

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

Decision No: [2014] NZIACDT 117

Reference No: IACDT 054/12

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**Anjani Lata Prakash**

Complainant

**AND**

**Na (Fiona) Zhou**

Adviser

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**DECISION**

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**REPRESENTATION:**

**Registrar:** Mr M Denyer, lawyer, Ministry of Business, Innovation and Employment

**Complainant:** In person

**Adviser:** Mr G P Tyrell, lawyer, Weston Ward & Lascelles, solicitors, Christchurch

Date Issued: 28 November 2014

## DECISION

### Preliminary

- [1] Ms Zhou took up employment in the practice of Richard Martin Immigration Ltd (the Practice). Mr Martin controlled the company, and was active in the Practice. Mr Martin was a struck off lawyer with a history of criminal offending against clients, and at the time Ms Zhou commenced employment he was facing criminal charges for breaches of the Immigration Advisers Licensing Act 2007 (the Act). The parties accept this is the background situation where this complaint arose and that, for the purposes of this decision, Mr Martin was dishonest and manipulative. Ms Zhou is entitled to any justification or excuse those circumstances provide to her.
- [2] Ms Zhou was the sole licensed immigration adviser in the Practice at the time of the events to which the complaint relates. However, a former licensed immigration adviser working in the Practice had completed the initial work for Ms Prakash. Ms Zhou personally lodged the application, naming herself as the authorised licensed immigration adviser, after she commenced working in the practice.
- [3] The parties largely agree on what happened:
  - [3.1] When Ms Zhou lodged the residence application (which was largely prepared by a former licensed immigration adviser in the Practice), there was no written agreement.
  - [3.2] When Immigration New Zealand queried the residence application, Ms Zhou consulted with Ms Prakash, prepared a response and submitted it.
  - [3.3] Immigration New Zealand, within two days or so of getting the response, declined Ms Prakash's application.
  - [3.4] Mr Martin, apparently, intercepted the letter from Immigration New Zealand declining the application. Ms Zhou did not know about Immigration New Zealand's decision and did not follow up until after Ms Prakash had made her own inquiries with Immigration New Zealand.
  - [3.5] Ms Prakash was not satisfied with the service she received. Ms Zhou agreed Ms Prakash would get a full refund of the fees she paid, unless the Associate Minister agreed to intervene for Ms Prakash.
  - [3.6] The Associate Minister did not intervene, and Ms Zhou did not refund the fees to Ms Prakash.
- [4] The issues for the Tribunal essentially turn on whether, in the circumstances, Ms Zhou should be personally responsible for the lack of a written agreement, a failure to follow up, and failure to refund fees. She says that, while there was no written agreement, she was entitled to assume the former licensed immigration adviser had attended to that matter. She says she could not have known Mr Martin intercepted correspondence and the delay in following up was reasonable. She says she endeavoured to persuade Mr Martin to refund fees and that was the extent of her responsibility.
- [5] The Tribunal has upheld the complaint because she was personally responsible for both having a written agreement and refunding fees. However, it has dismissed the complaint in respect of the failure to follow up Immigration New Zealand's decision, as the delay was not sufficient to trigger an adverse professional disciplinary finding.

### The Complaint

- [6] The Registrar filed a Statement of Complaint. The foundation of the complaint is an allegation by the complainant that:
  - [6.1] Ms Zhou was employed in the Practice from 30 May 2011 until 24 January 2013, and was the sole licensed immigration adviser conducting the Practice during that time. Mr Martin also worked in the practice.

