

**BEFORE THE IMMIGRATION ADVISERS  
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2016] NZIACDT 62

Reference No: IACDT 006/15

<b>IN THE MATTER</b>	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
<b>BY</b>	<b>The Registrar of Immigration Advisers</b> Registrar
<b>BETWEEN</b>	<b>Khushmeet Kaur Sidhu</b> Complainant
<b>AND</b>	<b>Wei-Xiang Shawn (Shawn) Tan</b> Adviser

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**DECISION**

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**REPRESENTATION:**

**Registrar:** In person

**Complainant:** In person

**Adviser:** In person

Date Issued: 29 September 2016

## DECISION

### Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The allegations founding the complaint are that in the course of providing immigration services as a licensed immigration adviser Mr Tan:
- [1.1] Failed to complete the client engagement process in accordance with the Code of Conduct.
- [1.2] Lodged a non-complying visa application in circumstances where Ms Sidhu had remitted funds to New Zealand without complying with the rules for Long Term Business Category visas. There is a specific requirement that an applicant remits their investment funds direct from their offshore bank account. When Mr Tan found out about the error, instead of providing appropriate advice, he proceeded to lodge a non-complying visa application, which failed.
- [2] Mr Tan essentially accepted the facts supporting the complaint. He appeared to concede he breached his duties relating to the client engagement process, but minimised the gravity and relied on busyness as a mitigating factor. However, he put it in terms of not being able to show he completed the process, rather than admitting he did not complete it.
- [3] In relation to whether he acted appropriately concerning the difficulty with the remittance of funds, Mr Tan accepts he was aware of the issue, lodged an application with Immigration New Zealand, and it failed. However, he contends that the relevant immigration instruction allowed a different method of remitting funds. Accordingly, he contends his professional service delivery was appropriate, and Immigration New Zealand was in error in its response.
- [4] The Tribunal's task is to evaluate the circumstances relating to the apparent failure to complete the client engagement process, and Mr Tan's response to the potentially irregular remittance of funds.
- [5] The Tribunal upheld both grounds of complaint.

### The complaint

- [6] The background narrative relating to the complaint is that Mr Tan provided immigration services to Ms Sidhu, relating to an application for Long Term Business Visas (LTBV) for Ms Sidhu and her husband. Mr Tan provided services; ultimately, there were serious difficulties, as Ms Sidhu did not comply with the requirements for the delivery of funds to New Zealand. In essence, Immigration New Zealand took the view that she was required to remit her investment capital direct from her bank account under the scheme. Instead, the funds came from third party bank accounts, which was not acceptable under the relevant immigration instruction.
- [7] The Registrar's investigation reduced the grounds of complaint from including dishonest or misleading behaviour to two simple issues. The first aspect of the complaint is:

- [7.1] An alleged breach of clauses 1.5(a), 8520(b) and (d), and 9(b) of the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code).
- [7.2] Those provisions relate to the requirement to commence a professional relationship with a written agreement meeting particular requirements, including an explanation of all significant matters relating to the instructions, and delivery of a copy of the advisers internal complaints procedure.
- [8] The second aspect is an allegation that Mr Tan failed to give appropriate advice to his client, and lodged a non-complying application:
- [8.1] The statement of complaint identifies the allegation as a breach of clause 1.1(a) of the 2010 Code. It requires that a licensed immigration adviser perform his or her services with due care, diligence, respect and professionalism.
- [8.2] The statement of complaint identifies the allegation that Mr Tan was aware third parties had transferred specified funds used as investment capital, and accordingly, Ms Sidhu would not meet the requirement that her or her husband transfer the funds from their accounts. Accordingly, Ms Sidhu would not meet the requirements for the visa she sought.
- [8.3] Mr Tan then allegedly lodged an application without addressing the non-compliant transfer, and failed to advise Ms Sidhu of the implications.

## **The responses**

### ***Ms Sidhu***

- [9] Ms Sidhu generally supported the Registrar's statement of complaint and the grounds. She added to the material, but did so more in the way of adding a narrative. Elements of the complaint as Ms Sidhu viewed the matter were somewhat wider than the Registrar's statement. However, Ms Sidhu did not seek to widen the elements of the 2010 Code or pursue other grounds under section 44(2) of the Immigration Advisers Licensing Act 2007.

