

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 27

Reference No: IACDT 023/17

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **JACOBUS VAN ZYL**
Complainant

AND **NETTA TEMAMAEROA
MARIA McNEIL**
Adviser

DECISION
Dated 8 May 2019

REPRESENTATION:

Registrar: Self-represented
Complainant: Self-represented
Adviser: No appearance

PRELIMINARY

[1] Ms McNeil, the adviser, represented the complainant, Mr van Zyl, in relation to an application for a work visa. After the application was made, Ms McNeil advised the complainant that her grandfather had died and she would be on bereavement leave. It was mutually agreed that she would no longer represent the complainant and would refund \$1,800 of the \$2,000 he had paid her. However, Ms McNeil neither refunded the money nor communicated again with the complainant.

BACKGROUND

[2] Ms Netta Temamaeroa Maria McNeil was a licensed immigration adviser. Her licence expired on 21 September 2016.

[3] On 19 April 2016, Ms McNeil (through her company, Koru Immigration Consultants Ltd) entered into a written agreement with Jacobus van Zyl and his wife. Ms McNeil would prepare and lodge with Immigration New Zealand an essential skills work visa for Mr van Zyl. The fee payable was \$2,500.

[4] The agreement stated that refunds would be assessed on the basis of what was fair and reasonable and would be paid within 20 working days of termination. A refund policy attached to the agreement stated that they would be considered in special circumstances on a case by case basis.

[5] In April and May 2016, Mr van Zyl paid a total of \$2,000.

[6] There were numerous emails in April and May 2016 between Ms McNeil and the complainant's wife concerning the information needed for the application.

[7] The application was duly prepared and lodged by Ms McNeil with Immigration New Zealand on 20 May 2016.

[8] On 1 June 2016, the complainant's wife asked Ms McNeil when they would hear from her. According to his wife, communication with Ms McNeil was "just so difficult". Ms McNeil advised his wife on 2 June that she would follow up with Immigration New Zealand. If there was any major update, she would contact them.

[9] On 8 June 2016, Ms McNeil advised the complainant that the application had been allocated to an immigration officer for processing.

[10] On the same day, Immigration New Zealand sent a letter by email to Ms McNeil identifying a number of issues with the complainant's application and inviting her response by 15 June 2016.

[11] On 10 June 2016, the complainant's wife sought an update on progress. Ms McNeil rang his wife in response but was unable to speak to her. Ms McNeil advised again in an email that day that the application had been allocated.

[12] The complainant's wife then sent an email on the same day to Ms McNeil asking whether she had followed up with Immigration New Zealand.

[13] On 13 June 2016, Ms McNeil advised the complainant's wife that her grandfather had passed away and she had been with her family. She would be on bereavement leave for the rest of the week. She would telephone them later that evening.

[14] It would appear that there was a discussion that evening between Ms McNeil and either the complainant or his wife. The complainant says that Ms McNeil agreed to refund \$1,800. The complainant's wife sent their bank account details to her that day.

[15] Immigration New Zealand advised the complainant on 14 June 2016 that it was aware Ms McNeil was not acting for him and extended the deadline for a reply to its letter until 17 June 2016.

[16] On 24 June and 12 July 2016, the complainant's wife sent further emails to Ms McNeil seeking a refund. According to the emails, Ms McNeil had told them she would keep \$200 and give the rest back. His wife noted that Ms McNeil had not sent them Immigration New Zealand's email of 8 June, nor had she communicated at all with them.

COMPLAINT

[17] On 9 January 2017, the complainant filed a complaint (signed 2 January 2017) with the Immigration Advisers Authority (the Authority). The complainant said that his application to Immigration New Zealand was ultimately withdrawn. Ms McNeil kept the \$2,000 paid to her. Furthermore, they had to pay a new immigration adviser \$2,961.25 to complete a fresh application on behalf of his wife in order to save themselves from deportation.

[18] According to the complainant, Ms McNeil's grandfather had died on 11 June 2016 but prior to that, on 8 June, she had received an email from Immigration New Zealand which she did not inform them about. It was only because his wife phoned Immigration New Zealand that they found out and managed to apply for an extension of time to provide the requested information. They wanted to get back \$1,800 of the fee paid, as Ms McNeil confirmed she would do on 13 June 2016. They are still recovering financially from the setback and the cost of time just sitting at home. She should have taken the matter more seriously.

[19] The Authority requested and obtained from Ms McNeil her full file in relation to the complainant.

[20] The Authority sent a formal letter to Ms McNeil on 15 June 2017 setting out the complaint and the potential breaches of her professional obligations. She was invited to provide a written explanation, but did not do so.

