

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

Decision No: [2015] NZIACDT 2

Reference No: IACDT 013/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Afrez Tasheef Ali

Complainant

AND

Zhirong (Gordon) Wang

Adviser

DECISION

REPRESENTATION:

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

Complainant: In person

Adviser: Ms H F McKenzie, Crown Solicitor's Office, Christchurch

Date Issued: 22 January 2015

DECISION

Preliminary

- [1] Mr Wang was an employee in the practice of Richard Martin Immigration Ltd (the Practice). Mr Martin controlled the company, and was active in the Practice. Mr Martin had been a lawyer but was struck off the roll of barristers and solicitors and has a history of criminal offending against clients. Mr Wang at the relevant time was the sole licensed immigration adviser in the Practice. The Immigration Advisers Licensing Act 2007 (the Act) allows only licensed immigration advisers and persons exempt from holding a licence (such as lawyers) to provide immigration services.
- [2] The parties largely agree on the general background:
 - [2.1] The complainant came to the Practice and had a meeting.
 - [2.2] He wanted a work permit; his prospective employers supported that and came to the meeting.
 - [2.3] The Practice prepared an application and lodged it with Immigration New Zealand.
 - [2.4] Mr Wang left the Practice, the application failed, and the complainant is not satisfied with how the Practice dealt with his instructions.
- [3] The critical issues are whether Mr Wang delivered professional services or whether Mr Martin did so, despite being unable to do so legally, or whether there was a combination. There is a critical factual dispute. The complainant says he never met Mr Wang, but the written record shows Mr Wang's name on documents including a representation to Immigration New Zealand that he provided the professional services for the complainant. Mr Wang also says he did briefly meet the complainant, but he accepts Mr Martin was involved in the delivery of services, though he says not in breach of the Act.
- [4] The outcome of this complaint requires an evaluation of the facts, particularly in relation to what role Mr Wang and Mr Martin respectively had. Then it is necessary to consider Mr Wang's obligations in his role as the sole licensee of the Practice and, in particular, as the licensed immigration adviser acting for the complainant in this matter.
- [5] After doing so, the Tribunal will determine the following potential grounds of complaint:
 - [5.1] Whether Mr Wang was a party to Mr Martin providing immigration services unlawfully and failed to take charge and manage the professional work.
 - [5.2] Whether Mr Wang dishonestly represented to Immigration New Zealand that he was the licensed immigration adviser providing professional services on the instructions in order to hide the fact Mr Martin unlawfully provided immigration services to Mr Ali.
 - [5.3] Whether Mr Wang acted properly, and looked after the complainant's interests when he left the Practice.
 - [5.4] Whether Mr Martin used the Practice dishonestly to take fees for unlawful immigration services and whether Mr Wang was a party to that.
- [6] The Tribunal has determined Mr Wang was a party to Mr Martin providing immigration services unlawfully in that he failed to manage the complainant's affairs in such a way as to reasonably prevent Mr Martin from achieving this. Furthermore, the Tribunal has concluded Mr Wang failed to look after the complainant's interests properly when he left the Practice.
- [7] However, the Tribunal has not upheld the other aspects of the complaint, as it has not found Mr Wang was dishonest.

The Complaint

- [8] The Registrar filed a Statement of Complaint. The foundation of the complaint is an allegation by the complainant that:
- [8.1] On 4 February 2011, the complainant met Mr Richard Martin at Richard Martin Immigration Ltd (the Practice), and told him he wanted to apply for a work visa.
 - [8.2] Other people involved with Richard Martin Immigration Ltd interacted with the complainant, but never the adviser.
 - [8.3] Mr Martin, or someone connected with him, lodged an application for a work visa; Immigration New Zealand declined the application on 19 May 2011.
 - [8.4] When Immigration New Zealand started to take steps to deport the complainant, Mr Martin continued to act. In August 2011, someone other than the adviser lodged an application under section 61. A licensed immigration adviser apparently signed the application. The person signing was not the adviser subject to this complaint.
 - [8.5] Richard Martin Immigration Ltd. returned the complainant's passport to him on 11 October 2011. That was too late, and as a result, the complainant was in New Zealand unlawfully.
- [9] Notably, these facts did not refer to Mr Wang; however, the particulars of the alleged infringements did imply Mr Wang was engaged in aspects of the instructions. There were also documents that appeared to show he did have a role in the matter.
- [10] The Tribunal has approached the complaint on the basis Mr Wang left the Practice ending the professional relationship in the period between 4 and 11 April 2011. Accordingly, whether he met his obligations down to that point, including his obligations to complainant at the time he left the Practice (refer Clause 1.1(c) of the Licensed Immigration Advisers Code of Conduct 2010 (Code of Conduct)) is the only relevant consideration. What occurred after that point, other than any need to inform of the consequences of any failure at the point where the professional relationship ended are not relevant to Mr Wang's professional obligations.