- [6.2] Ms Prakash engaged the Practice to assist her with an application for a residence visa; she paid a fee in April 2011 for those services.
- [6.3] At the time Ms Prakash engaged the Practice to provide immigration services, there was no written agreement and Ms Zhou did not put one in place when she took over as the licensee of the Practice.
- [6.4] On 10 June 2011, or thereabouts, Ms Zhou lodged Ms Prakash's residence application.
- [6.5] On 4 August 2011, Immigration New Zealand identified potential difficulties with the application. Ms Zhou notified Ms Prakash and responded to Immigration New Zealand on 24 August 2011.
- [6.6] Immigration New Zealand declined the application on 26 August 2011 and wrote to the Practice, care of Ms Zhou. She did not inform Ms Prakash of her response to Immigration New Zealand's queries or tell her that Immigration New Zealand declined her application.
- [6.7] Ms Prakash ascertained that Immigration New Zealand had declined her application on 5 January 2012, through making direct contact with Immigration New Zealand.
- [6.8] Ms Zhou agreed with Ms Prakash in writing that she would take the matter up with the Associate Minister of Immigration and fully refund all the professional fees if not successful.
- [6.9] Ms Zhou wrote to the Associate Minister, who declined to intervene.
- [7] The Statement of Complaint identified three potential breaches (a fourth was abandoned at the hearing), namely:
- [7.1] *Clause 3(a) of the Code of Conduct – the obligation to maintain professional business practices including confirming in writing when applications have been lodged and timely updates.* The particulars identify a failure to inform the Complainant in writing of the issues raised by Immigration New Zealand in the letter dated 4 August 2011, and that Immigration New Zealand declined her application on 26 August 2011.
- [7.2] *Clause 3(d) of the Code of Conduct – the obligation to maintain professional business practices including providing any refunds payable upon completing or ceasing a contract for services.* The particulars identify an agreement dated 13 February 2012 that entitled Ms Prakash to a full refund, on certain conditions. She refunded only \$1,500 of \$6,000, when the conditions for a full refund were met.
- [7.3] *Clause 1.5(a) of the Code of Conduct – the obligation to ensure that before any agreement was entered into, the Complainant was made aware in writing of the terms of the agreement and all significant matters relating to it.* The particulars identify that when Ms Zhou personally undertook work on the application for residence, there was no written agreement in place between her and the Complainant.

#### **Ms Zhou's response to the statement of complaint**

- [8] Ms Zhou responded to the Statement of Complaint with a Statement of Reply. To the extent it relates to matters still in issue, the response was to the effect:
- [8.1] She had met with Ms Prakash after Immigration New Zealand had sent notification of difficulties with the application on about 4 August 2011. She says Mr Richard Martin sent the letter to Ms Prakash by email.
- [8.2] The response to Immigration New Zealand regarding the issues raised was discussed when she and Ms Prakash met, soon after 4 August 2011.

- [8.3] Ms Zhou says the letter from Immigration New Zealand declining the application on 26 August 2011 was out of her knowledge and control.
- [8.4] She notified Ms Prakash that her residence application was declined promptly when she became aware of that fact in January 2012, and promptly informed her of the result of an approach to the Associate Minister in May 2012.
- [8.5] There was a written agreement after the Immigration New Zealand declined the application, and the initial work had commenced before Ms Zhou was in the practice.
- [8.6] Mr Martin's intervention was responsible for any communication failure.
- [8.7] Ms Zhou did not take the fees, so is not responsible for refunding them.

### **Ms Prakash's position**

- [9] Ms Prakash responded to the Statement of Complaint by supporting some of the grounds she did not pursue at the oral hearing.

### **Evidence**

- [10] At an oral hearing, Ms Prakash and Ms Zhou gave evidence.
- [11] Ms Prakash said she paid the fees before Ms Zhou worked in the practice, but said there was no written agreement relating to the work at that point. She dealt with a different licensed immigration adviser, and Mr Martin. She accepted she was satisfied with Ms Zhou's professional work down to the meeting of about 4 August 2011. To that point Ms Zhou communicated effectively, and she was satisfied with the response Ms Zhou made to Immigration New Zealand when they raised issues regarding the residence application.
- [12] Ms Prakash said her concerns started after Ms Zhou provided her response to Immigration New Zealand on 24 August 2011. She complains that Ms Zhou failed to tell her when Immigration New Zealand declined her application some two days later, she found out through her own inquiries in January 2012. Ms Prakash regarded the failure to follow up as negligence. Ms Prakash said the correct amount not refunded was \$5,500.
- [13] Ms Zhou said she assumed there was an existing agreement for the provision of services, as another licensed immigration adviser commenced the residence application instructions.
- [14] Ms Zhou said the delay in informing Ms Prakash occurred due to Mr Martin not passing on Immigration New Zealand's communication. She said she first saw Immigration New Zealand's 26 August 2011 letter in January 2012, and had until that time reasonably considered the application was still in progress. She thought Mr Martin had intercepted the communication, as he had control over the mail.
- [15] Ms Zhou accepted Ms Prakash was entitled to a refund of fees, but had limited control over the situation and Mr Martin only partly refunded fees. She said she did not have control of funds in the practice.