[21] The Registrar of Immigration Advisers (the Registrar), the head of the Authority, referred the complaint to the Tribunal on 21 July 2017. The following matters are alleged against Ms McNeil, including breaches of the Code of Conduct 2014 (the Code):

- (1) In failing to pay the refund despite assuring the complainant that he would receive one, the adviser may have been dishonest or misleading.
- (2) Failing to pay the refund despite assuring the complainant he would receive one, in breach of cl 24(b) and (c).
- (3) Failing to maintain a hard copy and/or electronic file of all communications with the complainant, in breach of cl 26(a)(iii).
- (4) Failing to make available for inspection written communications or records of communications with the complainant, in breach of cl 26(e).

JURISDICTION AND PROCEDURE

[22] The grounds for a complaint to the Registrar 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; and
- (e) a breach of the Code of Conduct.

[23] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.¹

[24] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.² It has been established to deal relatively summarily with complaints referred to it.³

[25] 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.⁴

[26] The sanctions that may be imposed by the Tribunal are set out in the Act.⁵ The focus of professional disciplinary proceedings is not punishment but the protection of the public.⁶

[27] 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.⁷

[28] The Tribunal has received a statement of complaint (21 July 2017) from the Authority, together with supporting documents. There were no submissions from the complainant. Ms McNeil declined to provide a statement of reply and did not request an oral hearing.

¹ Immigration Advisers Licensing Act 2007, s 45(2) & (3).

² Section 49(3) & (4).

³ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁴ Section 50.

⁵ Section 51(1).

⁶ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

⁷ *Z v Dental Complaints Assessment Committee* at [97], [101]–[102] & [112].

ASSESSMENT

[29] The Registrar relies on the following provisions of the Code:

Refunds

24 A licensed immigration adviser must:

...

- b) ensure that refund obligations can be met, and
- c) promptly provide any refunds payable upon completing or ceasing a contract for services.

File management

26 A licensed immigration adviser must:

- a) maintain a hard copy and/or electronic file for each client, which must include:

...

- (iii) copies of all written communications (including any file notes recording material oral communications and any electronic communications) between the adviser, the client and any other person or organisation

...

- e) maintain each client file for a period of no less than 7 years from closing the file, and make those records available for inspection on request by the Immigration Advisers Authority, and

...

(1) *In failing to pay the refund despite assuring the complainant that he would receive one, the adviser may have been dishonest or misleading*

(2) *Failing to pay the refund despite assuring the complainant he would receive one, in breach of cl 24(b) and (c)*

[30] The evidence from the complainant and his wife is that Ms McNeil promised to repay \$1,800 of the \$2,000 fee paid. While she failed to then communicate with the complainant and has not denied promising a refund, the evidence falls short of finding Ms McNeil was either dishonest or sought to mislead the complainant. Cogent evidence of a serious allegation of what is essentially wilful deceit must be presented to make such a finding.

[31] However, it is clear Ms McNeil has failed to promptly provide the promised refund. Not only is she in breach of cl 24(b) and (c) of the Code, but she is also in breach of her written agreement with them to provide a fair and reasonable refund within 20 working days.

[32] I dismiss the first head of complaint and uphold the second.

(3) *Failing to maintain a hard copy and/or electronic file of all communications with the complainant, in breach of cl 26(a)(iii)*

(4) *Failing to make available for inspection written communications or records of communications with the complainant, in breach of cl 26(e)*

[33] The Registrar alleges Ms McNeil's file discloses no email communications with the complainant and no file notes.

[34] While there are no email communications directly between Ms McNeil and the complainant, there are a number of emails from Ms McNeil to the complainant's wife. It is apparent the complainant authorised his wife to communicate on his behalf. I note also that she was a party to the written agreement with Ms McNeil.

[35] I find that there was a sufficient record of the communications between Ms McNeil and her clients. Furthermore, the email exchange in effect records the telephone discussions between them. The real problem was a lack of communication from Ms McNeil from at least the time of receipt of Immigration New Zealand's emailed letter on 8 June, not a lack of a record of such communications as there were.

[36] I dismiss the third and fourth heads of complaint.

OUTCOME

[37] I uphold the second head of complaint. Ms McNeil has breached cl 24(b) and (c) of the Code.

SUBMISSIONS ON SANCTIONS

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

[39] A timetable is set out below.

Timetable

[40] The timetable for submissions on sanctions will be as follows:

- (1) The Authority, the complainant and Ms McNeil are to make submissions by **30 May 2019**.
- (2) The Authority, the complainant and Ms McNeil may reply to the submissions of any other party by **13 June 2019**.

D J Plunkett
Chair