

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2018] NZIACDT 43

Reference No: IACDT 009/16

**BETWEEN**      **JENELLE GREEN**  
Complainant

**AND**            **BENJAMIN NEIL**  
**STEWART DE'ATH**  
Adviser

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**DECISION**  
**Date: 1 November 2018**

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**REPRESENTATION:**

Registrar:        R Denmead, counsel

Complainant:    In person

Adviser:         P Moses, counsel

## **PRELIMINARY**

[1] Mrs Jenelle Green and her husband, Gavin Green, own a farm. They engaged Mr De'Ath's firm, Cross Country Recruitment Ltd (Cross Country), to provide a farm worker. The firm sent Mr S and upon signing an employment contract, he promptly commenced work. Two days later, Mr De'Ath's firm advised the Greens that Mr S would have to cease work immediately due to an investigation being carried out by Immigration New Zealand concerning fraudulent documents from a large number of Filipino nationals.

[2] While Mr S's documents were not fraudulent, he did need a Variation of Conditions (Variation) allowing him to work for his new employer, the Greens. The Variation application was later lodged by Mr De'Ath with Immigration New Zealand but was held up with the broader investigation of fraudulent documents. Cross Country had overlooked the Variation in sending Mr S to the Greens. Mr S was eventually granted the Variation, but in the meantime the Greens had accommodated him even though he had not been able to work on the farm.

[3] The Registrar's complaint against Mr De'Ath concerns various breaches of the obligations in the Code of Conduct 2014 (the Code) to have a written agreement with Mr S, to advise Mr S of his professional responsibilities and to keep proper written or electronic records. Mr De'Ath failed to appreciate that his client for immigration purposes was Mr S and not the Greens, who would pay his fee. Mr De'Ath admits these breaches.

## **BACKGROUND**

[4] Mr Benjamin Neil Stewart De'Ath is a licensed immigration adviser and director of Cross Country.

[5] In August 2015, Ms Funnell of Cross Country contacted the Greens to see if they were interested in using the firm to obtain dairy workers for their farm. Mrs Green advised Cross Country on 1 September 2015 that she was interested in any available Filipino worker.

[6] On 10 September 2015, Ms Funnell sent Mr S's CV to Mrs Green. Mr S had previously been employed by Ms Funnell herself on her own farm. The Greens advised Ms Funnell they were happy to hire Mr S.

[7] Mr S was taken to the Green's farm on 15 September 2015 and the employment contract was signed. He commenced work on the farm.

[8] On the same day, Cross Country signed their standard “Terms of Business” with the Greens. The copy sent to the Tribunal has not been signed by the Greens. The terms stated Cross Country would provide recruiting services and “immigration application submissions”. The fee was set at \$4,500 plus GST.

[9] On 17 September 2015, Ms Funnell contacted Mr Green to advise him that Mr S would have to cease work immediately as a result of an investigation by Immigration New Zealand into fraudulent documents from Filipino nationals. Mrs Green rang Mr De’Ath at Cross Country who confirmed that there were about 30 farmers in the same predicament as her. Mr S immediately stopped working but remained in a house on the farm.

[10] Mrs Green then made her own enquiries of Immigration New Zealand on 19 September 2015 and was told that Mr S required an approved Variation prior to commencing work. She emailed Mr De’Ath who replied that he had misinterpreted the immigration instructions and it was only after Mr S had commenced work that he realised an approved Variation was needed first.

[11] Mrs Green sent an email to Mr De’Ath on 21 September 2015 expressing her dissatisfaction. They had to employ relief milkers who could do no other work, so their costs had escalated.

[12] Mr De’Ath twice responded at length to Mrs Green on the same day. He admitted making an error. He would endeavour to have Mr S’s work visa approved by the end of the week. Mr De’Ath said he was doing all he could to get Mr S up to speed as soon as possible. He advised Mrs Green she could pursue her complaint through the Law Society or the Authority. While he had fallen short, he had owned it from the moment it was known.

