

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

Decision No: [2017] NZIACDT 9

Reference No: IACDT 013/16

**IN THE MATTER** of a referral under s 48 of  
the Immigration Advisers  
Licensing Act 2007

**BY** **The Registrar of  
Immigration Advisers**

Registrar

**Between** **Kevin Almero**

Complainant

**AND** **Herminigilda (Loreen)  
Carlos**

Advisers

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**DECISION**

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**REPRESENTATION:**

**Registrar:** Ms T Thompson, lawyer, Legal Group, MBIE, Auckland.

**Complainant:** In person.

**Adviser:** Mr D Cowan, Lawyer, Auckland.

Date Issued: 27 July 2017

### **Introduction**

- [1] This matter involves a complaint against a licensed immigration adviser. There are three aspects to the complaint, as particularised in the Registrar's statement of complaint the adviser:
  - [1.1] Breached her duty to refund of fees on a fair and reasonable basis, and promptly pay that refund after the completion or cessation of the contract for services.
  - [1.2] Engaged in communications that failed to meet the required standards of professionalism and meet the requirement to maintain a relationship of confidence and trust.
  - [1.3] Failed in her duty to maintain confidentiality in relation to communications.

### **The adviser's response**

- [2] The adviser accepts that the tone and content of her communications did breach the standards required of her. There was a series of communications to consider. The complainant presented challenging communications, and unfortunately, the adviser replied in kind. The adviser accepts she had an obligation to maintain professional standards, regardless of the challenges that faced her. In mitigation, she does ask that the Tribunal take into account that the lapse occurred in the context of an intemperate and challenging relationship between her and the complainant, and others who were assisting the complainant.
- [3] The adviser denies she was obliged to pay a refund and denies that she breached obligations of confidentiality.

### **The facts**

- [4] The Tribunal convened an oral hearing to deal with this matter. The complainant endeavoured to participate in that hearing; unfortunately, he was unable to do so. It appears that the difficulties were technical in nature rather than him not being available. The complainant did communicate to the case officer that he was content that the written record did adequately record his position. Neither the Registrar nor the adviser sought an adjournment. Accordingly, the matter proceeded. Given the acceptance of the grounds of complaint relating to intemperate correspondence, and an indication from the Registrar that she did not seek to cross-examine the adviser, the Tribunal received

submissions, without further evidence. Accordingly, in relation to the two matters the adviser did not admit were established, the Tribunal heard them on the papers, after considering the oral submissions.

- [5] In relation to the intemperate correspondence, it is sufficient to record that the terms used and the tone of communication were not appropriate in a professional setting.
  
- [6] In relation to refunds, the adviser had a contract for fees that contemplated a fixed fee, but included provision for a fair and reasonable refund. The refund issue arose following a change in the complainant's circumstances.
  
- [7] The professional work related to obtaining a visa, so that the complainant could attend a course with a particular educational service provider. As matters transpired, the course ceased to be available. The total amount of the fee (which related in part to the complainant and, in part, to another person) was approximately NZ\$1,000. The adviser's position was that less than NZ\$300 remained after the work she had already performed at that point in time. She says that she performed other work for the complainant, because the course was cancelled. Furthermore, she offered to provide alternative services as a concession.
  
- [8] In relation to the alleged breach of confidentiality, it related to a series of communications with a number of people whom the complainant had introduced into his relationship with the adviser. Some had a direct connection; others seemed to be support persons. There was a series of emails, in which the various parties engaged. The Registrar did not pursue an argument that the complainant had marked out any particular area that the adviser should regard as having as confidential from any of them confidentiality, or that any of the information by its nature should be confined to only some members of the group. The evidence indicates the complainant introduced the wider group of persons into the correspondence, and he continued to engage them in the communications. There were also persons assisting the adviser in relation to the instructions involved in the communications.

## **Discussion**

### *Refunds*

- [9] Pursuant to Clause 24(a) of the Code of Conduct 2014 (the 2014 Code), a licensed immigration adviser must ensure refunds given are fair and reasonable in the circumstances. Clause 24(c) of the 2014

Code requires that a licensed immigration adviser must promptly provide any refunds payable upon completing or ceasing a contract for services.

- [10] The matter I must determine is whether I am satisfied that a refund was due to the complainant. I note that the complainant was one of two persons for whom the adviser performed the work; the other person has ceased to take an interest in the complaint. Regardless, I have considered the other person's circumstances as well.
  
- [11] The issue is a fee of NZ\$1,000. It is a modest amount. Furthermore, the fee was a fixed fee. The complainant's circumstances changed and the adviser could not complete the original instructions. Both the adviser's own contract and the 2014 Code require that a refund must be fair and reasonable in the circumstances. It is evident that the adviser completed a significant amount of work; in the context of a fixed fee, it is not easy to establish with any certainty what the market value or contractual value of the work performed was. On the adviser's estimate, approximately two thirds of the NZ\$1,000 had been earned through the services she provided before the cancellation of the course. She also says that the work she performed after the course cancellation exhausted the full NZ\$1,000 and more.
  
