

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

Decision No: [2015] NZIACDT 6

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**

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**REPRESENTATION:**

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

**Complainants:** Mr A Tsang, Prestige Lawyers, Auckland.

**Adviser:** Mr B-J Partridge, Lawyer, Auckland.

Date Issued: 13 February 2015

## DECISION

### Preliminary

- [1] Ms Xue had a practice where her husband Mr Fan was the director of a company that operated the practice. Ms Xue was the only licensed immigration adviser in the practice, and the complainants consulted her.
- [2] The complainants alleged that:
  - [2.1] Ms Xue published an advertisement in a magazine which included indentifying information, and fabricated a story to the effect the female complainant had previously misled Immigration New Zealand. The purpose of the advertisement was to falsely give the impression Ms Xue had successfully overcome the female complainant's previous misconduct by intervening with Immigration New Zealand.
  - [2.2] The fees were not properly set out, and the extent of fees payable was not clear.
  - [2.3] Ms Xue later withheld a passport to secure payment of fees, and did not return all the documents she held for the complainants. Furthermore, that failure was covered up by creating a false document.
- [3] Ms Xue claimed the advertisement was an error for which a former employee should carry responsibility, and lack of clarity regarding the fees was in the complainants' favour, and all documents were properly returned.
- [4] The issues are largely factual. It is necessary for the Tribunal to determine what happened, and who was responsible. The Tribunal has found that while Ms Xue was responsible for not protecting confidential information, she did not personally publish the advertisement. Mr Fan was responsible for that. The Tribunal also found Ms Xue failed to document her fees properly, but dismissed the complaint in respect of the return of documents.

### The Grounds of Complaint

- [5] The Registrar filed a Statement of Complaint. She identified the following grounds of complaint as matters potentially supported by evidence:
  - [5.1] 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.
  - [5.2] 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.
  - [5.3] 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.
- [6] The Registrar set out those grounds of complaint in a statement of complaint. The complainants through their counsel responded by identifying two further grounds of complaint:
  - [6.1] 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.
  - [6.2] 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.

## Ms Xue's Response to the Statement of Complaint

- [7] Ms Xue's principal responses to the Statement of Complaint in her Statement of Reply (which predated the additional grounds of complaint advanced by the complainants) were:
- [7.1] The application for a visa was successful, and Ms Xue has a history of successful professional representation for her clients.
  - [7.2] The publication of confidential information was a genuine error, the employee responsible had been dismissed, and Ms Xue responded professionally by waiving fees and a written apology.
  - [7.3] The information published did accurately promote Ms Xue's practice.
  - [7.4] The changes in the fee arrangements were favourable to the complainants, and no additional fees were charged.
  - [7.5] Ms Xue was a provisional licence holder under supervision at the time of the relevant events.

## Oral hearing

- [8] Given the allegation that Ms Xue dishonestly altered a document and other contested issues of fact, the Tribunal directed that an oral hearing occur. The Tribunal's procedure mandated by the Immigration Advisers Licensing Act 2007 (the Act) is that it hears matters on the papers to the extent possible. However, in the present case there was a clear conflict in the evidence leaving no alternative to hearing oral evidence. The hearing provided the parties with an opportunity to lead evidence on any contentious issues, but there was no requirement to provide oral evidence on matters adequately established on the papers.
- [9] The Registrar called no evidence, but did participate in the hearing cross-examining through her counsel.
- [10] The complainants provide briefs of evidence, though at the hearing the parties agreed the female complainant should give oral evidence on behalf of both (they are a married couple).
- [11] For Ms Xue she and her husband both gave evidence. Her husband Mr Tianjing Fan is the director of the company through which Ms Xue operates her practice. Ms Yu, a receptionist who was involved in delivering the documents to the complainants also gave evidence.

## Discussion

### *The facts*

- [12] The background facts were largely uncontested, though the parties did dispute the implications of the facts. The focal point of contention at the hearing was whether Ms Xue returned all the documents, and whether she dishonestly falsified a receipt to hide her failure to do so. I will address the facts in relation to each of the grounds of complaint.

### *Is Ms Xue responsible for disclosing confidential information relating to the complainants in breach of clause 1.2 of the Code of Conduct?*

- [13] Ms Xue accepted the advertisement did disclose confidential information. The breach was a patent and obvious one, given the information disclosed included the complainant's surname, and a copy of his visitor's visa (with some information hidden).
- [14] Advertisement included a claim that the female complainant concealed information from Immigration New Zealand. Accordingly, the information was both confidential and reflected very adversely on her.
- [15] Clause 1.2 of the Code of Conduct requires that a licensed immigration adviser must preserve the confidentiality of clients.

