

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2019] NZIACDT 64

Reference No: IACDT 002/18

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

**BY** **THE REGISTRAR OF  
IMMIGRATION ADVISERS**  
Registrar

**BETWEEN** **TT**  
Complainant

**AND** **KEN**  
Adviser

**SUBJECT TO SUPPRESSION ORDER**

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**DECISION**  
**Dated 11 September 2019**

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**REPRESENTATION:**

Registrar: Self-represented  
Complainant: Self-represented  
Adviser: Self-represented

**PRELIMINARY**

[1] Mr [KEN], the adviser, is based in Australia. At the relevant time, he was a contractor to New World Immigration (New World), based in Cape Town, South Africa.

[2] Mr [TT], the complainant, was also based in Cape Town. He was expecting a job offer from New Zealand. When he approached New World for immigration assistance, [Mr P] and [Mr Q] met and advised him. They are both unlicensed. He had no contact with the adviser. As the complainant was unsuccessful in obtaining the job in New Zealand, he withdrew his instructions to New World and sought a refund.

[3] The complainant made a complaint against the adviser to the Immigration Advisers Authority (the Authority), seeking a refund of the fees paid to New World. The refund was eventually made.

[4] The Registrar of Immigration Advisers (the Registrar), the head of the Authority, alleges that the adviser breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code) in failing to engage with the complainant and by allowing unlicensed staff to provide immigration services. It is also alleged that the delayed refund was a breach of the Code.

[5] The adviser says he knew nothing about the complainant until the latter approached him seeking a refund.

**BACKGROUND**

[6] The adviser was a licensed immigration adviser, registered with the Authority as self-employed. He is the managing director of an Australian company providing migration services to Australia-bound migrants.

[7] The Authority suspended the adviser's licence on 9 March 2018 for six months and it expired on 12 October 2018. The formal status of his licence is recorded on the Authority's website as suspended.

[8] The complainant considered he had good job prospects for a position available in New Zealand in a company which was related to his employer in South Africa.

[9] As a result of an internet search for New Zealand visa companies based in Cape Town, the complainant made contact with New World on 22 February 2017. According to the complainant, Mr Q set up an appointment for him and his wife to meet Messrs P and Q the next day. He advised them about his qualifications, industry background and

gave them other information relevant to the immigration criteria. He paid New World R 32,500 on the same day, 23 February.<sup>1</sup>

[10] In an email on 23 February 2017, Mr Q sent the complainant New World's client agreement. It made no reference to the adviser. It stated that the company was registered internationally for South Africa, New Zealand, Canada and Australia. A note on the agreement advised clients that, where there was a code of conduct in relation to Australia or New Zealand, then the agreement would not "override the country specific terms and conditions". A reference was made to the Authority's website where the Code could be accessed.

[11] Also on 23 February 2017, Mr Q sent the complainant a quotation for New World's fees of ZAR 32,500 plus government fees. He provided a breakdown of the process for obtaining residence under the long-term skills shortage list. An invoice for this sum was also sent to the complainant.

[12] Mr P phoned the complainant at about the same time and they discussed the route to follow for a successful visa. The latter was advised to use the long-term skill shortage category, which he was told would take 30 months.

[13] On 24 February 2017, an email in the name of the adviser was sent by New World introducing him and stating that he would oversee the processing of the application from beginning to end. According to the adviser, the email was generated automatically. The email said that his team in Cape Town would be actively involved in assisting the complainant to gather the documents and would liaise with him on important issues. Because of the time difference, it would be difficult for him to attend to the complainant's daily needs, but his line was always open if he wished to call him. The complainant's case had been assigned to Mr P who was trusted implicitly by the adviser. Mr P would be working with him over the next couple of months.

[14] Mr Q advised the complainant by email on 27 February 2017 that he had sent a draft letter to "our New Zealand adviser" for his review and signature. It could be used to show the New Zealand employer that the complainant had engaged New World. This letter was never sent to the complainant.

[15] In mid-March 2017, the complainant and Mr P had another telephone discussion about his medical tests.

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<sup>1</sup> Both R and ZAR are used in the file documentation for the South African Rand.

[16] The complainant applied for the role in New Zealand but was advised on 28 April 2017 that he was unsuccessful.