Mr Wang's Response to the Statement of Complaint

- [11] Mr Wang responded to the Statement of Complaint by filing a Statement of Reply and affidavit in support.
- [12] He acknowledged there were difficulties in the Practice, including that Mr Martin was a former lawyer, struck off for dishonesty.
- [13] Mr Wang said he was a part-time employee in the Practice during the period from 20 October 2009 to 11 April 2011. Another licensed immigration adviser was working full-time in the Practice from November 2009 until approximately the end of the first week in February 2011.
- [14] On 25 January 2011 Mr Wang wrote an email to Mr Martin, in this email:
- [14.1] He indicated he was aware it was unlawful for Mr Martin to provide immigration advice, and that Mr Martin appeared to be "top of the list [for the Authority's] investigation over suspicion of providing immigration advice unlawfully".
 - [14.2] He could resign and leave when the fulltime licence holder was leaving.
 - [14.3] Unless there was another licensed immigration adviser appointed on a fulltime basis, Mr Wang could not deal with the existing clients, let alone any new clients.
- [15] On 28 January 2011, the adviser had a meeting regarding the arrangements for the continuation of the Practice. Mr Martin, the departing licence holder and Mr Wang were present. Mr Wang agreed:
- [15.1] To be briefed on all existing cases,

- [15.2] To be the point of contact for urgent matters, and
- [15.3] The departing adviser would inform clients Mr Wang was to be responsible for the departing adviser's clients until a new person took over.
- [16] Mr Wang continued in his position until 4 April 2011 when he resigned with effect from 11 April 2011. He says a decision of this Tribunal he received a few days earlier disclosed Mr Martin's professional history and influenced him to resign.
- [17] He notified clients on 11 April 2011 he had resigned and indicated the Practice would have a new licensed immigration adviser who would take over their affairs. He considered he could do no more for the existing clients as he was under a restraint of trade agreement with Richard Martin Immigration Ltd.
- [18] Because of the complaint, Mr Wang obtained part of the complainant's file from the Practice. However, the material was limited, consisting of a note of a meeting and some steps taken on behalf of the complainant. From this material Mr Wang deduced:
- [18.1] There was a meeting with three people attending. It appears the meeting was on 4 February 2011. Mr Wang did not identify whether he was the third person or whether someone else from Richard Martin Immigration Ltd. attended.
- [18.2] There was an issue relating to a missing advertisement identified on 4 March 2011, someone followed up with a prospective employer on the same day.
- [18.3] On 7 March 2011 and 9 March 2011, someone contacted the employer again.
- [18.4] On 4 April 2011, someone communicated with Immigration New Zealand.

The Complainant's Statement of Reply

- [19] The complainant produced an agreement for the provision of professional services dated 4 February 2011; it identifies Mr Wang as the licensed immigration adviser dealing with the instructions.
- [20] He also produced an invoice addressed to a prospective employer for seeking a work permit for the complainant. The date on the document is 24 November 2010. It appears to relate to work prior to Mr Wang's involvement.
- [21] He also produced a letter dated 19 May 2011 addressed to Mr Wang from Immigration New Zealand. It was addressed to the post office box that appeared to be held by the Practice. This letter declined the application for a work visa, and referred to a previous letter dated 28 April 2011. The complainant said Mr Wang faxed him a copy of the letter, though the document does not on its face show it came from Mr Wang.

Interim Decision

- [22] The Tribunal has an inquisitorial role when necessary (s 49 of the Act). The Statement of Complaint failed to provide clear allegations as to Mr Wang's role or identify the potential findings of professional conduct consistent with the factual base. Mr Wang's and the complainant's statements in response to the Statement of Complaint, however, did provide some basis for potential factual findings that could result in adverse findings against Mr Wang.
- [23] The Tribunal issued an interim decision identifying potential factual findings that might be made on the material before it, and related them to potential findings of breaches of the Code of Conduct, and the Act that could result. The interim decision made it very clear the Tribunal was not reaching any conclusions. Instead, it put Mr Wang on notice of adverse findings that may follow in the absence of further information, and provided him with the opportunity to seek an oral hearing to address the issues effectively.
- [24] The crux of the Tribunal's concerns regarding the material before it, and its potential implications for Mr Wang were:

