IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 81

Reference No: IACDT 016/18

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**NLT** Complainant
AND	**KELLY DEE COETZEE** Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 10 December 2019

REPRESENTATION:

Registrar:	Self-represented
Complainant:	Self-represented
Adviser:	P Moses, counsel

PRELIMINARY

[1] Ms Kelly Dee Coetzee, the adviser, represented Mr NLT, the complainant, who sought residence in New Zealand. Employment was arranged through Ms Coetzee and a work visa was approved.

[2] On his arrival in New Zealand, Ms Coetzee presented the complainant with an addendum to the employment agreement provided by the employer stating he would be an independent contractor. She erroneously advised him at least twice that this status could still lead to residence. He worked for the employer both as an employee and an independent contractor. Eventually, the complainant left the employer and worked unlawfully as an independent contractor until issued with a deportation liability notice by Immigration New Zealand.

[3] Ms Coetzee admits wrongly advising the complainant he could work as an independent contractor.

BACKGROUND

[4] Ms Coetzee, a licensed immigration adviser, is a director of Immigration Central Ltd in Auckland.

[5] The narrative below is based on the documents sent to the Tribunal. They are contradictory, particularly as to when the complainant worked as an employee and when he worked as a contractor. Given Ms Coetzee's admissions, it is not necessary to resolve these discrepancies.

[6] The complainant is a national of India. While still in India, he made contact with Ms Coetzee.

[7] On 21 August 2014, Ms Coetzee sent an email to the complainant advising that she had received $2,875 from him. She was preparing a checklist and instructions for his expression of interest for skilled migrant residence in New Zealand. She would assess whether he or his wife would make the best principal applicant. She sent the complainant and his wife on 4 September 2014, an assessment of the points each could claim on a residence application. Both would need an offer of employment for automatic selection.

[8] It is clear from an activity list on Ms Coetzee's file that through late 2014 and into 2015, she was active in assisting the complainant to obtain employment, recognition of his qualifications and registration as a health professional in New Zealand. On 13 February 2015, the complainant accepted a quote from Ms Coetzee for $5,750 to provide employment consultation services.

[9] Ms Coetzee sent the complainant's CV to the owner of a health centre in a tourist location (who will be referred to as the employer). He left a telephone message for her on 4 August 2015. He was impressed by the CV. The employer explained that most of his people were self-employed. They start work and then "go self-employed". He could work that out with the complainant without Ms Coetzee knowing.

[10] On 3 October 2015, the employer sent an email to the complainant (copied to Ms Coetzee) about living and working in New Zealand. He said he would discuss with Ms Coetzee whether a self-employed contract would serve the complainant better, as he could claim his tax back.

[11] An offer of employment (letter dated 30 October 2015) to work as a health professional for the employer was drafted by the employer's solicitor. The agreement was unsigned by the employer. Ms Coetzee sent it to the complainant on 2 November 2015. At the same time, she advised that her fee for the visa would be $1,500 and Immigration New Zealand's fee would be $270. Her "employment consultation fee" of $5,000 (plus GST where applicable) would be due when he signed the offer of employment.

[12] The complainant signed the employment agreement on 5 November 2015 and sent it to Ms Coetzee on 8 November. The copy sent by her to Immigration New Zealand was signed by the employer, purportedly also on 5 November 2015.

[13] On 4 December 2015, Ms Coetzee filed an application for a work visa with Immigration New Zealand on behalf of the complainant, based on the employment offer he had signed. The signed employment agreement was sent to Immigration New Zealand. It was approved by the agency on 12 January 2016. The complainant was issued with a work visa on that day valid for 36 months. It gave him permission to work for the named employer only.

Complainant arrives in New Zealand

[14] The complainant arrived in New Zealand on 26 January 2016. He met with Ms Coetzee on the following day. She presented him with an addendum to the employment agreement provided by the employer, which had been signed by the

employer on 23 November 2015. It stated that at the start of his new employment, all contracts would be considered null and void and he would be employed as an independent contractor. She advised him that it was okay to work as a contractor, if he wanted to. The complainant signed the addendum at the meeting on 27 January 2016.

[15] On the same day, Ms Coetzee advised the employer that the complainant had signed the addendum. She said that he had taken away the independent contractor contracts and would sign them in the coming days.

[16] It would appear to the Tribunal that the complainant commenced work with the employer as a contractor. An issue arose as to the nature of his employment, given concerns expressed by the complainant and/or Ms Coetzee as to the effect of this on his immigration status. At some point, unknown to the Tribunal, the employer started treating the complainant as an employee in order to assist him to obtain residence. The payments made to him as a contractor from about March to August 2016 were reversed and recreated to show an employee relationship in the payroll system.[1]

[17] On 3 August 2016, the employer sent an email to Ms Coetzee and the complainant asking how he could make the latter a contractor as fast as possible.