- [16] Ms Xue put forward in justification that the publication was the result of an employee stepping outside of his authorised scope of work. Ms Xue represented to the Tribunal in her statement of reply:

“The Evisa employee who created the advertisement has subsequently been dismissed.”

- [17] The evidence did not support that claim. It became clear that Mr Fan, Ms Xue’s husband, in reality regarded the practice as his own and the employee consulted with him before publishing the advertisement. Mr Fan’s evidence made it very clear he had no appreciation of professional responsibilities and no real understanding of, or respect for, the professional obligations on a licensed immigration adviser.
- [18] Furthermore, it was clear on Mr Fan’s evidence the claim the employee was dismissed was false. Mr Fan was aware of the advertisement before publication and approved it. The best that can be said was that the employee left of his own accord out of embarrassment at the consequences of the advertisement. Ms Xue had an obligation to ensure her Statement of Reply was accurate; it was in fact false in a critical particular.
- [19] The evidence given by Ms Xue and her husband Mr Fan gave me the clear impression they regarded Mr Fan as the person who was in charge of the practice, and that Ms Xue was only the technician. That is a serious misconception of Ms Xue’s responsibility as the sole licensed immigration adviser in the practice. Her duty was to control the practice, and manage her subordinates in the practice including Mr Fan and employees.
- [20] Ms Xue had an obligation to maintain her client’s confidentiality in relation to Mr Fan and other employees, except as far as it was necessary for them to access information to carry out administrative functions. 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.

- [21] *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) are decisions primarily dealing with 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.
- [22] None-the-less the District Court's observation that when something is truly beyond a person's control it does not trigger professional disciplinary consequences is an un-contentious and unexceptional professional disciplinary principle. This Tribunal invariably applies this principle. 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 of 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.
- [23] In this case, Ms Xue should have controlled Mr Fan and the employee in the practice. They were not licensed immigration advisers, and Ms Xue should have controlled their access to files and client information. She should have ensured she was fully aware of and controlled any marketing initiatives, or similar activities. They impinge not only on duties relating to confidentiality, but also on the duty not to misrepresent the practice (clause 5 of the Code of Conduct). The evidence did not demonstrate either control, or attempts to exercise such control. On the contrary, Mr Fan made it clear he regarded himself as in charge of the practice.
- [24] Accordingly, while I accept Ms Xue's evidence she was not aware of the contents of the advertisement before publication, that occurred because she did not take adequate steps to maintain confidentiality in the first place. Preserving the confidentiality of clients is not limited to avoiding intentional publication of information; clients are entitled to expect proactive steps to preserve their confidentiality.
- [25] Accordingly, I am satisfied Ms Xue failed to ensure the complainant's confidentiality was preserved, and accordingly she breached clause 1.2 of the Code of Conduct.

*Did the advertisement contain false and exaggerated information to promote Ms Xue's practice, in breach of clause 5.1 of the Code of Conduct?*

- [26] I have found on the balance of probabilities that Ms Xue did not know of the advertisement and its terms before publication. However, I am satisfied the information in the advertisement was false and exaggerated. In short, the advertisement suggested the female complainant had provided false information to Immigration New Zealand and Ms Xue had successfully intervened to evade the likely consequences of such conduct. In fact, the evidence is that the female complainant for understandable reasons had provided information to Immigration New Zealand. She understood she had an obligation to provide the information and there had been a misunderstanding. Ms Xue gave advice that was potentially misplaced, but more important, the female complainant provided a full and satisfactory explanation to Immigration New Zealand.
- [27] The contents of the advertisement were reprehensible. It identified a client and presented them as dishonest. There was no foundation for that. The advertisement was false and exaggerated.
- [28] However, clause 5.1 provides a *licensed immigration adviser must not* promote their business in a false or exaggerated way. Ms Xue did not know of the advertisement before publication, and she took steps to have it removed from her website when she found out about it. Accordingly, while I am satisfied, Ms Xue was responsible for the advertisement due to her lack of control over confidential information and failure to control personnel in her practice; I cannot conclude she was the person who falsely promoted her practice. Mr Fan was responsible for that. Accordingly, I do not uphold the complaint in respect of a breach of clause 5.1.