### ***Mr Tan***

- [10] Mr Tan's initial response to the complaint was, in significant part, to challenge the way the Registrar has investigated the complaint, and criticise Ms Sidhu. He apparently disputed the facts, but his focus on criticising the Registrar obscured those elements of his response.
- [11] Accordingly, the Tribunal requested Mr Tan, pursuant to section 49(4)(a), to file an affidavit setting out:
- [11.1] What he did to comply with the 2010 Code's requirements for commencing his professional relationship with Ms Sidhu (with specific reference to clauses 1.5(a), (b) and (d) and 9(b) of the 2010 Code).

- [11.2] That he attach his record of the process as exhibits to his affidavit.
- [11.3] His knowledge of, and the enquiries he made, concerning whether third parties had transferred the funds specified in the statement of complaint which were used as investment capital. Then, the effect on whether Ms Sidhu would meet the requirement that her or her husband transfer the funds from their accounts.
- [11.4] Whether he then lodged an application without addressing the non-compliant transfer, and whether he failed to advise his client of the implications.
- [11.5] Mr Tan was required to produce his records including the records that clause 3 of the 2010 Code required, and an explanation if any records were not available.
- [11.6] He was also asked to provide any other relevant evidence.
- [12] When he responded, Mr Tan said he could not recall whether there was a written agreement, or whether he gave Ms Sidhu a copy of his internal complaints procedure; he accepted there were no copies on his file. He said the omissions were oversights, due to busyness.
- [13] Mr Tan took issue with the potential for him to be required to refund fees as:
- [13.1] He paid a \$1,000 commission to Kunal Sood “for referring Mrs Sidhu to [him]”.
- [13.2] He paid \$2,700 to Kim Chow Cheng to provide a business plan.
- [13.3] He had done most of the work; he said, calculated on a monthly basis, any refund was not more than \$2,100 including GST, but there should be no refund.
- [14] In relation to the merits of Mr Tan’s advice to his client, he said:
- [14.1] He accepted he knew of the third party transfers at the first stage of the process for seeking LTBVs, and emailed information from Immigration New Zealand for Ms Sidhu to consider. He was satisfied that he could deal with the issue. In his view, it was not critical if funds came from bank accounts other than Ms Sidhu’s bank account, provided it was her money.
- [14.2] When Immigration New Zealand raised the issue of third party transfers, Mr Tan provided information regarding Ms Sidhu owning the funds.
- [14.3] Ultimately, Immigration New Zealand approved Ms Sidhu’s application. Mr Tan contends that:

*There are a plethora of reasons why an application is declined – one must not automatically assume this is attributable to an adviser’s negligence, incompetence, or misrepresentation.*

**Further material**

[15] Following Mr Tan's reply, both parties provided further material, which I have considered. However, it suffices to say it has peripheral relevance to any of the issues. Much of it is plainly irrelevant, such as references to Mr Tan's work for other clients. I have given that information no weight. The Registrar did not reply to any of the material, and was not required to do so.

**Discussion****The issues**

[16] It is important to focus on the relevant issues. The Tribunal is required to decide the two grounds of complaint identified by the Registrar:

[16.1] Failure to complete the client engagement process properly; and

[16.2] Failure to perform services with due care, diligence, and professionalism, in relation to managing the consequences of fund transfers from third party bank accounts.

**The standard of proof**

[17] The Tribunal determines facts on the balance of probabilities; however, the test must be applied with regard to the gravity of the finding: *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [55].

**The facts**

[18] The Registrar provided a chronology and supporting documentation; and Mr Tan has not generally challenged the information, beyond an overall denial of liability. It appears Mr Tan effectively admits that he failed to comply with the client engagement process; to be precise, he admits that he has no memory or record suggesting he did comply.

[19] There is a documentary record in relation to how Mr Tan addressed the issue relating to funds coming from third party bank accounts; he admits he was aware of the issue from an early stage. Accordingly, the dispute is not concerned with primary facts, rather the professional judgements Mr Tan made.

**Failure to comply with the client engagement process**

[20] Ms Sidhu says that Mr Tan failed to complete the client engagement process, he says he cannot remember doing so, and that his file has no evidence that he did so. The 2010 Code is prescriptive regarding the client engagement process. Mr Tan could not become a licensed immigration adviser without demonstrating he understood that process; for every client engagement, he had to complete the process. It is intended both to protect him, and his clients.

[21] One of the very important elements of professional conduct is that the licensed immigration adviser must obtain informed instructions. That requires an evaluation of the available

immigration options, and the benefits and risks of the potential choices. Then the scope of work, and terms of engagement need to be recorded in writing.