### **The positions taken by the parties**

- [16] The Registrar did not take any position on the facts.
- [17] Ms Prakash accepted that particularised breaches of clause 1.1(a) in the Statement of Complaint could not be sustained. She was however, still concerned about the delay in finding out what happened with her application and the failure to refund fees. She also maintained the position she had not signed a contract when Ms Zhou first engaged with the file.
- [18] For Ms Zhou, Mr Tyrrell contended the real issues were the delay and the failure to refund money. However, they were both matters under Mr Martin's control and he contended that Ms Zhou is not accountable for Mr Martin's conduct.

[19] He referred to the decision *Immigration Advisers Authority v Yap* [2014] NZHC 1215, and the District Court's decision in that matter (DC Christchurch, 2013-009-001684, 28 January 2014). In particular, he relied on the argument that Ms Zhou is not responsible for what she could not control.

[20] Mr Tyrrell emphasised Mr Martin's role. He was formerly a lawyer, struck off after stealing from clients. He said Mr Martin had a history of using immigration advisers *like puppets*, and he was a *skilled, manipulative, liar who uses people to further his own ends*.

## Discussion

### *The issues*

[21] The Statement of Complaint identifies the grounds of the complaint. It did refer to potential consideration of dishonesty and other matters. However, I am satisfied the evidence did not support those potential grounds, and would have had natural justice concerns as to the adequacy of the notice for Ms Zhou if the evidence did seriously raise such concerns.

[22] Accordingly, I am satisfied the evidence is sufficient to consider only the three grounds identified in the Statement of Complaint (set out in paragraph [7] above); they are the grounds the parties agreed the Tribunal needed to consider.

### *The evidence*

[23] Ms Zhou's account and Ms Prakash's account, in relation to matters of which they were both aware of, agreed. The critical differences relate to their perspective of Ms Zhou's responsibility.

*Clause 3(a) of the Code of Conduct – the obligation to maintain professional business practices including confirming in writing when applications have been lodged and timely updates.*

[24] The first ground of complaint has two factual components:

[24.1] A failure to inform Ms Prakash in writing of the issues raised by Immigration New Zealand in the letter dated 4 August 2011, and

[24.2] Failing to inform Ms Prakash that Immigration New Zealand declined her application on 26 August 2011.

[25] The first of those limbs is somewhat technical in nature as both Ms Prakash and the Registrar appear to accept that there was a meeting with adequate discussion of the issues. However, the statement of complaint alleges a failure to inform the complainant in writing. The extent of the duty under clause 3(a) of the Code of Conduct is to *confirm in writing to clients when applications have been lodged, with ongoing timely updates*. There was no lodgement involved at that point, and Ms Prakash accepts she saw Immigration New Zealand's letter. Accordingly, I find no breach of clause 3(a) in respect of this matter Ms Prakash accepted that at the hearing.

[26] The second limb is more complex. Ms Zhou says she was the victim of Mr Martin, and she thinks he deceptively withheld the correspondence. On the balance of probabilities and recognising that Mr Martin has not had an opportunity for comment, I accept that for the purposes of this decision that Ms Zhou's version of events is probably what happened. The evidence supported Mr Tyrrell's submission regarding Mr Martin's dishonest disposition and deceptive conduct. The particulars do not allege Ms Zhou failed to secure the Practice against Mr Martin; accordingly, I approach the issue on the basis that is not an element of the complaint.

