerman give oral evidence they will do so first (Ms Yerman may seek to cross-examine any persons filing affidavits for the sanctions hearing) and in the standard format;
- [42.2] Then Ms Yerman will provide her explanation, and be subject to cross-examination and re-examination;

[42.3] The parties will then present submissions.

DATED at WELLINGTON this 25th day of June 2015.

G D Pearson
Chair