

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

Decision No: [2015] NZIACDT 94

Reference No: IACDT 052/14

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**Natalie Francine Adams**

Complainant

**AND**

**Martinus Philippus (Martin) Aucamp**

Adviser

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**DECISION**

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**REPRESENTATION:**

**Registrar:** Ms S Blick, lawyer, Ministry of Business, Innovation and Employment

**Complainant:** In person

**Adviser:** Mr W Nelson, lawyer, Nelson & Co, Auckland

Date Issued: 22 October 2015

## DECISION

### Preliminary

- [1] Mr Aucamp was a licensed immigration adviser who received instructions from the complainant and her husband, and her parents (the clients). I will refer to the family as a whole (including wider family members) as the complainant's family. The complaint relates to the services provided to the clients and involves several alleged irregularities in the course of the dealings. The Registrar's Statement of Complaint identifies the following potential grounds for complaint:
- [1.1] Mr Aucamp did not identify that the complainant's IELTS score was insufficient for her to obtain teacher's registration. He submitted the registration application rather than tell her she needed to re-sit the test.
- [1.2] He did not report to the complainant when he lodged an application with Immigration New Zealand; he told her brother instead.
- [1.3] When his initial approach to gain residence for the complainant failed, he said he would prepare a work visa application without charging fees. However, after filing the application, he presented a backdated agreement requiring the complainant to pay fees.
- [1.4] After the professional relationship became strained, Mr Aucamp left a threatening message on the complainant's telephone.
- [1.5] Mr Aucamp overcharged the complainant's parents, and failed to refund the overpayment.
- [1.6] He did not have a written agreement for work he performed for the complainant's parents.
- [2] In his response to the complaint, Mr Aucamp took issue with the allegations against him, and the Tribunal convened a hearing to determine the facts. Mr Aucamp attended the hearing, but did not give oral evidence. Accordingly, the issues are essentially factual matters where the Tribunal has had to consider the written material before it, the complainant's oral evidence and oral evidence from a witness called by the complainant. Mr Aucamp provided an affidavit in response to the complaint, but chose not to give oral evidence; accordingly, his account was not subject to cross-examination. The Tribunal must give appropriate weight to the various materials before it, and reach conclusions regarding what occurred.
- [3] The Tribunal considered the complainant's evidence, and found that the written material supports the grounds of complaint. The witness she called provided further support. The Tribunal has therefore found that the grounds of complaint are established, and each of the grounds of complaint amount to a breach of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code). Accordingly, the Tribunal has upheld the complaint.

### The Complaint

- [4] The Registrar filed a statement of complaint. The Registrar set out a factual narrative, and identified six potential grounds for complaint (as outlined above). The main elements of the factual background in the Statement of Complaint were as follows:
- [4.1] In February 2011, the complainant engaged Mr Aucamp to assist with a residence application. As part of this process, Mr Aucamp assisted the complainant with obtaining registration as a teacher in New Zealand.
- [4.2] In July 2011, the complainant sat the International English Language Testing System (IELTS) test. Mr Aucamp provided the complainant with the incorrect forms for her application to register as a teacher. That occurred between 2 August and 9 November 2011. In November 2011, Mr Aucamp submitted the registration application, however

the IELTS score was not sufficient. The complainant re-sat the test and passed in February 2012, and subsequently gained registration as a teacher.

- [4.3] On 12 March 2012, Mr Aucamp submitted the complainant's Expression of Interest to apply for residence to Immigration New Zealand. It was unsuccessful. On 28 September 2012, Mr Aucamp submitted a work visa application for the complainant as an alternative strategy; and on 19 October 2012, Immigration New Zealand granted the application.
- [4.4] Around the end of October 2012, Mr Aucamp provided the complainant with a written agreement for his services relating to the work visa, which she signed. On 7 November 2012, the complainant's brother made inquiries regarding Mr Aucamp's fee. Mr Aucamp then left a threatening message on the complainant's voicemail.
- [4.5] On 16 August 2011, the complainant's parents engaged Mr Aucamp to assist in making an application to extend their visitor visas and paid him \$2,500. In late 2012, they engaged him to submit an Expression of Interest for residence, which he filed on 6 November 2012.
- [5] The statement of complaint identified six potential breaches of the 2010 Code arising out of that background. These are:

