

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

Decision No: [2012] NZIACDT 32

Reference No: IACDT 028/10

**IN THE MATTER**

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

**BY**

**Immigration Advisers Authority**  
Authority

**BETWEEN**

**Hui Wang**  
Complainant

**AND**

**Roy (Liqing) Xue**  
Adviser

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**DECISION**

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**REPRESENTATION:**

**Adviser:** In person

**Complainant:** In person

Date Issued: 29 June 2012

## DECISION

### Introduction

- [1] Mr Wang engaged Mr Xue, a licensed immigration adviser, to apply for a new work permit. His existing work permit was about to expire.
- [2] Mr Wang complained Mr Xue did not comply with the requirements of the Licensed Immigration Advisers Code of Conduct ("the Code", found at [www.iaa.govt.nz](http://www.iaa.govt.nz)) developed pursuant to section 37 of the Immigration Advisers Licensing Act 2007).
- [3] He says Mr Xu did not meet the requirement for commencing the professional relationship, lodged the application in a form that did not meet Immigration New Zealand's requirements, and then failed to communicate with him and give him adequate advice.
- [4] Mr Xue says that he did generally comply with the process for completing his professional engagement. However, the materials were in English, which was not Mr Wang's first language, so Mr Wang was reluctant to engage with that material. In other respects, Mr Xue maintains he did comply with his obligations in a usual and professional manner.
- [5] Accordingly, the central issue that determines whether the complaint will be upheld is the merits of Mr Wang and Mr Xue's different factual perspectives.
- [6] It is also necessary to consider with some care how the Code should apply to the English language documentation relating to engagement.

### Mr Wang's Complaint

- [7] Mr Wang had been working in New Zealand since August 2006. In May 2010 he engaged Mr Xue to apply for a further work permit, as he wanted to be able to continue working for his current employer.
- [8] He complains Mr Xue did not comply with his obligations under the Code, as he:
  - [8.1] Failed to enter into a written agreement in relation to the professional engagement.
  - [8.2] Did not give him a copy of the Code or complaints procedure.
  - [8.3] Lodged an application without the necessary medical certificate, and did not provide the information required by Immigration New Zealand relating to Mr Wang's employment.
  - [8.4] Did not inform Mr Wang of the steps he was taking.
  - [8.5] Failed to tell Mr Wang he had to stop working when his permit expired.

### Mr Xue's Reply to the Complaint

- [9] Mr Xue responded to the complaint, and stated:
  - [9.1] He was engaged to act for Mr Wang approximately a month before his work permit expired. The date the permit expired was 20 June 2010.
  - [9.2] He ascertained Mr Wang had made a failed application for residence, and was concerned that may have an adverse effect on his application for a new work permit.
  - [9.3] While he had prepared an agreement regarding his services, Mr Wang said he did not need to sign it, as he had paid fees and received an invoice. Mr Xue is willing to accept he was in error in accepting that response.