- [24.1] Mr Wang accepted he was the sole licensee in the Practice from early February 2011 until 11 April 2011. He was accordingly responsible for ensuring the complainant received services lawfully, in accordance with the Act and the Code of Conduct.
- [24.2] Mr Richard Martin was to some extent engaged in the complainant's affairs. He had a history of criminal offending where he exploited vulnerable immigration clients. He could not give *immigration advice* as defined in the Act without committing a criminal offence.
- [24.3] The complainant did not believe he had ever met Mr Wang, though documents before the Tribunal have Mr Wang's name on them, indicating he carried out some of the work.
- [24.4] If the complainant was correct about the 4 February 2011 meeting, Mr Martin conducted it and Mr Wang was not present. At that meeting, Mr Martin acted unlawfully and Mr Wang apparently implemented the instructions knowing that was the position.
- [25] Specifically the Tribunal put Mr Wang on notice it could potentially find:
- [25.1] He acted unprofessionally as he was a party to Mr Martin providing immigration advice unlawfully (clause 1 of the Code of Conduct).
- [25.2] He continued to act with a lack of care, diligence and professionalism in failing to:
- [25.2.1] Take charge of the instructions and client relationship, and
- [25.2.2] Ensure he delivered professional advice and services, meeting the legislated standard, to the complainant
- (clause 1 of the Code of Conduct).
- [25.3] He engaged in dishonest or misleading behaviour in being a party to submitting a work visa application on 9 March 2011. That document contained in section R a representation that he was the licensed immigration adviser responsible for the application. That he affixed, in section S, his licence number and signed the document intending to cause Immigration New Zealand to believe he was responsible for submitting the document and attended to the professional duties in relation to it. Whereas, he knew he had never met the complainant and that in fact Mr Martin prepared the document. That he did so:
- [25.3.1] For the purpose of hiding the fact Mr Martin unlawfully gave advice;
- [25.3.2] Intended to prevent Immigration New Zealand detecting Mr Martin's offending; and
- [25.3.3] Despite express notice on the form concerning criminal offending.
- (Section 44(2)(d) of the Act)
- [25.4] He failed to refund fees due when his instructions were terminated (clause 3(d) of the Code of Conduct) and failed to ensure the return of passports and personal documents without delay (clause 1.3 of the Code of Conduct). There was no other person in the practice of Richard Martin Immigration Ltd. at the time, who could lawfully continue the instructions in any form; the instructions ended when the adviser ceased to act. He was not entitled to leave any unlicensed person dealing with the engagement and knew that Mr Martin was likely to exploit the complainant.
- [25.5] In the course of the sustained and unprofessional conduct, he was a party to Mr Martin's criminal offending, assisted him in unlawfully providing immigration advice and in dishonestly taking fees for his unlawful activities (clause 1 of the Code of Conduct).

Mr Wang's Response to the Interim Decision

- [26] Mr Wang engaged counsel at this point. Ms McKenzie for Mr Wang provided submissions that re-characterised what the interim decision identified as *potential grounds for complaint as interim findings*. She then submitted the Tribunal reached interim findings which:
- [26.1] No reasonable decision-maker could reach;
 - [26.2] They were unreasonable *per se*;
 - [26.3] Irrational, and
 - [26.4] Were disproportionate to the facts at hand.
- [27] Mr Wang sought an oral hearing, which took place.

Oral Hearing

- [28] At the oral hearing Mr Wang was the only witness present. The complainant, who was not in New Zealand, attended by telephone. However, the telephone connection was less than ideal. As matters transpired the telephone connection was compromised. However, there was only one critical element of fact where Mr Wang and the complainant disagreed. That related to whether Mr Wang was personally present at the 4 February 2011 meeting or not. The complainant said Mr Wang was not present and Mr Wang said he was present, though only for a short time.
- [29] Due to the communication difficulties, the parties agreed the Tribunal should put disputed points to the complainant in writing, and give him the opportunity to reply. A memorandum was issued after the hearing, though the complainant did not reply. The Tribunal made it clear he was not required to respond unless he wished to make any further points.
- [30] In relation to the meeting, there were factors that made it understandable that Mr Wang and the complainant may have different recall regarding Mr Wang's presence. They both agreed that Mr Martin was present during at least part of the meeting. The complainant's prospective employers were actively engaged at the meeting, as the complainant's command of the English language is incomplete. Accordingly, the complainant was not necessarily fully aware of the roles of the persons present or what they said in detail. In these circumstances, it would be unsafe to reject Mr Wang's evidence he was present for part of the meeting, even though the complainant does not recall him being there. That is particularly so when the complainant could not be cross-examined.
- [31] The Tribunal is required to deal with matters on the papers to the extent possible; the purpose of the oral hearing, in this instance, was to give Mr Wang the opportunity to answer the written material before the Tribunal, in the most effective manner and not for the presentation of a prosecution. Neither the complainant nor the Registrar sought to add to the written material with oral evidence.

