IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 4

Reference No: IACDT 017/19

IN THE MATTER	of an appeal against a decision of the Registrar under s 54 of the Immigration Advisers Licensing Act 2007
BY	**R (D) A** Appellant
AND	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 24 January 2020

REPRESENTATION:

Appellant: Self-represented
Registrar: S Blick, counsel

INTRODUCTION

[1] This is an appeal against the decision of 8 August 2019 made by the Registrar of Immigration Advisers (the Registrar), the head of the Immigration Advisers Authority (the Authority). He rejected a complaint about fees made by the appellant, Mr R (D) A against a licensed adviser, Ms R (M) U.

[2] The appellant was unable to proceed with a residence application, so the adviser did not have to complete all the contracted work. A dispute arose between them as to the level of fee refund offered by the adviser. An unusual feature of the circumstances giving rise to the complaint is that the appellant commenced working for the adviser as an employee after engaging her as an adviser. This led to another dispute between them as to his pay.

[3] The essential issue for the Tribunal is whether the dispute about the fees, which is contractual in nature, justifies disciplinary proceedings.

BACKGROUND

[4] The following narrative is the best that can be ascertained from the limited documentation produced to the Tribunal.

[5] The adviser is a director of Q J D H Ltd.

[6] In March 2018, the adviser represented the appellant in obtaining an Essential Skills work visa. She charged him $5,600.

[7] The appellant then decided to obtain residence based on his employment and contacted the adviser.

[8] On 21 August 2018, the adviser and the appellant both signed the adviser's terms of engagement. She offered to represent him in respect of the following services:

1. work visa application;
2. expression of interest under the skilled migrant category; and
3. lodging an application for residence (contingent upon Immigration New Zealand issuing an invitation to apply).

[9] According to the terms of engagement, the total fee was $17,250:

Professional services	$15,000
GST	$ 2,250
	$17,250

[10] The fee was payable in instalments:

At time of contract (stage 1)	$ 8,625
Immediately before lodging work visa application (stage 2)	$ 8,625
	$17,250

[11] In addition, there would be disbursements of $3,818, largely made up of the fees of Immigration New Zealand for the various applications that were required.

[12] The stage 1 fee was expressed to be not refundable:

> An initial payment of $8,625.00, comprising $7,500 for our professional fee plus $1,125.00 for GST, is required to be paid at the time of signing this contract. Please note that this is non refundable and we will not commence any work on your matter unless and until we have received this payment in full.

[13] The terms of engagement had the following "condition":

> 1. If you cancel our authorisation to represent you, you will pay to us that portion of our professional fee for the work we have completed to that date, at a rate calculated on our hourly rate which is $300.00 per hour plus GST.

[14] In signing the terms of engagement, the appellant confirmed the following statement:

> 4. I confirm that enclosed with this "Terms of Engagement" letter, I have received a copy of the [adviser's] "Refund Policy".

[15] The refund policy attached to the terms set out a procedure applicable to refunds where the terms of engagement provided for any fee to be contingent upon a successful result (not applicable to the appellant). The policy also stated that refunds would not be provided if the client withdrew the application or terminated the instructions for any reason at any stage of the process, or the application was refused because of a change in personal circumstances or employment.

[16] According to the appellant, he paid the adviser $10,534 on the day the agreement was signed. This was half of the total fee of $21,068 ($17,250 + $3,818).

[17] The adviser then prepared the work visa application and lodged it with Immigration New Zealand. It was approved on 26 October 2018.

[18] Between late November and early December 2018, the appellant advised the adviser that he might be unable to progress the residence application as his employer had changed the business structure. The appellant said that his employment turned sour in November 2018.

[19] The appellant then started working for the adviser as an office assistant on 4 December 2018. Disputes arose during this time between the two of them, notably about his pay. This is now subject to the statutory employment dispute process.

[20] A dispute also arose between the appellant and the adviser as to when the former terminated the latter's instructions to represent him on the immigration application.

[21] On about 25 February 2019, the appellant orally requested a refund from the adviser for the immigration services that had been paid for but not undertaken. He ceased working for the adviser about two days later.

[22] According to the appellant, a fee refund was refused by the adviser on the basis that the terms of engagement precluded refunds and the application for residence had been commenced.