[13] On 22 September 2015, Mr De’Ath sent an email to Immigration New Zealand asking whether processing would be faster for a Variation or a new work visa. Immigration New Zealand responded the next day advising that a Variation would not be processed urgently due to the issue with documentation.

[14] On 25 September 2015, Mr De’Ath and later Ms Funnell rang Mrs Green. The latter alleges Mr De’Ath bullied her.

[15] Immigration New Zealand advised Mr De’Ath on about 28 September 2015 that it was seeking verification of Mr S’s work experience in Saudi Arabia. It did not matter

whether he sought a Variation or applied for a new work visa in terms of the timing of processing.

[16] An application for a Variation for Mr S appears to have been made by Mr De'Ath on 30 September and/or 5 October 2015.

[17] On 7 October 2015, Mr S emailed Mr De'Ath requesting a progress update. He had a lot of financial responsibilities but was not earning any salary. Mr De'Ath responded on the same day stating that he had requested an electronic visa to allow Mr S to commence work as soon as the visa was issued. He apologised that his start in New Zealand had been so traumatic.

[18] Mr De'Ath emailed Mrs Green on 9 October 2015 telling her he anticipated Mr S's visa would be approved that week, if not that day.

[19] Mr De'Ath advised Mrs Green on 13 October 2015 that Mr S's immigration status had been updated to pending which meant that it was in the final stages of processing.

[20] On 27 October 2015, Mrs Green emailed Ms Funnell asking for an update. Mr De'Ath responded expressing frustration with Immigration New Zealand and advised that he was still waiting for a response.

[21] Mrs Green states that on 29 October 2015 she received a telephone call from an officer at Immigration New Zealand asking if she was expecting Mr S to immediately commence work. When she replied affirmatively, the officer told her that Cross Country had put her in a position where her farm could have been fined \$10,000.

[22] On 31 October 2015, Mr S's Variation was approved.

[23] The Greens received an invoice for \$4,500 + GST from Cross Country on 16 November 2015.

[24] In response to an enquiry from Mrs Green, Immigration New Zealand advised her on 30 November 2015 that applications relating to Filipino dairy workers were taking longer due to the verification process that was needed.

[25] Mrs Green advised Mr De'Ath by email on 2 December 2015 that due to the financial and emotional stress, as well as the hardship imposed on their business for six weeks, she was withholding payment of the invoice until the dispute had been resolved.

[26] Mr De'Ath responded to Mrs Green on the same day stating that Immigration New Zealand had placed all stakeholders in jeopardy, so her complaint should more appropriately be directed to the Minister of Immigration rather than to himself or his company. Without the extra work he had done, the matter would not have been resolved at all. He gave Mrs Green a link to the website of the Immigration Advisers Authority (Authority). According to Mr De'Ath, the accusation of negligence was unfounded. He added that if Mrs Green failed to make payment, he would institute legal proceedings against her.

[27] The Greens instituted proceedings in the Disputes Tribunal against Cross Country alleging losses resulting from Cross Country's mistake in the employment of Mr S.

[28] In a decision issued on 7 July 2016, the Disputes Tribunal referee recorded that Cross Country acknowledged it had incorrectly interpreted the law. A claim for the additional hours worked by Mr Green and the farm manager was not allowed, since there was no actual monetary loss and the number of hours claimed was at best an estimate.

[29] The referee did award the Greens a total of \$936.22. This was made up of \$336.22 (the "difference between the wages they would have paid [Mr S] and the wages they actually had to pay for the 6 weeks period [Mr S] could not be employed") and \$600 loss of rent for six weeks at \$100 per week (as the house was not able to be rented to someone else over the period Mr S occupied it but he could not pay rent as he had no income). This amount was deducted from the \$5,175 owed to Cross Country, leaving a balance to be paid by the Greens of \$4,238.78. The referee ordered the Greens to pay this sum to Cross Country, which they have done.

## **COMPLAINT**

[30] Mrs and Mr Green made a complaint to the Authority on 2 December 2015. They alleged negligence, incompetence and breach of the Code by Mr De'Ath. They expressed concern that their business had been placed at risk of a \$10,000 fine because they did not know of the need for a Variation.