*The complainant*

- [5.1] *Clause 1.1(a) – the obligation to perform services with due care, diligence, respect and professionalism.* The particulars allege Mr Aucamp repeatedly provided the incorrect form for the complainant's teacher registration, and he failed to identify that her IELTS results were below the requirements for registration. The failure to notify the complainant that her IELTS results were insufficient breached duties under clause 1.1(a) of the 2010 Code.
- [5.2] *Clause 3(a) – the obligation to maintain professional business practices including confirming in writing to clients when applications have been lodged, and providing timely updates.* The particulars allege Mr Aucamp did not give notice when he lodged the complainant's Expression of Interest, and instead reported to the complainant's brother, thereby breaching his duty to confirm in writing to the complainant.
- [5.3] *Clause 1.5(b) and 8(b) – ensuring an agreement contains a full description of the services to be provided; and setting out fees and disbursements before commencing work incurring costs.* The particulars allege Mr Aucamp failed to prepare this documentation before preparing the work visa application.
- [5.4] *Clause 1.1(a) – the obligation to perform services with due care, diligence, respect and professionalism.* The particulars allege Mr Aucamp left a threatening message on the complainant's telephone, saying he would report her and her family to Immigration New Zealand.

*The complainant's parents*

- [5.5] *Clause 3(d) – the obligation to pay refunds on ceasing to provide services.* The particulars allege Mr Aucamp accidentally charged a fee of \$1,250 twice, and failed to repay the double payment.
- [5.6] *Clause 1.5(a), (b) and (d) – the obligation to provide an agreement with the terms of engagement, a full description of the services in the agreement, and confirmation in writing that the client has accepted the terms.* The particulars allege Mr Aucamp failed to prepare an agreement in respect of the Expression of Interest he prepared for the complainant's parents. He accordingly failed to comply with each of these provisions.

## Responses to the Statement of Complaint

- [6] Mr Aucamp responded to the Statement of Complaint with a statement of reply. He challenged the factual basis for the complaint. The complainant added some details to the basis for her complaint.
- [7] The Tribunal accordingly convened an oral hearing to determine the facts.

## Evidence

- [8] The Tribunal has a body of written material, some filed with the Statement of Complaint, and some filed subsequently by the parties. The Tribunal primarily hears complaints on the papers and, accordingly, the Tribunal will consider all of the written material.
- [9] The complainant attended an oral hearing, gave evidence and called a witness in support of her evidence. Mr Aucamp attended the oral hearing, but elected not to give evidence, and called no witnesses.

## 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 potential finding: *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [55].

### *The issues*

- [11] As the facts are in contention, and a range of provisions in the 2010 Code potentially apply depending on the factual findings, I will identify the issues and make findings in respect of each of the six grounds of complaint.

### *First ground of complaint – not identifying the IELTS tests results were insufficient*

- [12] The first ground of complaint relates to clause 1.1(a) of the 2010 Code. It contains a requirement to perform services with due care, diligence, respect and professionalism. The particulars in the Statement of Complaint identify the critical issue as being that Mr Aucamp failed to notify the complainant that her IELTS results were not satisfactory. Potentially, a failure to notify could amount to a lack of care, diligence or professionalism.
- [13] The complainant gave evidence which Mr Aucamp's counsel tested under cross-examination. However, Mr Aucamp chose not to give any evidence. Accordingly, I give greatest weight to the complainant's evidence, measured against the documentary record.
- [14] The particulars in the Statement of Complaint refer to Mr Aucamp supplying the wrong forms for teacher registration, but do not specifically identify that as a breach of the Code in itself. At most, it could point to a lack of care in dealing with the issues relating to the complainant's registration.
- [15] It is clear Mr Aucamp did understand the IELTS requirements for the complainant's registration. In an email dated 19 April 2011, he correctly said she had to achieve an "IELTS test score of 7 in each band". The complainant's score was 8 overall, but in the written band it was 6.5. The complainant said the testing authority delivered the results to her brother in New Zealand, and he took the results to Mr Aucamp. There was an existing friendship between the complainant's brother and Mr Aucamp; it was a reason for the complainant selecting Mr Aucamp to provide services.
- [16] The complainant says Mr Aucamp failed to examine the results and identify the grading was not sufficient; and instead he used the insufficient results to lodge the failed application for registration. The result was some months of delay in the complainant receiving her registration. When her registration application failed, she then re-sat the test successfully and lodged the registration application herself.

- [17] It is evident Mr Aucamp did understand the requirements; or at least he had them in mind when he wrote his email of 19 April 2011. The complainant's evidence was that Mr Aucamp received the results after the complainant sat the test on 9 July 2011 and that he filed the application for registration in November of that year. Mr Aucamp has not given evidence to challenge that or explain why he filed the application when, on his own earlier understanding, the results were not sufficient for registration.
- [18] The issue was an important one for the complainant and her family. Mr Aucamp had two opportunities to identify that the results did not meet registration requirements. First, when the complainant's brother delivered them and second, when he submitted the application for registration. The issue was an important one with the potential to delay the complainant's migration, and he held the professional responsibility for managing the application. Accordingly, I am satisfied Mr Aucamp's management of this issue amounted to a lack of care and he breached clause 1.1(a) of the 2010 Code. There was no justification for not properly examining the results and explaining to the complainant she had to re-sit the test.