[27] The failure to follow up was over an extended period (from 24 August 2011, when Ms Zhou lodged final information, to early January 2012); however, I accept that the summer holiday period did contribute. My view is that the delay was longer than reasonable, but the initial period prior to the summer holiday period was not great. A fair view might be that two months was reasonable, and there was a further month. However, I do not consider that passes the disciplinary threshold. The charge relates to reporting and in all the circumstances, an additional month is an oversight not a disciplinary offence.

[28] Accordingly, I do not find any breach of clause 3(a) of the Code established.

*Clause 3(d) of the Code of Conduct – the obligation to maintain professional business practices including providing any refunds payable upon completing or ceasing a contract for services.*

[29] The particulars identify an agreement dated 13 February 2012 that entitled Ms Prakash to a full refund which Ms Zhou failed to pay.

[30] Ms Zhou accepts she was the sole licenced immigration adviser in the Practice, she is named as the licensed immigration adviser in an agreement which provides Ms Prakash would get a full refund on certain conditions. She accepts she was present when the agreement was executed and she accepts Ms Prakash is entitled to the refund.

[31] However, Ms Zhou says that the extent of her obligation was to encourage Mr Martin to pay the refund, she made her best efforts and that is all she had to do. She also says she did not receive the fees; Mr Martin received them before she was working in the Practice.

[32] I do not accept Ms Zhou's contention. Ms Prakash was dealing with a practice where Ms Zhou was the sole licensed immigration adviser and was identified personally in the agreement as the licensee. The term in the agreement amounts to an undertaking that Ms Prakash would refund the fees on certain conditions. It is wholly inconsistent with the Act, and elementary notions of professional responsibility, that the licensed professional personally responsible for service delivery can transfer their statutory responsibility to another party.

[33] I do not accept the proposition the refund was beyond Ms Zhou's control, before she gave the undertaking she was personally responsible for ensuring she could make good on her undertaking. This Tribunal has consistently made it clear to licensed immigration advisers, that they carry personal responsibility for the whole practice where they are the sole licensee, and the professional instructions where they are the licensed immigration adviser.

[34] In the Tribunal's decision *JM v DTM* [2011] NZIACDT 1, the Tribunal emphasised these aspects of professional responsibility:

[38] It is evident a key element of the mechanism in the Act is that licensed immigration advisers are clearly identified; client relationships commence with the Adviser identifying their standing, and providing of a copy of the Code (Code clause 1.4). The scope of section 6 is wide, and one no doubt intended to ensure licensed advisers are not able to be used as a "front" for unlicensed operators. The legislation is structured to effect functional exclusion from the professional relationship of any person who is not either licensed or exempt.

[39] The legislation provides an important privilege to licensed immigration advisers in allowing them to exclusively provide immigration advice (along with exempt persons). However, consistent with that, licensed advisers carry professional obligations. They are personally responsible for the professional relationship, regardless of whether they are employees, or otherwise.

[40] Dealings in relation to fees in my view come with section 7, so a licensed immigration adviser must deal with the client in relation to fees (unless it is simply a clerical aspect such as issuing invoices, which is provided for in section 7(b)(iii)). Determining the value of professional work, and negotiating what is to be paid requires knowledge and experience in immigration, and assists with an immigration matter.

[41] The purpose of the Act is set out in section 3, and it includes promoting and protecting the interests of consumers receiving immigration advice. Abusive practices in relation to fees were certainly among the concerns the Act was intended to meet. Some confirmation licensed immigration advisers are responsible for dealing with fees as well as other aspects of the professional relationship is found in the scope of disciplinary sanctions. Licensed immigration advisers will potentially be personally responsible under section 51(1)(h) for the refunding of fees in the event such an order is made as a disciplinary sanction. It will not be an answer to say their employer received the fees.