[31] The statement of complaint lodged by the Registrar with the Tribunal on 29 June 2016 alleges breaches of the Code by Mr De'Ath in the following respects:

- (1) Failing to explain the summary of licenced immigration advisers' professional responsibilities to the client and advising him how to access a

full copy of the Code before entering into a written agreement, as required by cl 17(b) of the Code.

- (2) Failing to ensure there was a written agreement containing a record that a copy of the summary of the licenced immigration advisers' professional responsibilities had been provided and explained to the client, as required by cl 19(m) of the Code.
- (3) Failing to ensure that all parties to a written agreement signed or confirmed in writing their acceptance, as required by cl 18(c) of the Code.
- (4) Failing to ensure that there was a written agreement containing a written authority from the client for the adviser to act on the client's behalf, as required by cl 19(b) of the Code.
- (5) Failing to maintain a hard copy and/or electronic file, including file notes of all written, material oral and electronic communications between the adviser, the client and any other person, as required by cl 26(a)(iii) of the Code.

## **JURISDICTION AND PROCEDURE**

[32] The grounds for a complaint to the Registrar of the Authority made against an immigration adviser or former immigration adviser are set out in s 44(2) of the Immigration Advisers Licensing Act 2007 (the Act):

- (a) negligence;
- (b) incompetence;
- (c) incapacity;
- (d) dishonest or misleading behaviour;
- (e) a breach of the Code of Conduct.

[33] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.<sup>1</sup>

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<sup>1</sup> Immigration Advisers Licensing Act 2007, s 45(2) & (3).

[34] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.<sup>2</sup>

[35] After hearing a complaint, the Tribunal may dismiss it, uphold it but take no further action, or uphold it and impose one or more sanctions.<sup>3</sup>

[36] The sanctions that may be imposed by the Tribunal are set out in the Act.<sup>4</sup> It may also suspend a licence pending the outcome of a complaint.<sup>5</sup>

[37] The burden of proving each head of complaint lies with the Registrar. It is the civil standard of proof, the balance of probabilities, that is applicable in professional disciplinary proceedings. However, the quality of the evidence required to meet that standard may differ in cogency, depending on the gravity of the charges.<sup>6</sup>

[38] Following receipt of the statement of complaint against Mr De'Ath with supporting documents, the Tribunal issued directions on 27 October and 5 December 2016. It decided to hear the complaint on the papers. No party sought an oral hearing.

[39] There is a complainant's statement of reply from Mrs and Mr Green, dated 18 July 2016, attached to a completed form dated 20 July 2016. They say that Mr De'Ath and Cross Country breached the contract with them and they suffered monetary loss. They are disappointed that the additional hours worked by Mr Green and his farm manager could not be quantified. They are unhappy and dissatisfied with the service provided.

[40] There were no submissions from counsel for the Registrar, Ms Denmead.

[41] There is an adviser's statement of reply from Mr De'Ath dated 7 July 2016. Counsel for Mr De'Ath, Mr Moses, filed a further statement of reply on 16 November 2016. An affidavit from Mr De'Ath, sworn on the same day, was also filed. Mr De'Ath admits to the breaches of the Code alleged.

## **ASSESSMENT**

[42] I will deal with each head of complaint in the order in which it is presented in the statement of complaint.

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<sup>2</sup> Section 49(3) & (4).

<sup>3</sup> Section 50.

<sup>4</sup> Section 51(1).

<sup>5</sup> Section 53(1).

<sup>6</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [101]–[102] & [112].

**BREACH OF CODE**

- (1) *Failing to explain the summary of licenced immigration advisers' professional responsibilities to the client and advising him how to access a full copy of the Code before entering into a written agreement, as required by cl 17(b) of the Code*
- (2) *Failing to ensure there was a written agreement containing a record that a copy of the summary of the licenced immigration advisers' professional responsibilities had been provided and explained to the client, as required by cl 19(m) of the Code*

[43] These heads of complaint will be dealt with together.