*Second ground of complaint – not giving the complainant notice of filing her expression of interest*

- [19] The second ground of complaint relates to clause 3(a) of the 2010 Code. It contains a requirement that a licensed immigration adviser give their client written notification of filing an application. The particulars in the Statement of Complaint say Mr Aucamp did not give notice to the complainant when he filed her Expression of Interest, and instead he told her brother.
- [20] The complainant was clear in her evidence and she did not invite Mr Aucamp to communicate with her brother rather than her. She said there was only an isolated occasion when she had a communication difficulty; otherwise, she was readily contactable in South Africa.
- [21] It appears that due to the complainant's relationship with her brother, and his friendship with Mr Aucamp, she was not concerned about confidentiality issues. However, she reasonably expected Mr Aucamp to communicate with her about what was occurring with her immigration matters. Mr Aucamp did not give evidence of either compliance, or justification for not complying.
- [22] I am satisfied that Mr Aucamp failed to give the complainant written notice when he filed her expression of interest, and accordingly breached clause 3(a) of the 2010 Code.

*Third ground of complaint – not giving a written agreement in place for the work visa*

- [23] The third ground of complaint relates to clauses 1.5(b) and 8(b) of the 2010 Code. They require an agreement with a full description of the services; and that fees and disbursements are set out before the licensed immigration adviser commences work that incurs costs. The particulars say Mr Aucamp failed to prepare the necessary documentation before preparing the work visa application.
- [24] The complainant's Expression of Interest failed. While the Expression of Interest was a more direct route to residence, gaining a work visa and employment was an alternative approach to progress towards residence. The complainant's evidence is that after Mr Aucamp's initial approach failed, he offered to apply for a work visa for the complainant without charge. However, there is a written agreement that on its face purports to be dated 24 September 2012, which contains the required information. If the date of the application is correct, it was created before Mr Aucamp commenced this work.
- [25] However, the complainant's position is that Mr Aucamp presented this document and demanded that it be backdated. The complainant has undertaken some research and identified the day Mr Aucamp presented the document to her as 24 October 2012. Mr Aucamp gave no evidence regarding the matter. I accept the complainant's account.
- [26] Accordingly, I find that the document did not exist until after the work was completed. Accordingly, Mr Aucamp failed to have a written agreement for this work, and failed to set out the fees and disbursements.

*Fourth ground of complaint – threatening message*

- [27] The fourth ground of complaint relates to clause 1.1(a) of the 2010 Code. It contains a requirement to perform services with respect and professionalism. The particulars in the Statement of Complaint identify the critical issue as an allegation that Mr Aucamp left a threatening message on the complainant's telephone, saying he would report her and her family to Immigration New Zealand.
- [28] At the point this is alleged to have occurred, the relationship between Mr Aucamp and the complainant's family was strained. Some of those tensions are evident in correspondence. The complainant is clear in her evidence that Mr Aucamp left a message threatening to report her family to Immigration New Zealand. There is nothing to suggest there was anything adverse to report; nonetheless such a suggestion was calculated to be very distressing for a migrant concerned for their future. Mr Aucamp gave no evidence about the matter at the hearing, but when responding to the complaint he did identify some tensions arising from rumours.
- [29] I accept the complainant's evidence of the contents of the message. Whatever emotional state Mr Aucamp was in, and whatever the reasons for it, he was a professional person required to conduct his interactions with clients in a professional manner. If he had concerns, his duty was to set them out in writing and address them in a professional manner. Threatening the complainant and her family with a malicious and unfounded complaint to Immigration New Zealand is wholly incompatible with maintaining professional standards.
- [30] I find Mr Aucamp's conduct was unprofessional and he breached clause 1.1(a) of the 2010 Code in the course of delivering his services to the complainant.