Discussion

Mr Wang's evidence

- [32] As noted the only point of significant dispute in the evidence was whether Mr Wang attended the 4 February 2011 meeting. For the reasons discussed, I accept his evidence he did attend the meeting for a brief period as he claimed. Mr Wang suggested there were inconsistencies in the complainant's account. However, they were matters of detail and the complainant was dealing with a process where in significant respects he gained information second hand from his prospective employers. He sought to characterise this as going to the complainant's integrity. That suggestion is without merit, any discrepancies are unexceptional matters likely arising out of the communication difficulties the complainant faced. Regardless, I have accepted Mr Wang's evidence of the events, and nothing turns on those minor differences.

- [33] Mr Wang's account of the relevant events concedes that he was the only licensed immigration adviser in the Practice on 4 February 2011 when the meeting with the complainant, his prospective employers, Mr Martin and Mr Wang occurred. By that time Mr Wang had become aware of a decision of this Tribunal made on 21 January 2011, which found in an unrelated matter he was a party to Mr Martin providing immigration advice unlawfully. At the time of the meeting, he was facing the imposition of professional disciplinary sanctions in relation to that finding. In evidence, Mr Wang attributed the Tribunal's finding not to his conduct, but to the adequacy of his response to the Tribunal.
- [34] He said that on 4 February 2011, he was still not aware of Mr Martin's previous criminal offending against clients or his professional disciplinary history. However, only days earlier on 25 January 2011, he had written to Mr Martin in an email stating it was 'obvious you are on the top of the list in IAA's investigation over suspicion in providing immigration advice unlawfully.'
- [35] Mr Wang said of Mr Martin's background that he did not consider it relevant to findings the Tribunal may make if Mr Martin was engaging in the complainant's affairs. He justified this by saying that he intended to ensure compliance with the Act and the Code of Conduct, and attended the 4 February 2011 meeting for that purpose. Mr Wang accepted Mr Martin was engaging with clients behind closed doors and that he did not know what Mr Martin said to clients in those circumstances.
- [36] Mr Wang said there were some 130 live files in the Practice while he was the sole licensee. He also accepted that he was concerned as to his capacity to manage them all as he had other work. However, as matters transpired the files were largely inactive and only required monitoring. Accordingly, he said he was able to deal professionally with the Practice and did not need to have Mr Martin undertake work which the Act did not permit. In particular, he said there were six or so new matters and he personally managed them and the 170 live applications that only required monitoring by him.
- [37] Mr Wang said the complainant's matter was straightforward and he was satisfied only minor input was necessary. He said he attended the meeting for a sufficient period to get an understanding of the issues. He accepted he was responsible for lodging the complainant's work visa and undertook a number of steps. Those included reviewing the visa application and its supporting material before submitting it to Immigration New Zealand.
- [38] He said Mr Martin undertook what he considered to be *clerical functions*. These included:
- [38.1] Discussions with the complainant's prospective employers.
- [38.2] Signing the agreement for the provision of services.
- [38.3] Filling in Mr Wang's details on the application for a work visa for the complainant.
- [38.4] Receiving fees and arranging for delivery of the application for a work visa to Immigration New Zealand.
- [39] He did not consider Mr Martin did any work prohibited by the Act.
- [40] He said he could not control the refund of fees after he left. He said when he left the Practice on 11 April 2011 there was no reason for Mr Wang to think there was any irregularity with the complainant's affairs, or that a refund of fees was due, or would be due. However, he did accept that when he left there was no licensed immigration adviser in the Practice; accordingly, he left clients in Mr Martin's care. He also accepted he did not have control of, or access to, the bank accounts in the Practice.
- [41] Mr Wang said he was not dishonest or misleading, and undertook his professional responsibilities properly. However, he said that as a part-time employee, he was not responsible for failings of Mr Martin. When he left the Practice, Mr Wang says he notified clients and claimed there was only so much he could do as a departing employee. He said he did not agree to accept responsibility for the Practice, or present himself as the sole licensee. However, he accepted he was in the relevant period the sole licensee and that during that period the Practice offered and provided immigration services to the public and existing clients. Mr Wang said he was doing no more than acting as 'a point of contact for clients in relation to urgent matters.' He said he 'could not and did not purport to have taken responsibility for the

entire Practice.’ He accepted he ‘neither knew nor controlled what Mr Martin and others were doing in the Practice during the period he was the sole licensee.’