Complaint to Authority

[23] On about 28 February 2019, a complaint was made by the appellant against the adviser to the Authority. He stated that he had paid $10,534 to the adviser. He got his work visa but the business then closed, so the residence application was impossible. The adviser had not started work on the expression of interest or the residence application.

[24] The appellant said he wanted a refund "for the representation not going to go forward". He had spoken to the adviser about a refund but she had refused on the ground that she had already done the work when the work visa application had been prepared. She also claimed the contract stated that the fee was not refundable.

[25] The Registrar wrote to the appellant on 5 July 2019. The letter recorded that the adviser had been successful in obtaining a work visa, but not been able to show that the application for residence had begun. Nor had the appellant provided evidence that he had terminated the adviser's services. The adviser had confirmed that the contract precluded a refund for a change in personal circumstances.

[26] The Registrar noted in his letter that the adviser was prepared to offer the appellant in good faith a refund of $1,511, which was the $10,534 he had paid to date

minus both the fee of $8,625 (stage 1) and the disbursements paid of $398. The Registrar considered this to be reasonable. Furthermore, according to the Registrar, the adviser had been requested to review her refund policy in the written contracts.

[27] In his letter, the Registrar recommended that the appellant make a complaint directly to the adviser in accordance with her own complaint procedure. If the issue could not be resolved using the adviser's complaint procedure, the complaint would be reassessed.

[28] The appellant sent an email to the adviser on 9 July 2019 thanking her for the offer of a refund of $1,511, but advising that it was not acceptable. He believed it was fair and reasonable to deduct, from the $10,534 paid, the fee of $5,600 charged by her in the past for an essential work visa. The balance would be paid to him.

[29] The adviser wrote to the appellant on 19 July 2019 noting that the Registrar had regarded the offer of a refund of $1,511 as reasonable. Furthermore, a refund was not compulsory, nor did his change of circumstance justify any additional refund. In accordance with the Registrar's request, she was reviewing the clause in her written contract and would notify the Registrar accordingly.

[30] The adviser noted in her letter that the appellant, in his email of 9 July 2019, had requested a refund of $4,934 ($10,534 – $5,600). This was a renegotiation of the fee schedule "after the fact". What he was trying to do was enter into fresh negotiations to set as a new fee what he believed should be charged. This was not required by her professional obligations. There was no requirement for her to renegotiate a fee upon completion of a service, which had included the issuing of a work visa. However, in fairness and as a gesture of goodwill, she had decided to round up the refund offered of $1,511 to $2,000. This was above what was required by the signed contract and the refund procedure. She believed this was a fair and reasonable outcome.

[31] The adviser wrote to the appellant again on 25 July 2019. She recorded having telephoned him the previous day. She further recorded inviting him to her office to discuss the matter, but he had said he was not in Wellington. She had telephoned him again but he did not answer the call. The Registrar had requested that she notify the Authority by 26 July 2019 of the outcome of the complaint procedure, which she would do.

[32] The appellant sent an email to the adviser on 25 July 2019 at 3:08 pm stating that her proposal was not fair and reasonable. He denied renegotiating the price for the service. It was apparent that the work visa and residence service had never been

apportioned, due to the genuine belief that the contract would go ahead without a problem. Due to the lack of an acceptable reference as to what the fee should be for a work visa, he suggested using her past charge of $5,600 for such a visa. He asked her to advise him why his calculation was not fair and reasonable.

[33] On 26 July 2019, the adviser wrote to the Registrar advising him of the outcome of the complaint procedure. After setting out the various communications between her and the appellant, she advised that she did not believe they would be able to reach a settlement. The appellant had rejected her offer of $2,000, but the Registrar had already advised that $1,511 was reasonable.

[34] The adviser confirmed to the Registrar accepting his advice to better align her contract with the Code.

[35] According to the adviser, a renegotiation of the fee in the sum sought by the appellant for a service rendered in the previous year was not required. Fees were not refundable when a visa application was declined through no fault of the adviser. She did not believe that the Registrar was available to renegotiate after the event a fee paid in respect of a successful service. At the time the appellant signed the contract, she carefully explained to him the details in payment plan, as well as her refund policy. It was only after a change in his personal circumstances that he now wanted to renegotiate the fee.