[18] On the same day, the complainant sent an email to Ms Coetzee stating that he was working as a permanent employee but the employer wanted him to work as a contractor. However, it was difficult to get residence as a contractor, so he asked whether he should obtain residence first and then work as a contractor. He expressed confusion as to what he should do.

[19] Ms Coetzee replied by email, also on 3 August 2016, advising the complainant that he could get residence as a contractor and she would help with the immigration side of things. It would also be more financially beneficial for him to work as a contractor. The contract should be for the duration of his current visa. He would need to inform Immigration New Zealand of his new contract.

[20] On 12 September 2016, the complainant sent an email to Ms Coetzee stating that he wished to work as a contractor as soon as possible. She then advised him to approach the employer and discuss entering into an independent contractor arrangement. The employer duly prepared that contract.

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[1] Letter from employer's solicitor, 31 January 2017; documents supporting the statement of complaint at 32.

[21] An invoice was sent by Ms Coetzee to the complainant, dated 19 September 2016, for the work in switching him from an employee to an independent contractor, including advising Immigration New Zealand. It was for $402.50.

[22] The complainant and the employer entered into an independent contractor contract on about 21 September 2016.

Ms Coetzee contacts Immigration New Zealand

[23] Ms Coetzee telephoned Immigration New Zealand on 7 October 2016 in relation to the complainant becoming self-employed and was informed that he could not be an independent contractor without being on an open work visa. He had been issued with an essential skills work visa, so had to remain as an employee for the approved employer.

[24] Following the discussion with Immigration New Zealand, Ms Coetzee sent an email to the employer on 8 October 2016. She advised that a person on an essential skills visa could not switch to an independent contractor arrangement, unless the person held an open work visa or another visa allowing self-employment. The complainant had to remain on his employment agreement for the duration of his visa. He therefore had to switch back to the employment agreement immediately. He could not operate as a self-employed person until he got the correct visa. She also advised the employer in relation to the status of another staff member.

[25] On 1 November 2016, Ms Coetzee asked an immigration officer, in the context of another client who was also an employee for the same employer, to advise as to the best approach to ensuring compliance with the immigration rules. She wanted to work with Immigration New Zealand to maintain the integrity of the immigration system. The Tribunal notes that Ms Coetzee does not explain in that email what issue had arisen requiring advice as to the best approach.

[26] The complainant resigned from his role on 25 November 2016. According to the Registrar of Immigration Advisers (the Registrar), he then worked unlawfully as a self-employed contractor.[2]

[27] A dispute arose between the employer and the complainant regarding whether the latter was in breach of a restraint of trade clause. The complainant's solicitor wrote to the employer's solicitor on 25 January 2017 denying he was bound by any such clause and claiming the purported change to an independent contractor amounted to an

[2] Statement of complaint (28 March 2018) at [2.8].

unjustified termination of his employment agreement. This appears to have prompted a letter to Ms Coetzee from the employer's solicitor (unseen by the Tribunal).

Ms Coetzee's explanation to the employer's solicitor

[28] Ms Coetzee wrote to the employer's solicitor on 25 January 2017 setting out at length her dealings with the complainant. She had understood he was an employee and that he knew his employment status. He raised with her being an independent contractor in September 2016. She regarded his switch to working as an independent contractor as an employment matter.

[29] According to Ms Coetzee, as the switch had immigration consequences, she advised the complainant to wait until the immigration status of another employee had been resolved. However, the complainant continued to contact her about such employment matters, even though it was not her area of expertise. So she contacted the employer in order to arrange the new contracts. The employer had switched other employees and was "blissfully unaware" this was "operating in a grey area". She was currently working with Immigration New Zealand on the issue.

[30] In her letter to the employer's solicitor, Ms Coetzee says that, as the complainant insisted on working as a contractor, she therefore prepared a letter for Immigration New Zealand. She discussed it with the employer and also received the new signed contracts from the complainant. Ms Coetzee then had the discussion with Immigration New Zealand on 7 October 2016 and learned that he could not switch to being an independent contractor unless he had an open work visa. As an essential skills work visa holder, the complainant had to remain on the employment agreement for the duration of his visa. The area was therefore no longer grey.

[31] As the situation had been clarified by Immigration New Zealand, the complainant had remained on his individual employment agreement. That agreement was not terminated. If he had switched to being an independent contractor, that would have jeopardised his future prospects of residence.