*Fifth ground of complaint – double charge and not refunding the overpayment*

- [31] The fifth ground of complaint in the Statement of Complaint is that Mr Aucamp accidentally charged each of the complainant's parents a fee of \$1,250 when there should have been only one fee. In her statement of reply, the complainant advanced the complaint on the grounds the double charge was deliberate. Both the Statement of Complaint and the complainant contend Mr Aucamp failed to refund the overcharge, and accordingly breached clause 3(d) of the 2010 Code.
- [32] The complainant's evidence was that there were attempts to refund the overpayment, but they were refused, due to concern that accepting the repayment would compromise this complaint. She pointed out that the first offer of a refund was a year after the payment, and she found Mr Aucamp's explanation for the double charge unsatisfactory.
- [33] Mr Aucamp's explanation was set out in an affidavit provided to the Registrar when she investigated the complaint. The complainant is correct that the double charging was intentional. Mr Aucamp's explanation was that it was an error of judgment. He said he charged two fees, \$1,250 each, for the complainant's two parents to apply for visitor visas. He said he did so based on advice from his then supervisor. At that time, he held a provisional licence and accordingly had a supervisor. By the time this complaint came to Mr Aucamp's attention he held a full licence, so did not have a supervisor. He was also in a different practice, and consulted with a colleague in his new practice. This colleague advised him that he should have only charged a single fee. He took that advice, and offered to refund half the total. The discussion with his colleague in the new practice occurred in December 2012, and the offer to refund is set out in Mr Aucamp's affidavit of 29 April 2013.
- [34] The complainant produced an unsworn statement from Mr Aucamp's former supervisor. It states that she did not advise him to charge twice; she says he never discussed these fees with her. Furthermore, she advised Mr Aucamp on multiple occasions to take note of the fees usually charged by the profession at the time, which she indicated were about half the amount Mr Aucamp charged.
- [35] The colleague who later advised Mr Aucamp he should not have charged twice, presented a sworn statement and gave oral evidence. However, she was called as a witness by the complainant, not Mr Aucamp. She said she had the opportunity to examine a number of Mr Aucamp's files and found they exhibited poor record-keeping, defective advice, and other matters of concern going to Mr Aucamp's professionalism. She confirmed that she advised Mr Aucamp the fee he charged the complainant's parents was excessive.

- [36] I have before me Mr Aucamp's claim his supervisor told him to charge two fees of \$1,250 and he did so, relying on her advice. He has chosen not to present himself for cross-examination, notwithstanding that he attended the hearing. I have an unsworn statement from his supervisor saying she gave no such advice, and that it was wrong of him to charge the fees as they were about twice as much as they should have been. She said she advised Mr Aucamp multiple times to have regard to the proper level of fees, and she referred to material that gave some support for her own evaluation of the proper level of fees. On the balance of probabilities, I find Mr Aucamp did not have advice from his supervisor to charge approximately twice as much as the figure she reports is an appropriate fee. I take support from the oral evidence of Mr Aucamp's colleague who later advised him to refund part of the fee; she says the supervisor's report of the appropriate fee range is correct, and Mr Aucamp overcharged.
- [37] I accept that Mr Aucamp did offer a refund of the fees after becoming aware of the complaint. However, the fee was unjustifiable, and aside from the incorrect claim that his supervisor told him it was appropriate, he has not attempted to justify the fee. He was never entitled to the fee and should have refunded it to the extent of \$1,250. He failed to do so promptly, and accordingly breached clause 3(d) of the 2010 Code. I accept he attempted to refund the money after receiving the complaint.

*Sixth ground of complaint – double charging and failing to refund the overpayment*

- [38] The sixth ground of complaint in the Statement of Complaint is that Mr Aucamp failed to prepare an agreement in respect of the Expression of Interest he prepared for the complainant's parents. He accordingly failed to comply with clause 1.5(a), (b) and (d) of the 2010 Code, which require an agreement with the terms of engagement, a full description of the services in the agreement, and confirmation in writing that the client accepts the terms.
- [39] The complainant said Mr Aucamp did not have an agreement. The Registrar required him to provide a copy of his records, and he has not produced an agreement for those instructions. It is evident there is no agreement as required by the 2010 Code. In an affidavit presented to the Registrar in response to the complaint, Mr Aucamp does not provide an explanation for why he did not have a written agreement. Accordingly, I find Mr Aucamp did not have the required written agreement and breached clauses 1.5(a), (b) and (d) as alleged.

**Decision**

- [40] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [41] The adviser breached the Code of Conduct in the respects identified. Breaches of the 2010 Code are grounds for complaint pursuant to section 44(2)(e) of the Act.
- [42] The complaint included wider grounds than those for which the Registrar found support, although the complainant largely accepted the scope the Registrar identified. The Tribunal dismisses the complaint to the extent that it is wider than the breaches of the 2010 Code identified above.

**Submissions on Sanctions**

- [43] The Tribunal has upheld the complaint, Therefore, pursuant to section 51 of the Act, it may impose sanctions.
- [44] 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, the adviser is entitled to make submissions and respond to any submissions from the other parties.
- [45] 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*

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

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

[46.2] The adviser is to make any further submissions (whether or not the Authority or the complainant make submissions) within 15 working days of the issue of this decision.

[46.3] The authority and the complainant may reply to any submissions made by the adviser within 5 working days of him filing and serving those submissions.

**DATED** at WELLINGTON this 22<sup>nd</sup> day of October 2015

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**G D Pearson**  
Chair