- [42] Accordingly, licensed immigration advisers are given the freedom to practise as employees where they have little control over the business practices of their employer. However, they do so at their peril unless they establish proper protection for their professional independence, and assurance they can ensure they manage and deliver service for all aspects of the professional relationship (alone or with another licensed adviser). It is not open to the Adviser to claim they are subordinate to an employer or contractor, or say an unlicensed person was responsible for aspects of the professional relationship.
- [35] There is nothing in the decisions *Immigration Advisers Authority v Yap* [2014] NZHC 1215, and the District Court's decision in that matter (DC Christchurch, 2013-009-001684, 28 January 2014) which reverse those views. The two decisions are essentially decisions on facts, and the proposition that something truly beyond a person's control does not trigger professional disciplinary consequences is self-evident. The usual point of difficulty is what is controllable, proper control often requires that a professional person maintain proper control over employees and resources within a practice. Regardless, there are occasions when professional persons are blameless victims of deception, or other circumstances, and that does not trigger professional disciplinary consequences.
- [36] In the present case, the undertaking to refund fees was entirely within Ms Zhou's control. Ms Zhou had at least two options in relation to the agreement to refund fees, either not give that undertaking, as she did not control of the practice, or be ready personally to make good on the undertaking. She did neither. It cannot be a matter of justification or excuse for not making good on the undertaking to say Mr Martin received the fees originally, she knew that when she gave the undertaking. She was responsible for making any arrangements with Mr Martin, her client was not privy to that. Her client had an undertaking in writing and Ms Zhou is named as the licensed immigration adviser in that document; Ms Prakash was entitled to have it honoured by Ms Zhou.
- [37] I am satisfied Ms Zhou breached clause 3(d) of the Code of Conduct, she gave an undertaking, had a personal obligation to refund fees and failed to do so.

*Clause 1.5(a) of the Code of Conduct – the obligation to ensure that before any agreement was entered into, the Complainant was made aware in writing of the terms of the agreement and all significant matters relating to it.*

- [38] The particulars identify that when Ms Zhou personally undertook work on the application for residence, there was no written agreement in place between her and the complainant. The relevant point in time is lodging the application, this was the first work she did on the file, and she needed written authority at that point. Ms Zhou personally signed the application as the licensed immigration adviser. Later it was necessary for her to engage again with the instructions and prepare a response for Immigration New Zealand.
- [39] Ms Zhou says she was entitled to rely on a former adviser having completed client engagement processes, including disclosure and having a written agreement. While I can accept that may be reasonable if a file required no action, this situation was different. Ms Zhou was personally lodging an application and then undertook further work. She had to look at the file and understand what the former licensed immigration adviser had done. Reinforcing the obligation regarding client engagement is the requirement to hold a written authority (clause 2.1(h) of the Code of Conduct). Ms Zhou had an obligation to personally get written authority to act, assuming the client engagement was in order was not a reasonable position as it would not cover her involvement even if it was otherwise compliant.
- [40] Accordingly, I am satisfied Ms Zhou did not have a written agreement in place, and this was within her control. She failed to address the issue. Accordingly, I find she breached clause 1.5(a) of the Code of Conduct.

## **Decision**

- [41] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [42] The adviser breached the Code of Conduct in the respects identified, namely clauses 3(d) and 1.5(a). They are grounds for complaint pursuant to section 44(2)(e) of the Act.

[43] In all other respects, the Tribunal dismisses the complaint.

**Submissions on Sanctions**

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

[45] The Authority and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, the adviser is entitled to make submissions and respond to any submissions from the other parties.

[46] The Tribunal will take the position the refund of fees should have been \$5,500 unless any party disputes the figure. If so, they should explain their position, and provide any evidence to support it.

[47] 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.

*Timetable*

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

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

[48.2] The adviser is to make any further submissions (whether or not the Authority or the complainant makes submissions) within 15 working days of the issue of this decision.

[48.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of her filing and serving those submissions.

**DATED** at WELLINGTON this 28<sup>th</sup> day of November 2014

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**G D Pearson**  
Chair