

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

Decision No: [2015] NZIACDT 58

Reference No: IACDT 006/13

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**S Y and R Y**

Complainants

**AND**

**Jia (Christina) Xue**

Adviser

**No information identifying the complainants to be published**

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**DECISION**  
IMPOSING SANCTIONS

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**REPRESENTATION:**

**Registrar:** Alastair Dumbleton, lawyer, Ministry of Business, Innovation and Employment,  
Auckland

**Complainants:** Alan Tsang, Prestige Lawyers, Auckland.

**Adviser:** Barrie-John Partridge, lawyer, Wellington.

Date Issued: 15 May 2015

## DECISION

### This Complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Ms Xue (*Y v Xue* [2015] NZIACDT 6; see [www.justice.govt.nz](http://www.justice.govt.nz)).
- [2] The Tribunal determined the following complaints:
- [2.1] Ms Xue was responsible for an advertisement that disclosed confidential information relating to the complainants. That potentially breached her obligations in clause 1.2 of the Code of Conduct.
  - [2.2] The same advertisement, represented as a true account, contained false and exaggerated information to promote her practice. That potentially breached her obligations in clause 5.1 of the Code of Conduct.
  - [2.3] The work Ms Xue undertook was pursuant to an agreement. It provided for a fee of \$3,500 payable in advance. The fees paid were different, and accordingly the original agreement was not accurate, or the change not recorded. Clause 1.5(e) and 8(b), (c) and (d) of the Code of Conduct require the fees and changes in the fees to be recorded and agreed in writing.
  - [2.4] Ms Xue failed to return a number of documents the complainants provided for Ms Xue to submit to Immigration New Zealand. Clause 1.3 of the Code of Conduct required that Ms Xue return the documents.
  - [2.5] Ms Xue dishonestly altered a document receipt to create an appearance that the complainants received their documents. Dishonest behaviour is a ground of complaint under section 44 of the Act.
- [3] The Tribunal determined:
- [3.1] Ms Xue failed to ensure the complainants' confidentiality was preserved, and accordingly she breached clause 1.2 of the Code of Conduct. However, the substantive decision explains the basis was that she failed to control personnel in her practice who had access to client information, rather than personally publishing the advertisement.
  - [3.2] The contents of the advertisement were reprehensible. It identified her clients and presented them as dishonest. There was no foundation for that, and the advertisement was false and exaggerated. However, clause 5.1 of the Code of Conduct applied to the conduct of a licensed adviser, not the unauthorised behaviour of unlicensed personnel. Accordingly, Ms Xue's lack of control over confidential information and failure to control personnel in her practice was where her professional failing lay (as identified in the immediately preceding subparagraph). She did not breach clause 5.1 of the Code of Conduct, as she was not a party to publishing the advertisement.
  - [3.3] Ms Xue failed to document changes to the terms of the agreement and breached clause 1.5(e) of the Code. That occurred as the terms of payment were not observed, and an invoice issued which was ambiguous and failed to clearly document the nature of the payment, and its relationship with the overall fees. In addition, Ms Xue breached clause 8(c) of the Code of Conduct, which relates to the initial terms. The second element was a minor matter; the significant element being it led to subsequent ambiguity.
  - [3.4] Ms Xue complied with her obligations to return documents.
  - [3.5] Ms Xue did not alter a document dishonestly.

- [4] Accordingly, the Tribunal upheld two of the complaints:
- [4.1] Ms Xue allowed client information to be available to personnel in her practice, and they used it in a reprehensible way, publishing a grossly defamatory and fabricated advertisement that identified the complainant. Ms Xue's professional failings related to her not having control over the information and the personnel in her practice.
- [4.2] She failed to documents arrangements relating to fees properly.
- [5] The full circumstances are set out in the substantive decision.

### **The Parties' Positions on Sanctions**

- [6] The Registrar did not provide submissions on the appropriate sanctions.
- [7] The complainants sought:
- [7.1] Censure,
- [7.2] An appropriate monetary penalty,
- [7.3] Costs of \$5,750,
- [7.4] Compensation of \$2,000.
- [8] Ms Xue's submission was:
- [8.1] She provided an undertaking regarding the future conduct of her practice,
- [8.2] She had already refunded all fees, and apologised,
- [8.3] The quantum of costs should reflect Category 1 Schedule 5 of the District Court scale.

### **Discussion**

#### *The Tribunal's starting point*

- [9] What happened to the complainants was an utterly disgraceful outcome for clients who engaged a licensed immigration adviser. They had every right to expect respect, and professionalism. Instead, Ms Xue's practice published an advertisement, which identified and disparaged them. The advertisement published a name and an image of personal information; and effectively said they were dishonest as they had attempted to mislead Immigration New Zealand. The purpose of the advertisement was to promote Ms Xue's practice.
- [10] If Ms Xue had published that advertisement, there could be little doubt the Tribunal would cancel her licence, impose the maximum period of disqualification, and apply a high monetary penalty. What occurred is one of the most egregious breaches of the professional standards imposed by the Act, which has come before the Tribunal.
- [11] However, Ms Xue did not publish the advertisement. Her husband was responsible for that, and she did not know at the time. However, Ms Xue had a professional responsibility to control her husband's conduct in the practice. His conduct on this occasion was so delinquent; it *prima facie* evidences he is not a fit and proper person to have any kind of access to an immigration practice, or the clients of the practice.
- [12] Given that Ms Xue's failings relate to practice management, this complaint is one where it is important not to unduly focus on the outcome, but rather on the gravity of Ms Xue's personal lapse from professional standards that led to the outcome. There is no doubt that a licensed immigration adviser must personally manage their practice, and deliver all professional services in the practice.