*The agreement provided for a fee of \$3,500 payable in advance, the fees paid were different, did Ms Xue breach clauses 1.5(e) or 8(b), (c) or (d) of the Code of Conduct?*

- [29] Ms Xue accepted the terms of payment applied were different from the agreement, though more generous. The contentious issue in relation to the fees was that Ms Xue issued an invoice for \$575 and identified it as the cost of an official information request. The complainants say Ms Xue identified the cost as a disbursement involved in making the application. Ms Xue says the invoice was simply an instalment of the fee of \$3,500.
- [30] It is not necessary to determine which perspective is correct, the allegation is Ms Xue breached clause 1.5(e) which required changes to the terms of agreements to be recorded; and clause 8 which materially requires fees, disbursements and terms and conditions to be set out initially, and provided in writing. While accepting or requiring payments more slowly than agreed potentially falls below the threshold for an adverse disciplinary finding, the invoice for \$575 relating to the official information request is different.
- [31] The official information request related to an unforeseen and significant adverse development in the application for a visa. The invoiced cost of \$575 was potentially additional fees, a trigger for claiming a set fee, or disbursements. The documentation fails to show what it was, and the Code requires clear documentation. Accordingly, I am satisfied 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. I also uphold this element of complaint under clause 8(c), which relates to the initial terms, Ms Xue from the outset invoiced the fees in instalments not in the manner provided in the agreement. However, that is a minor matter; the significant element is that this led to subsequent ambiguity.

*Did Ms Xue fail to return documents in breach of clause 1.3 of the Code of Conduct?*

- [32] Ms Xue claims she made arrangements for all the documents she held to be returned in accordance with clause 1.3 of the Code of Conduct. The complainants say they did not receive all their documents.
- [33] However, the most serious aspect of this ground of complaint is that the complainants say that these events occurred after the advertisement had been published and an agreement reached that the fees they paid would be refunded. In the additional grounds of complaint, they say Ms Xue and Mr Fan failed to honour that agreement, sought payment and withheld the male complainant's passport to enforce payment. Though their evidence did not assert there was any express refusal to return the passport until payment. The evidence put it no higher than there was communication from Mr Fan on 21 September 2012 demanding payment, and on 1 October 2012 an invitation to uplift the passport.
- [34] The complainants say they uplifted the passport the following day after that invitation, but did not get the other personal documents.
- [35] Mr Fan and Ms Xue say they did not demand fees. Mr Fan accepts that he had a telephone conversation with the male complainant on 21 September 2012, but he simply congratulated the male complainant on gaining a visa. Ms Xue says on 2 October 2012 the complainants had arranged to uplift documents, she would be out of the office and accordingly she arranged for Ms Yu the receptionist to deliver the documents.
- [36] Ms Yu gave evidence, she said she delivered the passport, and returned all the documents including photographs, letters and original documents.
- [37] Ms Xue has not provided evidence of which documents Immigration New Zealand returned. The written record before the Tribunal consists of a document headed *Documents returned to clients*. Ms Xue said she prepared the form stating that a passport was returned, in anticipation of Ms Yu delivering it and the complainants signing the form. Ms Yu gave evidence she added to the form the words *All original Document (letters/photos etc)*. She also said she delivered documents in addition to the passport, but could not be specific as to which documents.

[38] The complainants' memorandum setting out this ground of complaint is confined to clause 1.3(b) of the Code of Conduct, which provides:

"A licensed immigration adviser must:

...

b) return passports and other personal documents to clients, on request without delay and in a secure manner"

[39] The determinative factual finding is whether the complainants received their documents on request and without delay. I accept the complainant's evidence Ms Xue and Mr Fan demanded further payments. In doing so, it is necessary that I prefer the complainants evidence. I do so, as Ms Xue's response to the complaint has not been consistent. She lodged a statement of reply in which the cause of the advertisement was said to be an employee who was dismissed. Ms Xue was responsible for the truth of that document, and in evidence, it was clear Mr Fan approved the advertisement, and the employee was not dismissed.

[40] However, the demands for payment must relate to withholding the passport, and the evidence does not elevate that beyond an inference drawn by the complainants. Furthermore, Ms Xue took the initiative to return the passport in a reasonably short space of time. I am not satisfied there was a breach of clause 1.3(b) in respect of the passport.