Evaluation of the facts

- [42] The written material before the Tribunal showed the Practice was highly problematic. Mr Martin was active in the Practice; he had a history of criminally exploiting clients and is now serving a sentence of imprisonment for exploiting clients in the Practice. Only days prior to the engagement subject to this complaint, the Tribunal found Mr Wang had been a party to Mr Martin unlawfully providing services to a client. Furthermore, about the same time, Mr Wang had pointed out to Mr Martin that the Authority was in the process of investigating him (Mr Martin) for unlawfully providing immigration advice.
- [43] At the time the complainant first engaged with the Practice, it was entirely dependent on Mr Wang’s licence. Otherwise it could not have operated, except with obvious disregard for the Act.
- [44] The complainant’s evidence was that Mr Wang never engaged with him and that he never met with him at all. Mr Martin provided the immigration services, and he was surprised to find Mr Wang’s name on documentation submitted to Immigration New Zealand. That documentation represented to Immigration New Zealand that Mr Wang had engaged with the complainant and provided immigration advice to him.
- [45] Those facts, if established, would inevitably result in a finding Mr Wang was a party to Mr Martin engaging with the complainant unlawfully, then covering it up with a dishonest declaration to Immigration New Zealand. The declaration is before the Tribunal, and Mr Wang accepts he presented it to Immigration New Zealand. The Tribunal put Mr Wang on notice of this possibility and gave him the opportunity to respond.
- [46] I have already noted I accept Mr Wang’s evidence that he did briefly engage with the complainant. I also accept his evidence he made the declaration to Immigration New Zealand believing he had provided advice and that he had checked the documents and believed the declaration was true.
- [47] I also accept Mr Wang’s evidence regarding his management of the complainant’s instructions and the relevant circumstances.

Contention that the interim decision is unreasonable, irrational, and disproportionate

- [48] The first matter to address is the submission that the Tribunal’s interim decision was unreasonable, irrational and disproportionate.
- [49] The first difficulty with the submission is it mischaracterises the interim decision as making interim findings, rather than putting Mr Wang on notice of potential findings. The interim decision identified the Tribunal was not making findings, but putting Mr Wang on notice of potential findings if the material before the Tribunal was not answered. It gave him the opportunity to provide an answer. The obligation on a decision-maker to take such steps and ensure a person at risk of adverse findings is on notice is an elementary principle of administrative law.
- [50] The material before the Tribunal at the time of the interim decision, if not answered, potentially established:
- [50.1] Mr Martin was the person who unlawfully provided all the immigration advice to the complainant. That was the complainant’s position.
- [50.2] Mr Wang made a false declaration, which hid that fact from Immigration New Zealand.
- [50.3] Mr Wang was using his licence to cover up the fact Mr Martin was, in reality, the person operating the Practice and providing immigration advice in the Practice.
- [51] The suggestion that the potential findings were unreasonable, irrational and disproportionate was wholly without foundation and inappropriate.

Mr Wang's responsibility

- [52] A further preliminary matter to consider is Mr Wang's responsibility for the conduct of the Practice generally, and in relation to the complainant specifically.
- [53] A central feature of Mr Wang's evidence and the submissions presented for him was that he was only a part-time employee, so could not be expected to take responsibility for Mr Martin. His conduct was said to be beyond Mr Wang's control. Mr Wang accepted he did not have full and effective control of the Practice. Factually, he claimed he took all necessary and reasonable steps to control the Practice.
- [54] 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.
- [55] Ms McKenzie referred to *Immigration Advisers Authority v Yap* [2014] NZHC 1215, and the District Court's decision in that matter (DC Christchurch, CIV 2013-009-001684, 28 January 2014). The two decisions are essentially decisions considering facts, in the High Court both parties took the position that they would not support the District Court's analysis of the facts; the High Court allowed the appeal on that basis. Accordingly, the decisions do not take the matter beyond the facts of that case.
- [56] The observation by the District Court, that when something is truly beyond a person's control it does not trigger professional disciplinary consequences, is an unexceptional professional disciplinary principle and is consistent with the decisions of this Tribunal. The usual point of difficulty is identifying what is controllable. Proper control often requires that a professional person maintain reasonable practices to ensure the proper supervision over employees and

resources within a practice. Regardless, there are occasions when professional persons are blameless victims of deception, or other circumstances, and that will not trigger professional disciplinary consequences.

- [57] In this case, Mr Wang should have known Mr Martin posed a danger to clients. His history was a matter of public record, and he was a person in the Practice over whom Mr Wang had to maintain proper control. Mr Wang's assertions that he was not responsible for Mr Martin are wrong. If Mr Wang was not able to ensure his professional responsibilities were met, he should not have accepted the role in the Practice. The Practice could only operate because he was present; he had a duty to take charge of all the professional relationships in the Practice when he took on the responsibility of being the sole licensee in the Practice.