- [13] I am satisfied Ms Xue was naive, and not well equipped either to be the principal of a professional practice; or to deal decisively and professionally with her husband's delinquent behaviour when she found out about it.
- [14] The starting point in these circumstances is to make orders that as a minimum exclude Ms Xue holding the position of being a principal in a practice, and restrict her to practising under supervision. Accordingly, the Tribunal when issuing its substantive decision raised that issue, and invited Ms Xue to provide undertakings that might give the Tribunal confidence alternatives were realistic.
- [15] Regardless, Ms Xue must inevitably face responsibility for the harm her clients suffered in the practice she controlled as the sole licensed immigration adviser.

*The complainant's perspective*

- [16] The complainants, with the assistance of their counsel, have taken a restorative perspective. They have not sought to have Ms Xue's licence cancelled or suspended; and said they are satisfied if Ms Xue's husband is excluded from her practice, and future clients protected.
- [17] The complainants do expect to recover their actual cost of representation at the hearing.
- [18] The complainants have also sought a very modest level of compensation of \$2,000.

*The principles to apply*

- [19] The purpose of professional disciplinary proceedings was affirmed by the Supreme Court in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97]:
- “... the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.”
- [20] When imposing sanctions those statutory purposes require consideration of at least four factors which may materially bear upon maintaining appropriate standards of conduct:
- [20.1] *Protecting the public*: Section 3 of the Act states “The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice ...”
- [20.2] *Demanding minimum standards of conduct*: *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) and *Taylor v General Medical Council* [1990] 2 AC 539; [1990] 2 All ER 263 (PC), discuss this aspect.
- [20.3] *Punishment*: The authorities, including *Z v Dental Complaints Assessment Committee*, emphasise that punishment is not the purpose of disciplinary sanctions. Regardless, punishment is a deterrent and therefore a proper element of disciplinary sanctions (*Patel v Complaints Assessment Committee* (HC Auckland CIV-2007-404-1818, 13 August 2007).
- [20.4] *Rehabilitation*: It is important, when practicable, to have the practitioner continue as a member of the profession practising well (*B v B* [1993] BCL 1093, HC Auckland HC4/92, 6 April 1993).

*Ms Xue's licence*

- [21] Regardless of the position of the parties, the Tribunal must have regard to the public interest, which includes ensuring the Immigration Advisers Licensing Act 2007 is effective in protecting consumers of immigration services.
- [22] The authorities indicate it is a “last resort” to deprive a person of the ability to work as a member of their profession. However, regard must be had to the public interest when considering whether a person should be excluded from a profession due to a professional disciplinary offence: *Complaints Committee of Waikato Bay of Plenty District Law Society v Osmond* [2003] NZAR 162 (HC) at 172 and 173.

- [23] Rehabilitation of a practitioner is an important factor when appropriate (*B v B* HC Auckland HC4/92, 6 April 1993). In *Patel v The Dentists Disciplinary Tribunal* HC AK AP 77/02 8 October 2002 at [30]-[31], the Court stressed, when imposing sanctions in the disciplinary process applicable to that case, that it was necessary to consider the “alternatives available short of removal and explain why lesser options have not been adopted in the circumstances of the case”.
- [24] In the present case, Ms Xue has taken significant steps that allow the Tribunal to place considered trust in her.
- [25] The first factor and an essential one, is that she has shown insight into her professional failings and the effect on her clients, and apologised. Without that element, deterrence inevitably plays a significant role.
- [26] Ms Xue has also provided an undertaking that she will take full ownership of her practice, be the director of the company through which it operates, and exclude her husband. Further, that she will undertake training, and ensure she manages her practice effectively.
- [27] The Tribunal will have regard to the fact the complainants support a restorative approach. Ms Xue should appreciate that had the complainants taken a more punitive approach, it would have been very understandable. Furthermore, it may well have resulted in a far less favourable outcome for her. The complainant’s position gives weight to the option to extending trust to Ms Xue.
- [28] I am satisfied that in this case the Tribunal should accept Ms Xue’s initiatives, and not consider it must coercively impose them as orders. The complainants agree, and the Registrar has not opposed that course. Accordingly, the Tribunal will not impose any conditions on Ms Xue’s practice.
- [29] The Tribunal will caution Ms Xue pursuant to section 51(1)(a) that this decision is a lenient one, that extends trust to her. Should she abuse the trust, the consequences may well be severe.
- [30] There will be no order affecting Ms Xue’s licence or practice.