- [9.4] He did provide a copy of the Code, and also the complaints procedure. However, Mr Wang's English was not good, and he did not take the material away with him.
- [9.5] He discussed the currency of Mr Wang's medical certificate, and Mr Wang was not certain of the position. Accordingly, Mr Xue submitted the application, and when Immigration New Zealand said the certificate was not current, he promptly notified Mr Wang, and a current certificate was obtained.
- [9.6] He specifically raised the issue of Mr Wang's permit expiring, and told him he could no longer lawfully work if that occurred.
- [9.7] When the application was filed, he telephoned Mr Wang and informed him of this, as he had no email contact for Mr Wang.
- [9.8] In mid-July 2010, Mr Xue contacted Immigration New Zealand regarding progress, and then informed Mr Wang.
- [9.9] Mr Xue discussed with Mr Wang whether his employment met the requirements for a further work permit. Mr Wang said that his work colleague did not complete one of the usual forms. It would be sufficient that the Immigration New Zealand case officer could contact the employer (which was a substantial company used to dealing with the issues). Mr Xue was not comfortable that the form was incomplete, so he made a note on the form before it was submitted to Immigration New Zealand. He produced a copy of the form with the note.
- [9.10] After the application was filed, Immigration New Zealand responded with a letter dated 24 August 2010, which notified substantive concerns with the application submitted. In particular:
  - [9.10.1] Mr Wang's occupation as a fitter welder may not qualify. A recent labour market survey undertaken by Work and Income New Zealand in that locality indicated there were suitable New Zealand residents and citizens able to carry out the work Mr Wang undertook. Further, his occupation was not on the long term, or immediate, skill shortage list.
  - [9.10.2] Mr Wang's employer appeared not to have advertised the position, and provided no evidence of attempts to attract New Zealand residents or citizens for the position.
  - [9.10.3] Mr Wang was working without a permit, and accordingly was not a bona fide applicant.
- [9.11] Mr Xue contacted Mr Wang's employer and attempted to gain support for Mr Wang. However, that support was not forthcoming, as his employer was uncertain regarding ongoing work.
- [9.12] As Mr Wang's employer was not in a position to assist, Mr Xue explored the possibility of work with another employer. Mr Xue produced a letter from that potential employer, who indicated Mr Xue made considerable efforts to explore that possibility.
- [9.13] On 10 September 2010, Mr Wang came to see Mr Xue and said the potential employer could not assist, and accordingly he planned to return to China.
- [9.14] Mr Xue provided an example of his work to demonstrate his competence with work at the level presented by Mr Wang's case.

### **The Facts**

- [10] The Tribunal issued a minute to the parties (16 April 2012), identifying the issues that appeared to arise on the papers then before the Tribunal, and the conclusions that could potentially be reached.

- [11] The minute identified the key element in the complaint as issues of fact, as the grounds of complaint would all be breaches of the Code if established in the terms they were made. The apparent issues identified in the minute were:
- [11.1] Did Mr Xue fail to establish his professional relationship with Mr Wang in accordance with the Code, and if so in what respects?
  - [11.2] Was the application Mr Xue lodged on Mr Wang's behalf deficient to the point where Mr Xue failed in his professional obligations?
  - [11.3] Did Mr Xue fail to communicate with Mr Wang regarding progress with his application?
  - [11.4] Did Mr Xue fail to ensure that Mr Wang was on notice regarding the importance of not working after his permit expired?
- [12] The minute noted that the accounts given by Mr Wang and Mr Xue were quite different. However, on the information available the Tribunal was not satisfied either account was intended to mislead. There did appear to have been some level of miscommunication, and Mr Wang had explained he had difficulty communicating in English. The documents relating to the processes were in English.
- [13] The minute gave the parties the opportunity to provide further factual material and submissions. Mr Xue did not add to what he had already supplied.
- [14] It appears likely Mr Wang did not receive the minute. The Authority understands he left New Zealand without leaving a forwarding address.
- [15] Section 93 of the Act provides that any notice or other document required to be served on any person under the Act may be served in various forms. The minute was served in accordance with the section. As the minute has been served, and there is no practicable means of establishing contact, the decision must be made on the material presently before the Tribunal.

### **Decision**

- [16] The accounts given by Mr Wang and Mr Xue are quite different. However, I am not satisfied either account is intended to mislead. There does appear to have been some level of miscommunication, and Mr Wang has explained he had difficulty communicating in English. The relevant documents relating to the processes were in English, and that is essentially due to the Authority and Immigration New Zealand producing documents in English.
- [17] The decision on the merits of the complaint is discussed below.

#### *Establishing the professional relationship*

- [18] Mr Xue accepts he did not have Mr Wang sign a written agreement, and is willing to accept he was in error in that respect.
- [19] Mr Xue says he presented Mr Wang with a copy of the Code and the complaints procedure. He also says he gave Mr Wang an agreement, but did not insist on him signing it. He says that Mr Wang did not take the materials, as they were in English, and he was satisfied as he had a receipt for the payment made.
- [20] I accept Mr Xue's explanation that he did comply with the Code, subject to whether there was a written agreement meeting the requirements of the Code. His explanation derives some support from the documentary evidence, it shows he responsibly attended to other steps. His explanation is plausible, given the difficulties arising from a written process in English and a client who had difficulty communicating in that language.
- [21] There are degrees in relation to barriers to communication, and it is of course important that the Code does require an adviser to arrange for an interpreter in circumstances where that is appropriate. On the present facts it is not evident that was necessary, given apparently

satisfactory oral communication, and a relatively simple engagement; that is, simple in the sense that Mr Wang wanted a work permit to replace an existing work permit, rather than a more general review of his immigration situation.