[36] On the same day, 26 July 2019, the appellant sent an email to the Authority's investigator. He considered that a refund of $4,934 would be fair and reasonable. The fee charged earlier by the adviser for a work visa was the latest comparable agreed by both parties. He did not want to escalate the matter and it was a hard decision to turn down the revised offer of $2,000 and not know what would happen next. She was effectively charging $8,534 and he wanted to know what the extra $2,934 ($8,534 – $5,600) was for. He noted that in respect of the dispute concerning his wages, his lawyer had applied for mediation.

Registrar's letter dismissing complaint

[37] On 8 August 2019, the Registrar wrote to the appellant advising him that the complaint had been rejected, as it did not disclose any of the statutory grounds of complaint. It was noted that the dispute could continue to be resolved directly with the adviser through such options as the Disputes Tribunal.

JURISDICTION AND PROCEDURE

[38] The grounds for a complaint against a licensed adviser are listed 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] Section 45(1) provides that on receipt of a complaint, the Registrar may:

(a) determine that the complaint does not meet the criteria set out in section 44(3), and reject it accordingly;

(b) determine that the complaint does not disclose any of the grounds of complaint listed in section 44(2), and reject it accordingly;

(c) determine that the complaint discloses only a trivial or inconsequential matter, and for this reason need not be pursued; or

(d) request the complainant to consider whether or not the matter could be best settled by the complainant using the immigration adviser's own complaints procedure.

[40] In accordance with s 54 of the Act, a complainant may appeal to the Tribunal against a determination of the Registrar to reject or not pursue a complaint under s 45(1)(b) or (c).

[41] After considering the appeal, the Tribunal may:[1]

(a) reject the appeal; or

(b) determine that the decision of the Registrar was incorrect, but nevertheless reject the complaint upon another ground; or

[1] Immigration Advisers Licensing Act, s 54(3).

(c) determine that it should hear the complaint, and direct the Registrar to prepare the complaint for filing with the Tribunal; or

(d) determine that the Registrar should make a request under section 45(1)(d).

[42] The adviser against whom the complaint is made is not a party to the appeal and has not been served. The appeal itself cannot result in the Tribunal upholding the complaint against the adviser.

[43] In respect of the complaint here, the Registrar rejected it in accordance with s 45(1)(b) as it did not disclose any of the statutory grounds for a complaint. Accordingly, the Tribunal has jurisdiction to consider the appeal.

[44] The Tribunal issued a minute on 4 November 2019 setting out a timetable for submissions and evidence.

[45] The appellant provided submissions with the appeal form (dated 3 September 2019). He also sent a copy of the adviser's terms of engagement. He believes that a fair and reasonable refund would be the difference between the $10,534 which he paid and the $5,600 he paid last time to her for a work visa.

[46] The Registrar's counsel, Ms Blick, provided submissions on 17 December 2019, with supporting documents. She contends that the complaint has been properly considered and rejected. At the Tribunal's request, a further document was sent to the Tribunal by the Registrar on 6 January 2020.

ASSESSMENT

[47] There are a number of obligations in the Licensed Immigration Advisers Code of Conduct 2014 (the Code) relating to an adviser's fees. In particular, the fees must be set out in the client agreement.[2] They must be fair and reasonable in the circumstances.[3] An adviser must have a refund policy, which must also be set out in the agreement.[4] Refunds must be fair and reasonable in the circumstances.[5]

[48] The adviser's terms of agreement provided for a total fee of $21,068 ($17,250 + $3,818 in expected disbursements). This was for a work visa application, expression of

---

[2] Licensed Immigration Advisers Code of Conduct 2014, cl 19(f).
[3] Clause 20(a).
[4] Clauses 19(k) & 24.
[5] Clause 24(a).

interest and residence application. However, it was all payable early, being not later than "immediately before we lodge your work visa application".[6]

[49] The adviser prepared and filed the work visa application which was successful. Unfortunately, the subsequent steps could not proceed. There is no evidence the adviser did any work on those steps and the Registrar found that the adviser had not been able to show that work on the residence application had begun. The Registrar makes no finding as to whether work had started on the expression, but the adviser did not assert in her written communications with the appellant or the Authority that it had.