*The financial penalty on this complaint*

- [31] Given that Ms Xue was not aware of what was occurring at the time, and her fault lies in a failure to control and manage information, and personnel the starting point for the monetary penalty is \$5,000. I have regard to the fact that the gross abuse of confidential information was not something Ms Xue could have reasonably contemplated as a result of her lack of control.
- [32] In this instance, I will reduce the penalty to \$3,000. I do so for two reasons:
- [32.1] Ms Xue’s willingness to acknowledge her errors, and effect change and her earlier refund of fees; and
- [32.2] I expect Ms Xue to pay compensation and costs promptly; I will prioritise those elements in the complainants’ interests.

*Compensation and the refund of fees*

- [33] The Tribunal has generally awarded compensation applying ordinary principles of civil liability, as “reasonable compensation” will likely include an amount for which civil remedies are available. There must be an adequate nexus between a ground of complaint and the claim; and damages must meet the usual foresight, proximity and causal tests.
- [34] In the present case, Ms Xue was responsible for professional service delivery and her negligent failure to manage her practice resulted in the publication of a disparaging advertisement. There are multiple grounds for liability in tort<sup>1</sup>, and a direct nexus between Ms

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<sup>1</sup> Potentially also in contract, though the contract for delivery of professional services involved the company through which Ms Xue operated her practice.

Xue's failure to comply with clause 1.2 of the Code of Conduct in respect of protecting confidential information.

- [35] The complainants have limited their claim to \$2,000. It is a minimal claim considering the harm they suffered.

*Costs and expenses*

- [36] Pursuant to section 51(1)(g) the Tribunal may make an order that a adviser pay "all or any" of the costs or expenses of investigation, inquiry, hearing and any related prosecution.

- [37] This is a somewhat extended version of the power that commonly applies in professional disciplinary jurisdictions.

- [38] The principles relating to costs in professional disciplinary proceedings are discussed in *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850; [2011] NZAR 639. In that case actual costs of investigation of \$79,000 had resulted in an award of \$40,000. At [43], the Court commented:

"An award of costs under s 129 of the 1982 Act (and the 2006 Act) is entirely discretionary. ... It is clear that expenses include salaries and staff and overhead expenses incurred by the societies that investigate and bring proceedings before the Tribunal."

- [39] Those principles appear to apply, with necessary modifications, to the Act and, accordingly, the present proceedings.

- [40] In *O'Connor v Preliminary Proceedings Committee HC Wellington AP 280/89*, 23 August 1990, where an order for costs of \$50,000 out of a total of \$70,500 was awarded, Jeffries J said:

"It is a notorious fact that prosecutions in the hands of professional bodies, usually pursuant to statutory powers, are very costly and time consuming to those bodies and such knowledge is widespread within the professions so controlled. So as to alleviate the burden of the costs on the professional members as a whole the legislature had empowered the different bodies to impose orders for costs. They are nearly always substantial when the charges brought are successful and misconduct admitted, or found."

- [41] The Registrar has elected not to apply for costs of investigation, and representation at the hearing. The Tribunal will not make an order for its own costs. Furthermore, I have taken the liability to pay costs into account when discounting the financial penalty. These concessions to Ms Xue likely exceed the actual costs the complainants incurred for the hearing being \$5,750 including GST (they bear the cost of GST).

- [42] In my view, the Tribunal should order that Ms Xue fully reimburse the complainants for their costs of representation. The Registrar, though appearing and testing evidence, does not prosecute complaints at an oral hearing. Accordingly, the Tribunal depended on the complainants presenting the complaint.

- [43] The Tribunal will also award an additional \$1,000 to take account of the submissions on sanctions, and the complainants' costs of attending the hearing.

- [44] I do not accept it is appropriate to award costs by analogy with the District Court scale. The award of actual costs of the complainants, but not awarding costs of the Authority is a concession. The default position would be to apply the principle in the *Daniels* decision that the salaries and overheads of the Authority are taken into account, and the whole cost of the investigation and complaint process is accounted for, plus the costs of the Tribunal and the complainant would be added. Then a discount may be applied.

- [45] Accordingly, the only costs awarded will be \$6,750, being actual costs of \$5,750 for the complainants' representation at the hearing, and \$1,000 for submissions on sanctions and the expense of attending the hearing.

*Censure*

[46] In accordance with the usual practice of disciplinary tribunals, censure will be an express sanction.

**Decision**

[47] Ms Xue is:

[47.1] Censured, and cautioned in the terms appearing in paragraph [29].

[47.2] Ordered to pay a penalty of \$3,000.

[47.3] Ordered to pay the complainants \$8,750 in compensation, costs, and expenses.

**Prohibition on publication**

[48] No information disclosing the identity of the complainants is to be published.

[49] The complainants may apply to vary this order at anytime.

**DATED** at WELLINGTON this 15<sup>th</sup> day of May 2015

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**G D Pearson**  
Chair