The grounds of complaint

- [58] The interim decision identified potential grounds for complaint and the parties have not sought to expand the grounds; accordingly, that is the extent of the grounds the Tribunal will consider.
- [59] The potential grounds and my conclusions are as follows.
- [60] The first potential ground of complaint was that:
- [60.1] Mr Wang acted unprofessionally as he was a party to Mr Martin providing immigration advice unlawfully (clause 1 of the Code of Conduct).
- [60.2] That he continued to act with a lack of care, diligence and professionalism in failing to:
- [60.2.1] Take charge of the instructions and the client relationship, and
- [60.2.2] Ensure he delivered professional advice and services meeting those standards to the complainant
- (clause 1 of the Code of Conduct).
- [61] Mr Wang's response to this ground was that either Mr Martin did not unlawfully provide immigration advice, at least in respect of the complainant's affairs, or that Mr Wang neither knew of him doing so nor had any reason to think he did. In relation to taking charge of the instructions and client relationship Mr Wang took the position he was an employee and could exercise only limited control. Furthermore, the complainant received services that meet all professional standards.
- [62] To evaluate whether the evidence established that Mr Martin provided immigration advice it is necessary to consider and apply the Act to what occurred. The Act was, among other things, intended to put an end to a history of a small minority of advisers exploiting vulnerable migrants. The background to the Act is discussed in *ZW v Immigration Advisers Authority* [2012] NZHC 1069, and is reflected in section 3 of the Act.
- [63] It is evident the legislative scheme has been constructed in a manner designed to exclude unlicensed people being engaged in the delivery of professional services, to a degree that is exceptional in the regulation of professional service delivery.
- [64] It was foreseeable that some people, who had formerly provided immigration services and failed to gain a licence, would seek to have a licensed person "rubber stamp" their continuing activity in the industry. Unfortunately, this Tribunal's work and criminal prosecutions under the Act demonstrate that was a well-founded apprehension.
- [65] Against that background, the policy behind the stringent restrictions in the Act on unlicensed persons providing immigration services is evident.
- [66] Section 63 of the Act provides that a person commits an offence if they provide "immigration advice", without being either licensed, or exempt from the requirement to be licensed.
- [67] The scope of "immigration advice" is defined in section 7 very broadly. It includes:

“using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand ...”

- [68] The Tribunal is required to determine 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).
- [69] The expansive nature of the definition of *immigration advice* leaves no doubt, that for the purposes of this decision, Mr Martin did provide immigration advice as defined. He had knowledge and experience in immigration matters, was an active participant at the meeting on 4 February 2011 and Mr Wang left before the meeting finished. Mr Wang’s next involvement was to receive an application to review for filing; Mr Wang had not prepared the application he reviewed.
- [70] I have considered the possibility that Mr Martin simply engaged in a client relationship role not directed to an immigration matter. However, Mr Wang’s acceptance that he was at the meeting only briefly, initiated the client relationship and then received a prepared application to review, make it inevitable Mr Martin or someone else completed the work. In all probability, it was Mr Martin.
- [71] However, there are exceptions that must be considered, even though I have found Mr Martin provided immigration advice in respect of the complainant’s immigration matter. Section 7 provides that the definition does not include *clerical work, translation or interpreting services*. Accordingly, the question arises as to whether the work Mr Martin undertook came within that exception.
- [72] The scope of *clerical work* is important, as otherwise, the very wide definition of immigration advice would likely preclude any non-licence holder working in an immigration practice in any capacity.
- [73] *Clerical work* is defined in section 5 of the Act in the following manner:
- “**clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:
- (a) the recording, organising, storing, or retrieving of information:
 - (b) computing or data entry:
 - (c) recording information on any form, application, request, or claim on behalf and under the direction of another person”
- [74] The definition is directed towards administrative tasks, such as keeping business and financial records and the like. Mr Wang claims what Mr Martin did came within that exception. He says Mr Martin was entitled to sign an agreement for the provision of professional services, operate bank accounts, deal with issues relating to fees, fill in the forms and deliver the application to Immigration New Zealand.
- [75] I have no difficulty accepting that Mr Martin could sign an agreement if he was the proper officer of the company that was a party to the agreement. However, that does not mean he could undertake the process for initiation of the client relationship and disclosure under the Code of Conduct. Mr Wang says he did those tasks personally and I accept his evidence. Accordingly, I make no adverse finding regarding the process of establishing the commencement of the client relationship.
- [76] The definition of *clerical work* deals specifically with the role a non-licensed person may have in the process of preparing applications for visas. They may record information *on any form, application, request, or claim on behalf and under the direction of another person*.
- [77] The natural meaning of those words is that the unlicensed person relying on the *clerical work* exception, may type or write out what another person dictates.