[41] Ms Xue potentially failed to return the documents other than the passport. However, the evidence does not establish what the documents were, I am mindful of Ms Yu's evidence she believed she returned all the material documents. Her recall was general, which is not surprising given the unexceptional nature of her task and the passage of time. However, her evidence is not inconsistent with any of the written record. The documentation of the return of documents was inadequate as the documents were not particularised, and the evidence does not establish what documents, if any other than the passport, were returned from Immigration New Zealand. I am not in a position to make a finding there was a failure to return documents held by Ms Xue.

[42] Accordingly, this ground of complaint will not be upheld.

*Did Ms Xue dishonestly alter a document to create an appearance that the complainants received their documents, breaching section 44 of the Act.*

[43] Ms Yu gave direct evidence she added the written notation to the record relating to the return of documents. She said she did so at the time, and for routine and proper reasons. I accept Ms Yu's evidence, which is not inconsistent with any other direct evidence, and accordingly dismiss this ground of complaint.

### **Decision**

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

[45] The Adviser breached the Code of Conduct in the respects identified, namely clauses 1.3 and 1.5(e), and 8(c). They are grounds for complaint pursuant to section 44(2)(e) of the Act.

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

### **Submissions on Sanctions**

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

[48] The most serious aspect of the Tribunal's finding relates to the failure to keep information confidential. The breach had extremely serious consequences, namely the complainants were identified in a fabricated account in which the female complainant was said to have misled Immigration New Zealand, and that information was published in a magazine with an image of part of the male complainant's passport. Had Ms Xue intentionally done so, there could be little doubt removal from the profession would be inevitable. What occurs is wholly inconsistent with

the standards clients are entitled to expect under the Act. However, the Tribunal has found that Mr Fan intentionally or recklessly caused the publication. Ms Xue was only responsible for the failure to manage the subordinate personnel in her office, and allow them to have access to confidential information. None-the-less, the complaint the Tribunal upheld is a serious issue that potentially reflects on her fitness to hold a licence, or the conditions under which she should practice.

- [49] The Tribunal has no jurisdiction over Mr Fan; however, the Tribunal has found he was responsible for an egregious breach of the complainants' rights to respect, confidentiality and honesty. Mr Fan should not have had any access whatever to the clients of a licensed immigration adviser or to their confidential information. The Tribunal provides Ms Xue with the opportunity to offer an undertaking as to the future running of her practice, which will ensure Mr Fan has no control, financial interest (except as her husband), contractual or employment relationship, or physical access to premises or client information in respect of her practice.
- [50] Ms Xue has no obligation to provide an undertaking of this kind, and the Tribunal has no jurisdiction to make an order prohibiting Ms Xue allowing Mr Fan to engage in her practice. However, an undertaking may provide options in relation to rehabilitation that would not otherwise be open to the Tribunal.
- [51] Should Ms Xue provide an undertaking of this kind, the Tribunal will potentially accept it is a basis, on which she may continue to hold a licence. Ms Xue should not assume the Tribunal would consider she should continue to hold a licence unless it is satisfied she will not expose clients to risks arising from Mr Fan's failure to respect the obligations imposed by the Act. The Tribunal requests that she address that issue in her submission on sanctions, she may of course do in any way she elects.
- [52] The Tribunal also requests that Ms Xue provide full particulars of her qualifications and experience.
- [53] The Authority and the complainants 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.
- [54] 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. The complainants' solicitors may submit a conventional itemised invoice particularising their costs.

#### *Timetable*

- [55] The timetable for submissions will be as follows:
- [55.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.
- [55.2] The adviser is to make any further submissions (whether or not the Authority or the complainants make submissions) within 15 working days of the issue of this decision.
- [55.3] The Authority and the complainants may reply to any submissions made by the adviser within 5 working days of him filing and serving those submissions.

#### **Confidentiality**

- [56] The complainants have had a false statement regarding them published. They are entitled to confidentiality, but may prefer publication of their identity with the finding that the information was false.
- [57] The Tribunal orders there will be no publication of the complainant's names, or information that would identify them, unless there is a further order of the Tribunal.



[58] The complainants may indicate whether they seek to change to that order when lodging submissions on sanctions and the Tribunal reserves leave to apply to vary the order at anytime.

**DATED** at WELLINGTON this 13<sup>th</sup> day of February 2015

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**G D Pearson**  
Chair