- [12] I am not satisfied that the complainant's allegation that the adviser's approach was not fair or reasonable in the circumstances is correct. The material circumstances include the modest fixed fee, a change of circumstances, the resulting need to perform other work not contemplated and the willingness to provide alternative services. The willingness to provide alternative services does not substitute for a refund. Nonetheless, it does give some indication of good faith.
  
- [13] The evidence before me does not establish that the adviser provided services of less than the value of the agreed fee. That is so, viewed in the context of her services valued on the basis of a fixed fee, or on the basis of a market value for those services. Accordingly, I am not satisfied that any refund was due.
  
- [14] It necessarily follows that the Tribunal cannot not uphold this ground of complaint.

*Intemperate communications*

- [15] The adviser has admitted she breached her obligations to be professional and respectful, as Clause 1 of the Code of Conduct 2014 required.

[16] It is sufficient to note that the communications in issue were intemperate and occurred in a context where communications were emotionally charged and fraught.

[17] Accordingly, the Tribunal will assess the consequences on that basis.

*Confidentiality*

[18] Clause 1 of the 2014 Code of Conduct, as noted, requires that a licensed immigration adviser be professional. Clause 4(a) requires that a licensed immigration adviser must preserve the confidentiality of the client.

[19] The particulars provided by the Registrar particularly concern an e-mail of 20 November 2015 regarding refunds; the potential breach of privacy was copying that e-mail to other people. The Registrar contended that those other people were not authorised to receive a copy of the e-mail. However, the email was part of a series of communications, so the Tribunal cannot consider the single email in isolation.

[20] Although it is not a matter of great weight, I note that the complainant did not include this as a ground of his original complaint. He may not have been aware of a licensed immigration adviser's obligations of confidentiality, and may not have complained for that reason. It is, nonetheless, consistent with him not taking issue with the list of recipients. One of the persons was the other person who was seeking a visa. Initially, she was also a complainant, and it seems that there can be no objection to her being included in all correspondence. That person's sponsor was also included, which is not a surprising situation. It appears that the other persons were all engaged in the instructions, including specific staff in the adviser's practice.

[21] At the oral hearing, counsel for the adviser confirmed the adviser believed, and still believes she sent the email only to persons with a proper interest and where appropriate with authority to include them. Counsel for the Registrar did not seek to cross-examine the adviser on the issue.

[22] Accordingly, I cannot be satisfied that any of the persons included in the email were not included for a legitimate reason or without authority. It appears that they are all persons who were drawn into the communications by the complainant, the other applicant, or persons appropriately assisting the adviser to deal with the subject of the email. Accordingly, the circumstances did not affect the confidentiality of the complainant.

### **Decision – upholding a ground of the complaint**

- [23] Pursuant to s 50 of the Immigration Advisers Licensing Act 2007 (the Act), the Tribunal upholds the complaint in the respect identified. In particular, that the adviser breached Clause 1 of the Code of Conduct 2014, which is a ground for complaint under s 44 of the Act.

### **Sanctions**

- [24] The ground of the complaint upheld by the Tribunal is at the lower end of the spectrum. The Registrar agrees with that characterisation of the matter.
- [25] Inevitably, all professional persons in active practice will face challenging communications from clients. It is their duty to maintain professional standards when dealing with such circumstances. Intemperate communications that are inevitably inflammatory have no place in professional communications.
- [26] A number of factors mitigate the gravity of conduct in this case. This is not a case where the adviser gratuitously embarked on inflammatory communications. Rather, it was a situation where matters escalated with unfortunate communications from both sides. The adviser has not previously had any adverse professional disciplinary findings against her. It is of real significance that the adviser has recognised her error and accepted responsibility for it.
- [27] If the adviser were uncomprehending and unapologetic for her conduct, the Tribunal would consider requiring further training. In this case, the adviser's acceptance of her responsibilities makes that unnecessary. Ordinarily, the penalty would include a monetary penalty. In this case, the adviser has incurred significant expense to address the elements of the complaint that the Tribunal did not uphold. The body of documentation relating to those matters was significant; inevitably, it would have been a significant cost to the Adviser. Accordingly, I am satisfied that, in this case, a monetary penalty is not necessary or appropriate.
- [28] I am satisfied that the sole sanction in the present case should be that the adviser is censured pursuant to s 51(1).

### **Publication of the adviser's name**

- [29] The adviser initially sought an order that her name not be published, but did not pursue the matter.

[30] The Tribunal has applied the conventional “open justice” approach to complaints. It requires that an adviser must establish grounds for non-publication, before making an order where it has upheld a complaint. The approach will apply in this case. While publication is an imposition, there is nothing disproportionate. This decision clearly records that the ground of complaint was at the low end of severity, and mitigated by a number of factors.

**DATED** at WELLINGTON this 27<sup>th</sup> day of July 2017.

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**G D Pearson**  
Chair