- [78] That other person may properly be the person who is making the application, a licensed immigration adviser, or a person who is exempt from being licensed. The person typing or writing out the form in those circumstances is not giving immigration advice.
- [79] The definition does not give any authority for the unlicensed person to make inquiries, and determine what is to be recorded on the form. Under *clerical work* they must do nothing more than “record” information as directed. This is the role of a word processor operator, not an author.
- [80] The other exception in section 7 is that immigration advice does not include “providing information that is publicly available, or that is prepared or made available by the Department”. However, that is not material in this case.
- [81] Mr Wang accepts he briefly attended the initial meeting, commenced the client relationship and left the meeting allowing Mr Martin to complete it. The complainant and his prospective employers were there because they required assistance with preparing an application and supporting documentation for the complainant’s application for a work permit. Mr Wang’s next involvement was to review the completed documents. The plain inference, which Mr Wang ought to have appreciated at the time, was that Mr Martin had assisted the complainant by advising and preparing the documents.
- [82] Accordingly, I am satisfied on the balance of probabilities Mr Wang was a party to Mr Martin unlawfully providing immigration advice. He was aware of what Mr Martin did and agreed he should do so. I find Mr Wang breached clause 1.1 of the Code of Conduct as he failed to act with professionalism. His failures to ensure the complainant’s instructions were performed by a licensed immigration adviser, or person exempt from licensing meant he had unprofessionally allowed a person who could not lawfully perform the work to engage in the instructions.
- [83] I am also satisfied Mr Wang acted with a lack of care, diligence and professionalism as he failed to take charge of the instructions and client relationship, and to deliver professional advice and services. The complainant’s work, apart from establishing the client relationship and a review of documents, was not under Mr Wang’s control; Mr Martin dealt with the work. For reasons discussed, allowing Mr Martin access to a client both involved a breach of the Act, and an unprofessional disregard for the risks clients faced in being exposed to him. I am satisfied Mr Wang breached clause 1.1 of the Act in that respect also.
- [84] The second ground of potential complaint was that Mr Wang:
- [84.1] Engaged in dishonest or misleading behaviour in being a party to submitting a work visa application on 9 March 2011. That document containing, in section R, a representation that he was the licensed immigration adviser responsible for the application. That he affixed, in Section S, his licence number and signed the document intending to cause Immigration New Zealand to believe he was responsible for submitting the document, and attended to his professional duties in relation to it. Whereas, he knew he had never met the complainant, and that in fact Mr Martin prepared the document. He did so:
- [84.1.1] For the purpose of hiding the fact Mr Martin unlawfully gave advice;
- [84.1.2] Intended to prevent Immigration New Zealand detecting Mr Martin’s offending; and
- [84.1.3] Despite express notice on the form concerning criminal offending.
- (Section 44(2)(d) of the Act)
- [85] This matter is a factual issue, largely determined by finding Mr Wang was present at the meeting with the complainant. If he was not at that meeting, it would be difficult or impossible to explain the representation in the form other than in terms of dishonestly hiding who had provided immigration advice.
- [86] I have considered Mr Wang’s explanation with care, and I am satisfied he did not join in a dishonest enterprise to allow Mr Martin to continue to operate an immigration practice in breach of the Act. He has explained he believed he was entitled to be the only licensee in the

Practice and allow Mr Martin to engage with clients behind closed doors, manage the finances, and generally exercise certain 'rights' of ownership of the Practice. His view was woefully misconceived and that he failed in his duties in allowing such conduct; however, he did not do so dishonestly. The reality is Mr Martin committed a series of criminal offences in the Practice, and is now serving a sentence of imprisonment. Those charges do not relate to this complaint. However, it is very clear, for the reasons earlier discussed, that the Act is intended to prevent a person such as Mr Martin having any role in the delivery of professional services.