[17] On 7 May 2017, the complainant received from New World a list of all outstanding matters relating to his application. It was copied to Mr P. This email was also automatically generated.

[18] The complainant contacted Mr P on 12 May 2017 and they discussed the possibility of seeking other employment in New Zealand.

[19] The complainant sent an email on 5 June 2017 to the adviser and Mr P at New World expressing his dissatisfaction with the service received. He set out at some length the chronology of events relating to his communication with New World. He said that Mr P had not once offered any advice or identified any companies he could consult in respect of his medical issues, animal relocation, furniture removal or other immigration advice. The complainant said that on 12 May, he had discussed with Mr P the possibility of applying for another position in New Zealand and Mr P agreed to investigate and to get back to him by 15 May. However, he had yet to hear from Mr P. The complainant questioned whether it was unreasonable to ask for a refund.

[20] A manager at New World replied to the complainant on 20 June 2017. She stated that she had been in communication with her New Zealand team and they had advised that the complainant had informed them when he first approached New World that he was in the process of obtaining an offer of employment and the interview was a mere formality. Based on this information and the advice of the adviser, they had advised on the options available to him. He had been informed by the team that he would not qualify for skilled migration.

[21] According to the manager, the complainant had told them that the prospective employer was an accredited employer with Immigration New Zealand, so the possibility of applying for a work-to-residence visa had been discussed and upon receiving confirmation from the adviser they confidently decided to proceed with that process. When they started collecting the documents, the complainant had advised that the process should only continue once he had obtained the offer of employment. He then disclosed that he had not obtained the expected offer, so they assisted him to look at alternative ways of seeking employment in New Zealand as a matter of goodwill. As the only eligible route depended on holding a valid job offer, they were not in a position to proceed with his application.

[22] The manager agreed they had failed to assist him in the preparation of a letter which was expected to be included in his employment application to the New Zealand company concerning the seriousness of his migration intention. She apologised for that. She was looking into the question of a refund and would discuss the matter with the director the following week. There was an issue in relation to third party fees.

[23] The complainant replied to New World's manager on 21 June 2017. Mr Q had not got back to him to discuss any further prospects in New Zealand.

[24] As the complainant heard nothing more from the adviser or New World, a complaint was made to the Authority.

## **COMPLAINT**

[25] The complainant made a complaint to the Authority on 14 August 2017. He set out a timeline concerning his contact with New World and work in relation to New Zealand migration. He sought an 80 per cent refund of the ZAR 32,500 fee he had paid. As his application for employment in New Zealand was unsuccessful and New World had said they could not proceed with his application, he considered some refund was due. New World had not received any documents from him and therefore did not have to process any documents for Immigration New Zealand. Furthermore, there had only been limited telephone consultations.

[26] The Authority contacted the adviser by email with a list of queries.

[27] On 29 November 2017, the adviser informed the Authority by email that he had not met, spoken to or emailed the complainant personally prior to receiving his email on 5 June 2017. He explained that he had worked as a contractor for New World until 5 July 2017 when his agreement with them essentially ended due to issues concerning the working relationship. Since then, he only provided assistance to existing clients, so they were not disadvantaged.

[28] According to the adviser, the agreed arrangement was that if a potential client sought immigration advice relating to New Zealand, the client would be referred to him. He would provide the advice, assess their circumstances and outline the client's options. The relevant fees would then be outlined to the client. If the client wished to proceed, a service agreement and invoice would be provided, along with access to the Code.

[29] If the client agreed to the terms and conditions, a file would be opened and assigned to a local case manager who would correspond with the client in real time to ensure the relevant documentation was acquired for the process in a timely fashion. He was to provide any immigration advice required by the client.

[30] The adviser further informed the Authority that on hearing of the complaint, he had advised New World that a refund should be given and he was told that this would happen. This was followed up with New World after the Authority contacted him and he had been told that a refund had not been provided.

[31] The adviser was formally notified of the details of the complaint by the Authority on 4 December 2017 and his explanation invited.

[32] In response, the adviser sent a further email to the Authority on 19 December 2017. He confirmed that he had an agreement with New World in which they were well aware of the Code and the requirement to refer any potential clients to him for immigration advice. He was not given the opportunity to make any assessment or provide advice as he was unaware of the complainant. The introductory email had been automatically generated and was not written or sent by him. The first correspondence he received was the complainant's email making a complaint.