[32] According to Ms Coetzee, the complainant could not claim that he did not know what was going on. He was the instigator of the employment switch in September 2016, so his claim was puzzling. He may be upset about not being able to work as a contractor, but he must have the appropriate visa. She had always kept him in the picture and advised him with his best interests at heart.

Ms Coetzee's further contact with Immigration New Zealand

[33] Ms Coetzee sent an email to an immigration officer on 10 April 2017 stating that both the employer and the complainant were wondering what they could do to put things right.

[34] The officer responded by email to Ms Coetzee on 12 April 2017, expressing satisfaction as to there being no malicious intent. Ms Coetzee was advised that there was no clear pathway for employment on a contract basis, but reasons could be put forward as to why a contract was needed for particular employment.

Complainant requested to leave New Zealand

[35] Immigration New Zealand served the complainant with a deportation liability notice on 17 May 2017, as he was working in breach of his visa conditions. This led to his departure from New Zealand.

COMPLAINT

[36] On about 15 March 2017, the complainant made a complaint against Ms Coetzee to the Immigration Advisers Authority (the Authority). He alleged that at his first meeting with her, one day after he had arrived in New Zealand, she presented him with an addendum changing his employment to independent contractor. He had not seen this prior to leaving India. The employer was a friend of Ms Coetzee. In May 2016, the employer treated him again as a permanent employee without giving him a new agreement. He did not want the dishonesty and misleading behaviour of Ms Coetzee and the employer to affect his ability to live in New Zealand permanently. He also wanted compensation.

[37] The Authority wrote to Ms Coetzee seeking her file on 27 March 2017.

[38] On 24 August 2017, Ms Coetzee sent an email to the Authority acknowledging her mistake in not having a written agreement for the work visa application. This was because she had been in ongoing communication with him since July 2014. The assessment and preparation took more than 12 months. She communicated with him in writing and felt that he had a good understanding of everything. She entered into an agreement with him for the work visa application after he was offered the job on 30 October 2015.

[39] The Authority wrote to Ms Coetzee on 29 August 2017 formally advising her of the details of the complaint and seeking her explanation.

Explanation to Authority from Ms Coetzee

[40] Ms Coetzee replied on 19 September 2017 to the Authority. She advised that the switch from employee to self-employed was up to the employer and employee to arrange, once the employee had started work. She did not keep tabs on that as it was an employment matter. The employer used the services of a well-respected lawyer for employment matters and she had no doubt as to the integrity of the employment agreement.

[41] Ms Coetzee agreed that the addendum signed on 27 January 2016 was unnecessary and it was naïve on her part. She had assumed that the complainant had seen the independent contractor contracts, but had since discovered that he had not. She should have confirmed this with him before asking him to sign, but had regarded it as a matter for the employer. She offered her sincere apologies, knowing now that the complainant had only seen the employment agreement at that stage.

[42] So far as Ms Coetzee was aware, the complainant was being paid as an employee on his original agreement. The employer had confirmed that the complainant came into New Zealand as an employee and would switch to being an independent contractor, if it suited the complainant. No one advised her otherwise. She regarded it as an employment matter, not an immigration matter. It was not until later in the year that the complainant requested that he work as an independent contractor because it was more financially rewarding. Many staff of the employer wished to switch, which was why the employees were asked to sign two contracts as a standard procedure when they started work.

[43] According to Ms Coetzee, it was not until September 2016 that she realised the complainant was serious about working as an independent contractor. She therefore initiated enquiries with Immigration New Zealand and got a definitive answer. The immigration instructions were not clear, but they did not prohibit such a status. Ms Coetzee said she was not convinced that the complainant could not work as an independent contractor. However, she had to wait five months until April 2017 to get a response from Immigration New Zealand. Ms Coetzee said she did not feel she had breached her obligation to exercise due care by checking and applying the immigration instructions accurately and so advising the client. If anything, she took too much care.

[44] Ms Coetzee conceded that she did not provide a standard service agreement to the complainant. She confirmed understanding her professional obligations and now ensured that the service agreement was signed by each client. In respect of the complainant, she felt that her emails were comprehensive and amounted to a written agreement.

Complaint referred to Tribunal

[45] On 28 March 2018, the Registrar, the head of the Authority, referred the complaint to the Tribunal. It is alleged that Ms Coetzee's conduct breached the Code of Conduct 2014 (the Code) in the following respects:

(1) failing to enter into a written agreement with the complainant, in breach of cl 18(a); and

(2) failing to advise the complainant he could not lawfully work in New Zealand as an independent contractor, in breach of cl 1.

JURISDICTION AND PROCEDURE

[46] 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.