[44] It is contended by the Registrar that Mr De'Ath failed to explain the summary of advisers' professional responsibilities to Mr S before entering into a written agreement with him and failed to have a record of doing so. Mr De'Ath also failed to advise him how to access a full copy of the Code.

[45] Clause 17(b) of the Code stipulates that before entering into a written agreement with the client, the adviser must explain the summary of the advisers' professional responsibilities and advise the client how to access a full copy of the Code. Clause 19(m) requires the written agreement to contain a record that a copy of the summary has been provided and explained to the client. It is relevant to note that cl 26(a)(iii) requires a written record of material oral communications to the client which would include a record of advising the client how to access the Code.

[46] Mr De'Ath's record keeping faults arise from his failure to recognise the true nature of his legal relationship with Mr S. Mr De'Ath regarded the Greens, who engaged him to find a worker and who were to be responsible for his invoice, as his real or only client.

[47] Cross Country's legal relationship with Mr S is, or was intended, to be set out in a "Candidate Terms of Business". It may have been seen by Mr S, but it was never signed by him so its applicability is questionable. It states that Cross Country does not take a fee from the candidate, since it is paid by the New Zealand employer. While not stated in the document, Mr De'Ath advises that under the law of the Philippines, he is not permitted to take a fee from any worker from that country.

[48] The obligations on both sides stipulated in those terms of business were minimal. Cross Country offered "pastoral care" to the candidate. It further stated that it would provide all "immigration application submissions".

[49] Mr De'Ath acknowledges failing to realise that his obligations under the Act and the Code were owed to Mr S. As Mr De'Ath was providing "immigration advice" (as defined in the Act) to Mr S, whom he was representing in his dealings with Immigration New Zealand, Mr S must be the client to whom Mr De'Ath had statutory and Code obligations.<sup>7</sup>

[50] Mr De'Ath states that he now appreciates that both Mr S and the Greens are clients. While the Greens may be business clients, they are not clients for the purpose of the Act and the Code. Mr De'Ath is not representing the Greens in relation to immigration matters, as required in the statutory definition of "immigration advice".

[51] As a result of failing to recognise Mr S as the client for the purposes of the Act and Code, Mr De'Ath had no signed written agreement with him. All of the Code breaches flow from this fundamental mistake.

[52] Counsel for Mr De'Ath invites the Tribunal to dismiss the entire complaint, said to relate to procedural deficiencies, on the ground it fails to cross the threshold requiring a disciplinary sanction. It is submitted that the deficiencies have been recognised by Mr De'Ath and his practice has changed, so they will not be repeated in the future.

[53] I accept that there is a threshold in terms of the gravity a breach of the Code must satisfy to justify intervention and sanctions by a disciplinary body. The public interest does not warrant every technical breach of the Code resulting in disciplinary proceedings. The Tribunal acknowledges the reality of day-to-day professional practice and isolated human error.<sup>8</sup> This principle also has statutory recognition, to the extent that the Registrar can decide not to pursue a complaint which discloses only a trivial or inconsequential matter.<sup>9</sup>

[54] However, I do not accept that Mr De'Ath's infringements of the Code can be dismissed on any *de minimis* basis. The failure to recognise Mr S as the client to whom he owed statutory and Code obligations is a significant breach of the Act and the Code. It is not a one-off isolated mistake, as it has led to multiple violations over the period he was representing Mr S. There was a sustained failure to meet the standards set by the Code over a period of about two months. Nor is this an isolated case for Mr De'Ath, as he candidly concedes.<sup>10</sup>

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<sup>7</sup> Immigration Advisers Licensing Act 2007, s 7(1).

<sup>8</sup> *IT v KRR* [2015] NZIACDT 66 at [33]–[34].

<sup>9</sup> Immigration Advisers Licensing Act 2007, s 45(1)(c).

<sup>10</sup> Affidavit Mr De'Ath, sworn 16 November 2016 at [42].