[50] Despite the agreement requiring that the entire fee ($21,068) be paid prior to lodging the work visa, the adviser went ahead with the work visa application even though only half that fee ($10,534) was paid. No doubt that was by agreement between them.

[51] Since the expression and residence steps did not proceed, the appellant claimed a partial refund, seeking the return of that part of the $10,534 paid for work which was not done. He says this should be $4,934, being $10,534 minus the $5,600 which the adviser charged last time for a work visa.

[52] The adviser initially offered a refund of $1,511, being $10,534 minus $8,625 (the stage 1 fee) and also minus disbursements of $398 incurred. The Registrar said in his letter of 5 July 2019 that the $1,511 offer was reasonable. The adviser later increased the refund offer to a rounded-off figure of $2,000. This was rejected by the appellant, who seeks the refund of an additional $2,934.

[53] In terms of the adviser's professional obligations, the starting point as to what is a fair and reasonable refund must be the contractual fee agreed between the parties. It is not the fee allegedly charged by the adviser for an earlier immigration application, the circumstances of which are not known. The adviser correctly observes that the appellant cannot renegotiate the agreed fee retrospectively.

[54] What is fair and reasonable must therefore take into account, though is not wholly determined by, the fee arrangements agreed. A total fee of $21,068 was agreed. It was not apportioned between the three steps in the immigration process, though the timing of its payment was broken down. The whole fee was payable before the first step (the work visa application) had even been lodged. This is what the appellant agreed, though the adviser appears to have waived early payment of half the fee since she lodged the work visa application once $10,534 was paid.

---

[6] Terms of engagement (undated), Fees and Costs, cl 1.

[55] To that extent, the contract terms are relatively straightforward. However, the various contract provisions potentially applicable in the event of termination of the adviser's services before completion of the work are on their face markedly inconsistent with each other.

[56] In the event of termination, it is no longer straightforward what the contract (the terms of engagement and the refund policy) requires. On the one hand, the stage 1 fee of $8,625 (which does not necessarily represent just the work visa application) is said to be not refundable. This is consistent with the refund policy which stipulates that if the instructions are withdrawn or terminated, there will not be any refund. On the other hand, the adviser agreed in the conditions that if the instructions were cancelled, she would charge only for work completed at an hourly rate. It is not known what the fee would be on a time worked basis.

[57] It is plainly the adviser's fault that the agreed terms are unclear as to what should happen when the services are prematurely terminated apparently without fault by either party. Furthermore, I agree with the Registrar that the adviser's refund policy does not comply with the Code. An adviser cannot refuse a refund in all cases of withdrawal, termination or a change in personal circumstances, since the Code requires a refund where that would be fair and reasonable.

[58] Be that as it may, it is not the role of disciplinary processes to reconcile inconsistent contractual provisions. Essentially, this is a contractual dispute about $2,934, which the Registrar points out can be resolved by other bodies such as the Disputes Tribunal. The only issues for the Authority, and now the Tribunal, are first, whether the adviser has breached a professional obligation and second, whether that breach is sufficiently serious to justify disciplinary proceedings. A threshold as to the gravity of any professional misconduct must be met in order to warrant a complaint to a judicial body such as the Tribunal.[7]

Conclusion

[59] It is not clear to me, given the contractual terms, that the fee of $8,534 ($10,534 – $2,000) effectively being charged by the adviser is not fair and reasonable. Even if it is not fair and reasonable, I find that the dispute as to the fee does not cross the threshold justifying disciplinary action. Notwithstanding a flawed refund policy, I agree with Ms Blick that this is a contractual dispute, not a disciplinary matter. If the appellant is not

---

[7] *Orlov v New Zealand Law Society* [2012] NZHC 2154 at [79]–[80].

satisfied with the refund offered of $2,000, he should consider a claim in the Disputes Tribunal.

OUTCOME

[60] The appeal is rejected.

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.[8]

[62] There is no public interest in knowing the name of the adviser against whom the complaint is made. Nor would that be fair given that the complaint has been dismissed by the Authority and will not be restored by the Tribunal.

[63] Nor is there any public interest in knowing the identity of the appellant.

[64] The Tribunal orders that no information identifying the adviser or the appellant is to be published other than to Immigration New Zealand.

____

D J Plunkett
Chair

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