- [22] The circumstances mitigate the failure to have the agreement signed. In essence, Mr Xue was faced with a client who, understandably, was reluctant to sign an agreement he could not read. Pressuring a client to sign a document in such circumstances is in itself problematic. While there are of course ways of resolving such issues, they likely involve the expense of an interpreter and possibly independent advice. The costs of such assistance would have likely exceeded the cost of the work.
- [23] In these very specific circumstances, it is necessary to consider whether the Code was breached, despite Mr Xue not insisting that Mr Wang sign the agreement.
- [24] It is important to record that Mr Xue has produced his file, and demonstrated a thorough and careful approach to meeting his professional obligations and documenting his work.
- [25] I am satisfied there is no basis for finding Mr Xue intentionally failed to prepare a written agreement, and did in fact draft an agreement and explain it to Mr Wang.
- [26] The Code requires that "clients are made aware, in writing and in plain language, of the terms of the agreement", and other matters. It is necessary for there to be an "agreement", so the client's consent to the agreement is essential.
- [27] Mr Xue's evidence is that he explained the agreement, and produced it to Mr Wang. Mr Wang declined to sign the agreement, but said he understood the basis of the engagement and did not require the written material.
- [28] That was, in the particular circumstances, understandable. Mr Wang appeared to have satisfied himself of the matters he regarded as essential.
- [29] There are situations where there is a written agreement, which is not "signed", but affirmed and accepted in another way. The most common situation of this kind is probably an overseas client who confirms the terms of an agreement by email. The Code is drafted to accommodate such situations.
- [30] However, clause 1.5 d) of the Code does require that *clients confirm in writing that they accept the terms of agreements*. It is an important discipline, and despite the difficult circumstances, it was open to Mr Xue to insist on some form of written acknowledgement that Mr Wang accepted the terms of the engagement offered by Mr Xue. Indeed, to his credit it appears that Mr Xue accepts that is case.
- [31] It was necessary for Mr Xue to formalise the relationship at least to that extent, and his failure to do so amounts to a breach of clause 1.5 of the Code. The requirement in the Code is of real value to both the adviser and the client. The terms of the Code make it a relatively simple client relationship issue, an adviser can readily explain to clients they simply cannot act without a written acceptance of the terms.

*Whether the application was deficient*

- [32] The next issue is whether Mr Xue adequately addressed Mr Wang's employment qualifying for a work permit before submitting the application.
- [33] Mr Xue says he explored the issue with Mr Wang, and Mr Wang assured him his employer had addressed the issue of eligibility. Mr Xue has produced evidence that the form filed with Immigration New Zealand raised this point, and this corroborates Mr Xue's account.
- [34] However, the question remains whether the way in which Mr Xue addressed the issue was adequate. In essence, he is contending he did not complete the form in the normal manner, on the basis of an assurance from his client that his employer and Immigration New Zealand had already addressed the issues.