[55] Returning to the first two charges, Mr De'Ath accepts a breach of both cl 17(b) and cl 19(m) of the Code.

[56] I uphold these heads of complaint. Mr De'Ath breached cl 17(b) of the Code in not explaining his professional responsibilities to Mr S and advising him how to access a full copy of the Code. He breached cl 19(m) in not having a record of providing to Mr S a copy of the summary which had been explained.

(3) *Failing to ensure that all parties to a written agreement signed or confirmed in writing their acceptance, as required by cl 18(c) of the Code*

[57] It is alleged Mr De'Ath did not have a written agreement signed or confirmed in writing by all the parties.

[58] Clause 18(c) of the Code stipulates that all parties to a written agreement must sign it or confirm in writing their acceptance.

[59] Mr De'Ath accepts that he did not obtain Mr S's signature or written confirmation of any agreement. Like all the Code violations here, it results from a failure to recognise that Mr S was his client in terms of his professional obligations.

[60] I uphold this complaint. Mr De'Ath breached cl 18(c) in not obtaining Mr S's signature or written confirmation of a written agreement.

(4) *Failing to ensure that there was a written agreement containing a written authority from the client for the adviser to act on the client's behalf, as required by cl 19(b) of the Code*

[61] It is alleged that Mr De'Ath did not have a written agreement containing a written authority from Mr S to act on his behalf.

[62] Clause 19(b) requires an adviser to obtain a written authority from the client for the adviser to act on the client's behalf, which authority must be contained in the written agreement.

[63] Mr De'Ath accepts that he did not obtain a written authority from Mr S. Again, it comes from a failure to recognise who his client is for immigration purposes.

[64] I uphold this head of complaint. Mr De'Ath breached cl 19(b) of the Code in not obtaining from Mr S a written authority contained within a written agreement.

- (5) *Failing to maintain a hard copy and/or electronic file, including file notes of all written, material oral and electronic communications between the adviser, the client and any other person, as required by cl 26(a)(iii) of the Code*

[65] It is alleged Mr De'Ath did not have records of written communications or file notes of oral communications, between himself, the client and any other person. The Registrar does not identify the client, but it can only be Mr S. The Greens are "any other person" for the purpose of cl 26(a)(iii) of the Code.

[66] Clause 26(a)(iii) requires that an adviser maintain a hard copy and/or electronic file of all written communications (including any file notes recording material oral and electronic communications) between the adviser, the client and any other person or organisation.

[67] Mr De'Ath admits that he did not have a complete record of all written or material oral communications with Mr S or the Greens, in particular their instructions to him and material discussions concerning the Variation.

[68] I uphold this head of complaint. Mr De'Ath has not maintained an adequate written or electronic record of his communications with Mr S or the Greens, in breach of cl 26(a)(iii) of the Code.

## **OUTCOME**

[69] I conclude that Mr De'Ath has breached cls 17(b), 18(c), 19(b), 19(m) and 26(a)(iii) of the Code in the manner alleged by the Registrar, these breaches also being breaches of s 44(2)(e) of the Act.

## **SUPPRESSION**

[70] In the statement of complaint, the Registrar has sought suppression of the name and details of the complainant, the Greens. No grounds are given in support. There are no submissions from the Greens seeking suppression or advising circumstances that might give rise to suppression. I decline to suppress their names. Beyond recording they are dairy farmers, no other details of them are set out.

## **SUBMISSIONS ON SANCTIONS**

[71] As the complaint has been upheld, the Tribunal may impose sanctions pursuant to s 51 of the Act.

[72] A timetable is set below. Any request that Mr De'Ath undertake training should specify the precise course suggested. Any request for repayment of fees or the payment of costs or expenses or for compensation must be accompanied by a schedule particularising the amounts and basis of the claim.

*Timetable*

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

- (1) The Authority, the complainant and Mr De'Ath are to make submissions by **23 November 2018**.
- (2) The Authority, the complainant and Mr De'Ath may reply to any submissions by any other party by **7 December 2018**.

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D J Plunkett  
Chair