- [87] Mr Wang was fully on notice of his professional responsibility, only days before he commenced the engagement this Tribunal upheld a complaint that Mr Wang was a party to Mr Martin's unlawful conduct. While that is relevant to whether Mr Wang was honest, I am none-the-less satisfied he allowed Mr Martin to engage with clients and perform work believing he, not the Tribunal, understood the correct boundaries.
- [88] He appealed the Tribunal's decision unsuccessfully (*Wang v Immigration Advisers Authority* [2012] DCR 180). In his evidence on this matter, he explained the Tribunal's adverse finding in terms of the inadequacy of his response. His evidence unabashedly rejected the views expressed above regarding the effect of the strict limits the Act places on professional service delivery relating to immigration advice by unlicensed or exempt persons.
- [89] Having listened to Mr Wang's explanations, I am satisfied he genuinely believes he was fully entitled to allow Mr Martin to perform as he did. The reality that Mr Martin is now in prison because of his activities in the Practice, while Mr Wang and other licensed immigration advisers were responsible for conducting the Practice, appears not to temper his views. I am satisfied Mr Wang had, and when he gave evidence still had, a grossly incomplete comprehension of his professional responsibility. However, that is a very different matter to dishonesty through making a false statement to Immigration New Zealand.
- [90] Accordingly, I do not uphold this ground of complaint.
- [91] The next potential ground of complaint is:
- [91.1] Mr Wang failed to refund fees due when his instructions were terminated (clause 3(d)) of the Code of Conduct), and failed to return passports and personal documents (clause 1.3 of the Code of Conduct).
- [91.2] There was no other person in the practice of Richard Martin Immigration Ltd. at the time who could lawfully continue the instructions in any form; the instructions ended when the Adviser ceased to act. He was not entitled to leave any unlicensed person dealing with the engagement and knew that Mr Martin was likely to exploit the complainant.
- [92] Mr Wang accepts when he left the Practice there was no person in charge who could lawfully carryout the professional responsibilities. However, he says he is not responsible for that, it was not his Practice, and he was only a part-time employee and expected someone else would become the licensed adviser in the Practice. However, as already noted the Code of Conduct required a specific licensed immigration adviser to be responsible for a particular professional engagement. In this case Mr Wang was identified as the person responsible. Mr Wang accepted in his response to the Statement of Complaint: 'I was saddened that [the complainant] suffered badly in his work visa application because of my genuine mistakes as well as [the Practice's] utterly indifferent approach after my quitting.'
- [93] If Mr Wang could not control clients relationships when he left, then that was entirely foreseeable when he accepted the instructions. When he accepted the instructions he did not have control over the Practice's personnel, the finances, and importantly Mr Martin would not accept direction or authority exercised over him. For the reasons discussed, Mr Martin was a hazard to clients, and allowed Mr Wang only such control as he chose. At the commencement of his role as the sole licensee in the Practice, Mr Wang could have insisted on having proper control, or refused to be involved if Mr Martin did not allow that. When he left there were potential strategies, including reporting to the Authority that he did not have access to client's records and clients to comply with the Code's requirements that he:
- [93.1] Take reasonable steps to ensure clients' interests are represented when he could not continue as a representative (Code of Conduct, clause 1.1(c))

[93.2] Return documents (Code of conduct clause 1.3(b));

[93.3] Confirm in writing when work ceased (Code of conduct clause 3(b)); and

[93.4] Refund any fees when ending the contract (Code of conduct clause 3(d)).

[94] Mr Wang's position is that he was entitled not to concern himself with those responsibilities, and could leave the complainant's interests in Mr Martin's hands. That has no sensible connection with his duties under that Act and the Code. A professional evaluation of the situation when he left would have caused Mr Wang to appreciate his client's affairs had been mishandled through the intervention of an unlicensed person. Furthermore, the application failed. Mr Wang said he regarded the application as straight forward and he evaluated the process and documentation submitted to Immigration New Zealand. To his credit he has subsequently accepted he made mistakes. The result was the complainant's application failed for what I am satisfied were foreseeable reasons and directly connected with Mr Wang not managing the instructions properly; he then left the complainant without representation.

[95] I am satisfied Mr Wang did not return documents and should have refunded the fees in full when he left, as the work had not been performed either lawfully or satisfactorily, and that inevitably led to a failed application. Accordingly, he breached Clauses 3(d) and 1.3 of the Code of Conduct. I uphold the complaint in that respect.

[96] The final ground of potential complaint is that Mr Wang, in the course of sustained and unprofessional conduct, was a party to Mr Martin's criminal offending, assisted him in unlawfully providing immigration advice, and in dishonestly taking fees for his unlawful activities (clause 1 of the Code of Conduct).

[97] The findings I have already discussed, in respect of falsely representing to Immigration New Zealand that he was the professional adviser when he was not, are inconsistent with upholding this ground of complaint.

Decision

[98] The Tribunal upholds the complaint pursuant to section 50 of the Act.

[99] The adviser breached the Code of Conduct in the respects identified, namely clauses 1.1, 1.3 and 3(d). They are grounds for complaint pursuant to section 44(2)(e) of the Act.

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

Submissions on Sanctions

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

[102] 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.

[103] 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

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

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

[104.2] 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.

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

DATED at WELLINGTON this 22nd day of January 2015

G D Pearson
Chair