[22] On the balance of probabilities I am satisfied that:

[22.1] Mr Tan failed to comply with the client engagement process. He did not:

[22.1.1] ensure his clients were aware of all significant matters relating to the client engagement (including obtaining informed instructions); and

[22.1.2] have an agreement that contained a full description of his services, and his clients did not agree to terms in writing.

Accordingly, Mr Tan breached clause 1.5 of the 2010 Code.

[22.2] Mr Tan did not explain to, and provide his clients with, a copy of his internal complaints procedure before entering into an agreement to provide immigration services. Accordingly, he also breached clause 9(b) of the 2010 Code.

[23] Ms Sidhu's circumstances provide some dimension and perspective to this issue. The instructions involved a fee of \$10,000, and a critical migration pathway in which Ms Sidhu invested large amounts of money in a business, the success of which depended on keeping current visas. This immigration process required full disclosure and advice, and informed reflection by Ms Sidhu on all the factors. Mr Tan's excuse that busyness precluded him attending to his professional obligations aggravates rather than mitigates his failure to maintain minimum professional standards. His client relied on him in relation to a very important step affecting her and her family, with serious financial and personal consequences. His excuse trivialises his professional responsibilities.

***Lack of care, diligence and professionalism***

- [24] As Mr Tan does not challenge the essential factual narrative, a convenient starting point to evaluate Mr Tan's advice is first to examine what went wrong. Immigration New Zealand identifies that in their letter dated 9 January 2014:

Please refer to BC9bi<sup>1</sup> below which states that investment capital for the business must be transferred from your personal bank account through the banking system to New Zealand.

*BC9 Validity of work visas and grant of further work visas*

...

*b. A further work visa may be granted ... if ... [the Immigration New Zealand officer] is satisfied that:*

*i. the investment capital for the proposed business, as stated in the business plan, has been transferred direct from the principal applicant's bank accounts(s) through the banking system to New Zealand; and*

...

...

You have not provided evidence that you meet requirements of BC9bi. Funds transferred through the banking system total \$36,545, but from information you have provided, no funds have been transferred from your personal bank account through the banking system to New Zealand.

- [25] This requirement is not obscure. Working with this requirement is a core competency for a person undertaking LTBV instructions. Mr Tan provided various documentation, which he still relies on; it establishes, he claims, that the money was Ms Sidhu's, so it does not matter that it did not come from her bank account.
- [26] However, on 11 March 2014 Immigration New Zealand declined Ms Sidhu's application for a visa, as she did not comply with the requirement relating to remitting funds. Immigration New Zealand also said, after considering the information, that they did consider an exception to the immigration instructions could be justified.
- [27] When pressed for an explanation by the Tribunal after his initial unsatisfactory response, Mr Tan claimed in Ms Sidhu's situation:

... resort can be made to BC9.1.a.ii... that says ...

*a. Evidence of transferring investment capital to New Zealand through the banking system may include but is not limited to:*

*i. telegraphic transfer forms*

*ii. other documents, evidence and information the [Immigration New Zealand officer] considers may demonstrate the transfer of investment capital to New Zealand through the banking system.*

<sup>1</sup>

References to BC9 relate to the relevant immigration instructions in the Immigration New Zealand Operational Manual: [www.immigration.govt.nz](http://www.immigration.govt.nz)

[28] Mr Tan says this allows a person to remit funds from third party bank accounts, and meet the requirements. The obvious difficulties with Mr Tan's explanation are:

[28.1] Immigration New Zealand rejected it; and

[28.2] The documents provided pursuant to BC9 1 a ii are to prove "the investment capital ... has been transferred direct from the principal applicant's bank account", under BC9 b i.

[29] Permission to prove something using certain documents is not an authority to prove something else in substitution. Mr Tan's explanation has no merit. I am concerned he should continue to advance it, given that Immigration New Zealand and the Registrar have both already rejected it, and it lacks any substance.

[30] Mr Tan admits he was aware of the issue, and instead of dealing with it frankly, he wholly failed to recognise the significance of the non-compliance and proceeded to make an application that failed for predictable reasons. When questioned, instead of a realistic response, he simply attempted to argue, in substance compliance; that failed, and the outcome is unsurprising.

[31] I must consider whether the circumstances amount to evidence of a lack of care, diligence or professionalism. The first difficulty Mr Tan faces is that LTBVs are an area of work requiring significant technical expertise. The fee in this case was \$10,000; plainly, Mr Tan ought to have been aware of the expertise required given the fee he expected for the work. Second, the requirement for the remittance of funds is an elementary factor licensed immigration advisers working in this area must understand.