[47] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.[3]

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

[48] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.[4] It has been established to deal relatively summarily with complaints referred to it.[5]

[49] 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.[6]

[50] The sanctions that may be imposed by the Tribunal are set out in the Act.[7] The focus of professional disciplinary proceedings is not punishment but the protection of the public.[8]

[51] 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.[9]

[52] The Registrar has filed a statement of complaint, dated 28 March 2018, with supporting documents.

[53] The complainant has filed a statement of reply, received on 9 May 2018. He has returned to India, as a result of being served with a deportation liability notice. He alleges that both the employer and Ms Coetzee were aware that he was working as a contractor in breach of his visa. Ms Coetzee was paid nearly $10,000, as she had organised the employment. He was not familiar with the New Zealand law so never thought he was in breach of his visa. From the beginning, the employer and Ms Coetzee wanted him to convert to self-employment as soon as possible, which he did not want. The complainant sent supporting documents with his reply.

[54] There is a memorandum from Mr Moses, counsel for Ms Coetzee, dated 9 May 2018. In support, there is an affidavit from Ms Coetzee, sworn on 1 May 2018. She admits wrongly advising the complainant that he could work as an independent contractor and obtain residence in due course. At the request of the Tribunal, Mr Moses made further submissions on 5 December 2019.

[55] No party has requested an oral hearing.

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[4] Section 49(3) & (4).
[5] *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].
[6] Section 50.
[7] Section 51(1).
[8] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).
[9] *Z v Dental Complaints Assessment Committee*, above n 8, at [97], [101]–[102] & [112].

ASSESSMENT

[56] 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.
>
> **Written agreements**
>
> 18. A licensed immigration adviser must ensure that:
>
> a. when they and the client decide to proceed, they provide the client with a written agreement

(1) Failing to enter into a written agreement with the complainant, in breach of cl 18(a)

[57] Ms Coetzee admits that she failed to enter into an agreement with the complainant.

[58] Counsel, perhaps somewhat tentatively, raises an argument that an exchange of emails in early November 2015 between Ms Coetzee and the complainant may amount to an agreement, at least in the sense of a legally binding contract. That may be so, but the email of 2 November 2015 from Ms Coetzee primarily relied on by Mr Moses does not come close to being the client services agreement as envisaged by cls 18 and 19 of the Code.

[59] As counsel acknowledges, any agreement based on those emails was clearly inadequate to discharge Ms Coetzee's obligations under the Code. The agreement alleged here is missing most of the mandatory provisions and hence bears no relation to the agreement in the case relied on by counsel, *EQE v ICQ*, where only one piece of information was missing.[10] I derive no assistance from the Tribunal's earlier decision.

[60] Ms Coetzee explains that her failure to enter into a proper agreement was not a conscious decision to undertake services without an agreement. The quote given to the complainant along with the success of the other activities undertaken for him and his wife demonstrated that they could work together successfully. She says the error occurred partly because she got caught up in the excitement of having secured a job offer for him. The complainant himself was excited and keen to get the visa process underway. She simply did not stop to consider the need to complete a full engagement process.

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[10] *EQE v ICQ* [2019] NZIACDT 37 at [40]–[41].

[61] Counsel submits that Ms Coetzee's conduct was not a flagrant disregard of her obligations, but rather, having provided unregulated services in the beginning, she failed to recognise the point in time at which she needed to ensure compliance with the Code.

[62] It is not easy to understand how Ms Coetzee overlooked the need to have a compliant client agreement. She was not a novice adviser when the complainant first made contact. She was first licensed in January 2013 and says she has been working full-time as an adviser since 2013.

[63] Ms Coetzee should have entered into such an agreement in August 2014 at the commencement of her services, as it was apparent from the earliest contact that the complainant was looking for immigration advice, not just employment services. Her email of 21 August 2014 is clear about this and she even provided immigration advice on 4 September 2014, before commencing what counsel describes as unregulated employment work for him. In addition to her approximately 18 months' experience as a licensed adviser prior to the first contact with the complainant, she also had a Graduate Certificate in New Zealand Immigration Advice.

[64] While her explanation as to being caught up in the early employment work and the complainant's excitement is not convincing, there is no reason not to accept her evidence that she simply overlooked the requirement. I accept there was no flagrant disregard of her obligations.

[65] Ms Coetzee recognises that the lack of a written agreement is not a mere technicality. As she says, it deprived the complainant of knowledge of the very framework that exists to protect him. It is a vital document, as she now realises, in the provision of immigration services and in upholding the integrity of the industry.

[66] I find that Ms Coetzee failed to enter into a written client services agreement with the complainant at the commencement of their engagement, in breach of cl 18(a) of the Code.