[33] According to the adviser, he had never been given the opportunity to obtain instructions from the complainant or to advise him. He was not aware that the staff were meeting or corresponding with the complainant or engaging with him in respect of any service. He relied on the staff to be the point of contact to provide administrative support. They were well aware that they were not allowed to provide immigration advice and that if any advice was sought by a client, it should be referred to him.

[34] As soon as he had been made aware of the complaint, which was at the time it had been made, he had contacted New World to inform them that an immediate refund should be made. He had been advised by New World that they would make a refund immediately. He thought they would do so in a timely fashion. When he contacted New World regarding the refund, they had said they were not sure if it was to be made while the complaint process was still underway. This had not been discussed with him.

[35] The adviser said in his email to the Authority he had also told New World of the need to terminate or suspend his consultancy to ensure that nothing like this happened in the future. He had ceased his agreement with New World as he was not confident they would act in accordance with the Code though he was continuing to advise a few existing clients.

[36] A director at New World sent an email to the complainant on 23 December 2017 apologising for the time taken to make the refund. A refund of R 32,500 would be made when his banking details were known. The refund was made by New World on 8 January 2018.

#### *Complaint referred to Tribunal*

[37] The Registrar referred the complaint to the Tribunal on 25 January 2018. It alleges that the adviser breached the Code in the following respects:

- (1) conducted business using an automatically generated introductory email and did not have personal contact with the complainant thereby conducting himself unprofessionally, in breach of cl 1;
- (2) failed to personally engage with the complainant to obtain his lawful instructions, in breach of cl 2(e);
- (3) relied on unlicensed individuals to be the point of contact for the complainant resulting in unlicensed advice being given, in breach of cl 3(c);
- (4) did not ensure that the refund obligations could be met, in breach of cl 24(b); and
- (5) failed to promptly provide the complainant with a refund upon ceasing services, in breach of cl 24(c).

#### **JURISDICTION AND PROCEDURE**

[38] 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.

[39] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.<sup>2</sup>

[40] 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>3</sup> It has been established to deal relatively summarily with complaints referred to it.<sup>4</sup>

[41] 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>5</sup>

[42] The sanctions that may be imposed by the Tribunal are set out in the Act.<sup>6</sup> The focus of professional disciplinary proceedings is not punishment but the protection of the public.<sup>7</sup>

[43] 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>8</sup>

[44] The Tribunal has received from the Registrar the statement of complaint, dated 25 January 2018, with supporting documents.

[45] There are no submissions from the complainant.

[46] The adviser sent an email to the Tribunal on 27 March 2018 advising that he did not consider that the Authority had demonstrated grounds breaching the Code as he was unaware of the complainant. Once he became aware, he was instrumental in obtaining a refund for him.

[47] On 6 August 2019, the Tribunal requested the adviser to produce the agreement he had with New World concerning referrals, his instructions regarding the process for new clients and his later notification to New World of the termination of the agreement. The adviser replied on 30 August 2019. Neither he nor New World could locate a copy of the agreement. He provided email exchanges between himself and New World's director which showed that the latter initiated the termination of the agreement regarding New Zealand-bound clients on 5 July 2017.

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

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

<sup>4</sup> *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

<sup>5</sup> Section 50.

<sup>6</sup> Section 51(1).

<sup>7</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

<sup>8</sup> *Z*, above n 7, at [97], [101]–[102] & [112].

## ASSESSMENT

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

### General

1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.

### Client Care

2. A licensed immigration adviser must:

...

- e. obtain and carry out the informed lawful instructions of the client, and

...

### Legislative requirements

3. A licensed immigration adviser must:

...

- c. whether in New Zealand or offshore, act in accordance with New Zealand immigration legislation, including the Immigration Act 2009, the Immigration Advisers Licensing Act 2007 and any applicable regulations.