[32] Accordingly, when Mr Tan became aware that his client had not complied with the requirements, which was at an early stage in his instructions, he ought to have been on high alert and addressed the problem. Instead, the Registrar alleges he failed to respond appropriately and filed a non-complying application; he failed to inform his client of the non-compliance and its likely consequences. Mr Tan does not dispute he failed to take those steps. I have already indicated why proof the applicant owned funds coming from a third party does not meet the immigration instruction, and accordingly Mr Tan's explanation is wrong.

[33] Accordingly, I find Mr Tan failed to ensure that he had the skills to undertake the instructions, and then failed to research the issues adequately when he was aware there was a problem. If he lacked the skill to address the relationship between BC9 b i and BC9 1 a ii, then he had a duty to confer with Immigration New Zealand, or take advice from a licensed immigration adviser or lawyer with the relevant experience and skills. Filing an application that was plainly in breach of the instructions without taking those steps was wrong.

[34] Accordingly, I find Mr Tan's conduct fell far short of the minimum professional standards required of a licensed immigration adviser, and he failed to provide services to Ms Sidhu with due care, diligence and professionalism as he:

[34.1] failed to act responsibly or appropriately when he became aware of the irregular transmission of funds;

[34.2] lodged a non-complying application; and

[34.3] failed to give his client prompt notice of the gravity of the irregularity and its potential impact on her immigration process.

[35] I accordingly find Mr Tan breached clause 1.1(a) of the 2010 Code in those respects.

[36] Mr Tan has referred to the aftermath of the events, and Ms Sidhu's ultimate resolution of the issues. Those events only serve to demonstrate the gravity of the difficulties caused by Mr Tan's unacceptable professional service delivery. Immigration New Zealand rejected the explanation, and request to deal with the issue as an exception to instructions. Ms Sidhu gained some support from a Member of Parliament, and provided a range of information to Immigration New Zealand. Mr Tan claims these initiatives were his ideas, and he should have credit for them. The reality is that Ms Sidhu would not have had the problem of lodging a non-complying visa application if Mr Tan advised her properly.

### **Decision**

[37] The Tribunal upholds the complaint pursuant to section 50 of the Act; Mr Tan breached the 2010 Code in the respects identified and that is a ground for complaint pursuant to section 44(2)(e) of the Act.

[38] In other respects, the Tribunal dismisses the complaint.

### **Submissions on Sanctions**

[39] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.

[40] The authority and Ms Sidhu have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs and compensation. Whether they do so or not, Mr Tan is entitled to make submissions and respond to any submissions from the other parties. Mr Tan has already taken issue with the potential for the Tribunal to order a full refund of fees.

[41] If Ms Sidhu seeks orders for the refund of fees and compensation, she and Mr Tan should consider that:

[41.1] Sanctions, including compensation and the refund of fees must relate to the Tribunal's findings.

[41.2] In relation to fees, Mr Tan has identified he paid \$1,000 in commission to Kunal Sood "for referring Mrs Sidhu to me". Mr Tan should establish this is not in breach of the Secret Commissions Act 1910 if he wishes the Tribunal to consider it. Furthermore, Mr Tan would need to establish why his own costs should affect his liability to his client.

[41.3] It would appear there is potentially a relationship between the refund of fees, and compensation. One view would appear to be that when considering these orders the Tribunal should form a view:

[41.3.1] As to the value of the work Mr Tan provided;

[41.3.2] As to the cost of dealing with Mr Tan's errors in relation to managing the irregular remittance of funds, including any consequential costs; and

[41.3.3] Whether the failures relating to the client engagement process led to any loss, due to failing to consider alternative options.

[41.4] The Tribunal expects Ms Sidhu to identify any additional costs she claims as compensation, and provide documentation to support them; Mr Tan should identify whether or not he challenges any of the claims.

[42] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.

[43] The parties are free to provide submissions on the approach the Tribunal should take to imposing sanctions; the preceding comments are for guidance only.

#### **Timetable**

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

[44.1] The Authority and Ms Sidhu are to make any submissions within 10 working days of the issue of this decision.

[44.2] Mr Tan is to make any further submissions (whether or not the Authority or Ms Sidhu make submissions) within 15 working days of the issue of this decision.

[44.3] The Authority and Ms Sidhu may reply to any submissions made by Mr Tan within 5 working days of him filing and serving those submissions.

**DATED** at WELLINGTON this 29<sup>th</sup> day of September 2016.

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**G D Pearson**  
Chair