(2) Failing to advise the complainant he could not lawfully work in New Zealand as an independent contractor, in breach of cl 1

[67] Ms Coetzee acknowledges that her advice to the complainant in January 2016, that he could become an independent contractor without affecting his visa status, was erroneous.

[68] A range of factors are advanced to explain the error. Counsel and Ms Coetzee point to a lack of clarity in Immigration New Zealand's instructions. I am unpersuaded there is a lack of clarity, but any such uncertainty in the instructions should have induced her to seek advice from Immigration New Zealand much earlier than October 2016. She should not have advised the complainant on 27 January and again on 3 August 2016 that he could get residence as a contractor, if there was uncertainty. I also find it difficult to understand how she came to give that advice when she knew his visa had been approved on the basis of an employment agreement, not an independent contractor's contract.

[69] Ms Coetzee says she did not recognise the critical distinction in employment law between an employee and an independent contractor. She saw the difference as nothing more than the method of payment. She says she did not appreciate that becoming a contractor would be relevant to his visa. That is not easy to reconcile with the work she had to do to advise on the change of status and inform Immigration New Zealand, for which she charged a modest fee. She plainly knew it was a material matter for Immigration New Zealand. She advised him on 3 August 2016 that he would need to inform Immigration New Zealand of his new contract.

[70] In any event, both counsel and Ms Coetzee recognise these factors are no defence. Her advice was erroneous. She concedes that she should have immediately checked with Immigration New Zealand whether the complainant's visa enabled him to work as a contractor.

[71] Despite that concession, it is not admitted that there was any breach of the Code.

[72] It is apparent that there was a lack of due care by Ms Coetzee in failing to make it clear to the complainant, on 27 January (when she first met him) and later on 3 August 2016 (when he first queried his employment status), that he could not work as a contractor without first obtaining approval from Immigration New Zealand. Indeed, she knew before he arrived in New Zealand that the employer was proposing this, so should have informed him before his arrival. The employment agreement had been sent to Immigration New Zealand and the visa had been issued on the basis he was an employee for that particular employer only.

[73] Counsel contends that this conduct by Ms Coetzee may not require a disciplinary response. In saying that, counsel acknowledges that it is not a trivial matter. He accepts it is "close to the dividing line".[11]

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[11] Mr Moses' submissions (9 May 2018) at [31].

[74] I find Ms Coetzee's wrong advice to be more than just 'not trivial'. It put her client at risk of cancellation of his visa since he was working in breach of his visa conditions as an independent contractor for the employer. He may be fortunate that Immigration New Zealand accepted there was no malicious intent. Irrespective of her limited knowledge of employment law, there was a high level of carelessness here.

[75] It is found that Ms Coetzee did not advise the complainant in January and again in August 2016 that he could not lawfully work in New Zealand as an independent contractor, whether for the employer or generally. A competent, professional adviser exercising reasonable care would have done so. There was a failure to exercise due care, which is a breach of cl 1 of the Code.

[76] While the breach of the Code is clear, I accept Ms Coetzee's evidence that she did not connive with the employer to deprive the complainant of his employment status as an employee by ambushing him with the addendum to the agreement on his arrival in this country. I also find no evidence of dishonesty on her part, as alleged by the complainant. The evidence before the Tribunal shows that he knew his employment status at all times, but was confused as to whether the more financially rewarding status of an independent contractor was permissible for immigration purposes. Both he and the employer preferred that status. Their ignorance as to whether that was permissible was Ms Coetzee's fault.

[77] It makes no difference to the outcome, but I accept the complainant's contention that Ms Coetzee knew that he was not working as an employee early after his arrival in New Zealand. I do not accept as truthful her statement to the employer's solicitor on 25 January 2017 that, so far as she was aware, he was employed on the employment agreement since starting work. She sent the complainant an email on 16 March 2016 advising him to market himself, so that he could generate customers and money. He would not need to do so, if he was an employee. This is well before she contends he contacted her about becoming an independent contractor.

OUTCOME

[78] The complaint is upheld. Ms Coetzee has breached cls 1 and 18(a) of the Code.

SUBMISSIONS ON SANCTIONS

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

[80] A timetable is set out below. Any requests that Ms Coetzee 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

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

(1) The Registrar, the complainant and Ms Coetzee are to make submissions by **21 January 2020**.

(2) The Registrar, the complainant and Ms Coetzee may reply to the submissions of any other party by **4 February 2020.**

ORDER FOR SUPPRESSION

[82] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[12]

[83] There is no public interest in knowing the name of Ms Coetzee's client.

[84] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration New Zealand.

D J Plunkett
Chair

[12] Immigration Advisers Licensing Act 2007, s 50A.