### 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.

(1) *Conducted business using an automatically generated introductory email and did not have personal contact with the complainant thereby conducting himself unprofessionally, in breach of cl 1*

(2) *Failed to personally engage with the complainant to obtain his lawful instructions, in breach of cl 2(e)*

- (3) *Relied on unlicensed individuals to be the point of contact for the complainant resulting in unlicensed advice being given, in breach of cl 3(c)*

#### *General principles*

[49] The Tribunal has adversely commented in previous decisions on the practice which developed in the immigration advisory industry of what is known as “rubber stamping”.<sup>9</sup> This occurs where a licensed immigration adviser uses agents or employees sometimes in another country to recruit the clients, prepare the immigration applications and send them to the licensed adviser to sign off and file with Immigration New Zealand. There is little, if any, direct contact between the licensed adviser and the client.

[50] The practice is illegal. A person commits an offence under the Act if he or she provides “immigration advice” without being licensed or exempt from licensing.<sup>10</sup> A person employing as an immigration adviser another person who is neither licensed nor exempt also commits an offence.<sup>11</sup> A person may be charged with such an offence even where part or all of the actions occurred outside New Zealand.<sup>12</sup>

[51] The obligations set out in the Code are personal to the licensed immigration adviser and cannot be delegated.<sup>13</sup>

#### *Application of general principles to the adviser*

[52] I accept the adviser’s contention to the Authority that he was not aware of the complainant until the latter sought a refund on 5 June 2017. This is confirmed by an email sent by the adviser to New World on 6 December 2017 notifying New World that he was then under investigation by the Authority “for a client I knew nothing about”. He complained that his registration and livelihood were in jeopardy due to New World practices outside of what had been agreed.

[53] The adviser cannot therefore be responsible for New World’s engagement with the complainant before he knew of the latter’s existence as a client. According to the adviser, he had an agreement with New World concerning new clients. Unfortunately, he cannot now locate a copy. He set out in his email to the Authority on 29 November 2017 the process for new clients from New World. The client was supposed to be

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<sup>9</sup> *Stanimirovic v Levarko* [2018] NZIACDT 3 at [4], [36]–[38]; *Immigration New Zealand (Calder) v Soni* [2018] NZIACDT 6 at [4], [50]–[61].

<sup>10</sup> Immigration Advisers Licensing Act 2007, ss 7(1) definition of “immigration advice” & 63.

<sup>11</sup> Section 68(1).

<sup>12</sup> Sections 8 & 73.

<sup>13</sup> *Sparks*, above n 4, at [29], [34] & [47].

referred to him, so he could assess their circumstances and advise on options. If the client wanted to proceed, he would provide a service agreement. A local case manager would then correspond with the client “in real time”.

[54] It is quite possible that the agreed arrangement would have breached the adviser’s professional obligation to engage personally with his clients and ensure that licensed immigration work was not delegated. However, I cannot know this, as the adviser cannot be responsible for the conduct of the complainant’s application since he did not know about it.

[55] The first three heads of complaint are dismissed.

(4) *Did not ensure that the refund obligations could be met, in breach of cl 24(b)*

(5) *Failed to promptly provide the complainant with a refund upon ceasing services, in breach of cl 24(c)*

[56] An adviser is required to ensure that clients are promptly refunded unused fees, once their services cease. According to cl 24(a) of the Code, the refund must be fair and reasonable in the circumstances.

[57] It is apparent that New World did minimal work on behalf of the complainant and the adviser did none at all. The complainant sought a refund of 80 per cent of the fee paid, which would have been reasonable. In the event, he received a 100 per cent refund from New World.

[58] However, that refund was made on 8 January 2018, more than six months after the complainant sought it on 5 June 2017. It was self-evidently not made promptly. A licensed adviser must ensure that a reasonable refund is immediately made. The difficulty in upholding this aspect of the complaint is that the complainant was never the adviser’s client. The adviser knew of his existence on 5 June 2017, but only as a client of New World. The adviser never agreed to him becoming his (the adviser’s) client.

[59] I find no breach of cl 24(b) or (c) of the Code, as the Code obligations did not apply.

## **OUTCOME**

[60] I dismiss this complaint.

## **ORDER FOR SUPPRESSION**

[61] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.<sup>14</sup>

[62] There is no public interest in knowing the name of either the adviser's client or the employees of New World. Given the dismissal of the complaint, there is no public interest in knowing the name of the adviser.

[63] The Tribunal orders that no information identifying the client, the employees or the adviser is to be published other than to the parties or Immigration New Zealand.

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D J Plunkett  
Chair

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<sup>14</sup> Immigration Advisers Licensing Act 2007, s 50A.