- [35] The view may be open that for Mr Wang to accept his client's assurance without further inquiry was not best practice. However, there is an element of judgment in a decision of that kind, and if it was an error of judgment in the present case, it falls short of justifying an adverse disciplinary finding.
- [36] Factors relevant to my view are:
- [36.1] Mr Xue had been in the position of employment and was seeking a new permit for the same position, so it was understandable there was a history of dealing between Mr Wang's employer and Immigration New Zealand.
  - [36.2] Mr Xue referred to and referenced an "approval in principle" from Immigration New Zealand on the form he submitted.
  - [36.3] He noted on the form that he was relying on information from his client, and gave notice of the position as he understood it to be.
  - [36.4] If the information was defective, then Immigration New Zealand could, and in fact did, make further inquiries. This was not a situation where incorrect information would result in an adverse outcome that could not be addressed further.
  - [36.5] Immigration New Zealand, Mr Wang's employer and other agencies were all potentially addressing the issues relating to the immigration status of employment positions like Mr Wang's. In fact, Immigration New Zealand did identify a recent Labour Market Test undertaken by Work and Income New Zealand as being pertinent. It was not obviously unreasonable for Mr Xue to conclude that Mr Wang may have been informed of communication between his employer and Immigration New Zealand.
  - [36.6] Mr Xue did contact Mr Wang's employer when he became aware there was an issue relating to the status of Mr Wang's employment. This was evidence that he was not reluctant to make contact when required.
- [37] Accordingly, Mr Xue balanced the reliability of the information he had against taking the time of Mr Wang's employer, and/or Immigration New Zealand. I am satisfied his decision to rely on the information he had was reasonable, particularly given the previous history of permits relating to the same employment, and the expectation that if there was an issue Immigration New Zealand would raise it, meaning the opportunity to address the point was not lost.
- [38] In relation to the medical certificate, Mr Xue has said he made inquiries of Mr Wang and could not get definite confirmation of the currency of his medical certificate. Accordingly, he filed the application and promptly followed up the issue when he found out the certificate was not current.
- [39] I accept that Mr Xue addressed the currency of the medical certificate, and reasonably proceeded on the basis of the information he had available. The certificate was a matter that could be followed up without detriment to Mr Xue.
- [40] Accordingly, I am satisfied Mr Xue discharged his professional obligations in relation to preparing the application for a work permit.

*Failure to communicate progress*

- [41] Mr Xue says he did regularly communicate with Mr Wang, and keep him informed of progress. He says he did so by telephone, as Mr Wang did not have an email address.
- [42] The written material produced by Mr Xue does evidence continuing attention to the issues raised by Mr Wang's application. There is no evidence that would explain why Mr Xue would not communicate with Mr Wang regarding what he was doing; indeed it would be surprising if there was no contact when a medical examination had to be arranged, and there was contact with a potential new employer.

- [43] Accordingly, on the basis of the material presently before the Tribunal, Mr Xue's claim that he keep in regular contact with Mr Wang and communicated progress to him must be accepted. Again, I am satisfied Mr Xue discharged his professional obligations in relation to communication with Mr Wang.

*Failure to warn Mr Wang that he could not work without a permit*

- [44] Mr Wang claims Mr Xue failed to inform him that he should not work without a permit.
- [45] Mr Xue says he did so and, further, Mr Wang must have been aware of this issue given his history of working in New Zealand, and the need to renew his permit.
- [46] I am satisfied Mr Xue did discuss the issues relating to the expiry of Mr Wang's permit adequately and appropriately. It is implausible that Mr Wang would not have been aware of the significance of his permit expiring, given the fact he was going to some trouble to get a new permit. The timing of the expiry of his current permit and what was required to obtain a new permit would almost inevitably be discussed, and the evidence that this occurred must be accepted.

*Summary*

- [47] I am satisfied that Mr Xue discharged his professional obligations, with the exception of complying with clause 1.5 of the Code.
- [48] Section 44(2)(e) provides that a breach of the Code is a ground for complaint, accordingly the complaint is upheld in that respect.

**Submissions on Sanctions**

- [49] Given the findings, section 50 allows the Tribunal to impose one or more of the disciplinary sanctions under section 51 of the Act.
- [50] The parties have the opportunity to present submissions.
- [51] The timetable for submissions will be as follows:
- [51.1] Mr Wang and the Authority are to make any submissions within 10 working days of the issue of this decision.
- [51.2] Mr Xue is to make any submissions (whether or not Mr Wang or the Authority makes any submissions) within 15 working days of the issue of this decision.
- [52] The parties are notified this decision will be published, with the names of the parties, after five working days unless any party applies for orders not to publish any aspect.

**DATED** at WELLINGTON this 29<sup>th</sup> day of June 2012

  
G D Pearson  
Chair

