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

Decision No: [2016] NZIACDT 39

Reference No: IACDT 039/15

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| **IN THE MATTER** | of a referral under s 48 of the Immigration Advisers Licensing Act 2007 |
| **BY** | **The Registrar of Immigration Advisers**<br>Registrar |
| **BETWEEN** | **Salesh Ram**<br>Complainant |
| **AND** | **Shawn Tan**<br>Adviser |

## DECISION

**REPRESENTATION:**

**Registrar:** Mr M Denyer, lawyer, MBIE, Auckland.

**Complainant:** In person

**Adviser:** Mr P Moses, Barrister, Auckland.

Date Issued: 9 August 2016

## DECISION

### Introduction

[1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The complaint is that Mr Tan accepted instructions to assist the complainant to deal with his immigration affairs after his colleague Ms Aasa had been representing the complainant.

[2] There is no dispute that Ms Aasa represented the complainant poorly and failed to inform him of what had happened. Mr Tan was engaged in the instructions from an early stage, as he personally met with the complainant when Ms Aasa first accepted instructions. However, this was in his capacity as a proprietor of the practice. He was not a licensed immigration adviser at the time so Ms Aasa was responsible for the work at that point.

[3] After about a year and a half, the complainant asked Mr Tan to help, as the complainant could not understand why his immigration situation was not resolved. Mr Tan agreed to help; he was a licensed immigration adviser by this time. He tried to limit his role and responsibility but did get an authority to act. The essential difficulty was that by this time, Immigration New Zealand had declined the complainant's application. There were a number of problems with the services the complainant received:

[3.1] Ms Aasa had not done what she promised to do;

[3.2] Ms Aasa did not tell the complainant about the declined application or her failure to provide the services she promised; and

[3.3] Mr Tan did not know what the true position was either.

[4] Mr Tan accepts he failed to fully engage with the reality that he did accept instructions as a licensed immigration adviser and accordingly, failed to comply with some of the client engagement requirements. He also accepts he behaved badly, as he did not take sufficient care and some of his behaviour was misguided.

[5] The key area of dispute is that Mr Tan faces an allegation he deliberately engaged in misleading and dishonest behaviour. The behaviour alleged to be dishonest and misleading includes:

[5.1] On a number of occasions, Mr Tan told the complainant his application was pending, when in fact Immigration New Zealand had declined it some two years earlier.

[5.2] Mr Tan told the complainant Immigration New Zealand would not provide written confirmation of his immigration status; whereas it is readily ascertainable.

[5.3] Mr Tan told the complainant he would withdraw his pending application due to "false allegations"; when the complainant expressed reasonable concerns.

[5.4] Mr Tan told the complainant he would inform the "relevant authorities" if the complainant did not pay fees when he knew Ms Aasa had not performed the services to which the fees related.

[5.5] Mr Tan made other unprofessional comments referring to the complainant as a "non-citizen" making "all sorts of defamatory, inflammatory and fallacious remarks against" Mr Tan "an actual citizen"; and saying the complainant could not understand basic facts.

[6] The Tribunal put Mr Tan on notice that it had reviewed the written material supporting the complaint and said "in the absence of a further explanation, the Tribunal's finding will be that Mr Tan did engage in a sustained dishonest enterprise." The Tribunal gave Mr Tan an opportunity to appear in person and provide an oral explanation. He declined to appear and provide an oral explanation, which the Tribunal indicated it would test in an inquisitorial hearing.

[7] Accordingly, the Tribunal must evaluate the documentary material before it and determine whether the documented conduct was, through excusable error, lack of care that breached professional standards, or a course of misleading and dishonest behaviour.

[8] The Tribunal has found that Mr Tan engaged in a sustained course of misleading and dishonest behaviour, and was negligent in some respects. It has upheld the complaint on that basis, in addition to the elements Mr Tan accepted.

**The complaint**

[9] The Registrar filed a statement of complaint, she put forward the following background as the basis for the complaint:

[9.1] The complainant engaged Ms Aasa as a licensed immigration adviser. Mr Tan also attended a meeting on 21 October 2010, when Ms Aasa received her instructions from the complainant. Ms Aasa was a licensed immigration adviser; at this time Mr Tan did not hold a licence. The complainant paid Ms Aasa $1,850.

[9.2] The work the complainant required was to have Ms Aasa assist him to respond to a letter from Immigration New Zealand regarding his work visa application. On 24 December 2010, Immigration New Zealand declined that application; Ms Aasa had not taken steps to respond to Immigration New Zealand's letter. The complainant tried to follow up his case. Ms Aasa never told him she did not respond to the letter and accordingly, Immigration New Zealand declined his application.

[9.3] In March 2012, the complainant began emailing Mr Tan seeking an update regarding his immigration affairs. At that time, Mr Tan was a licensed immigration adviser, and agreed to assist the complainant. All of the relevant events occurred within the practice of Global Future Immigration Consultancy Ltd. However, the professional duties of licensed immigration advisers lie with the adviser personally as companies that engage licensed immigration advisers are not licensed. On 4 September 2012, Mr Tan sent an authority to act form to the complainant, and he signed the authority and returned it to Mr Tan.

[9.4] On a number of occasions in 2012 and 2013, Mr Tan told the complainant his application was "pending", and that Immigration New Zealand could not provide written confirmation of his status.

[9.5] On 22 January 2013, the complainant wrote to Mr Tan expressing concern he was appearing to disassociate himself from his case. Mr Tan responded on 31 January 2013 by saying that if the complainant continued to make false accusations against him he would withdraw his pending application with Immigration New Zealand.

[9.6] On 16 April 2013, Mr Tan informed the complainant Immigration New Zealand had declined his application. However, he did not tell him it had been declined in 2010, or that Ms Aasa failed to respond to Immigration New Zealand.

[10] The Registrar alleged Mr Tan engaged in dishonest or misleading behaviour, which is a ground for complaint under section 44(2) of the Immigration Advisers Licensing Act 2007 (the Act). The particulars were:

[10.1] That in a series of communications with the complainant Mr Tan dishonestly provided misleading information in that:

[10.1.1] On a number of occasions, he informed the complainant his application was pending, when in fact Immigration New Zealand had declined it; alternatively, he provided the information without making reasonable and simple inquiries as to why it would be pending after more than two years.

[10.1.2] He informed the complainant that Immigration New Zealand would not provide written confirmation of his immigration status.

[10.1.3] He told the complainant he would withdraw his pending application due to "false allegations" when the complainant expressed reasonable concerns.

Further, Mr Tan knew it would not have been lawful to withdraw the application without instructions.

[10.1.4] He told the complainant he would inform the "relevant authorities" if the complainant did not pay fees to the practices where he worked, when he knew Ms Aasa had not performed the services to which the fees related.

[10.1.5] He made other unprofessional comments, including suggesting that a "non-citizen should not make defamatory" comments against an "actual citizen of this country", and saying the complainant could not understand basic facts.

[10.1.6] He failed to initiate the client relationship and, after the complainant signed an authority to act, referred to himself as the complainant's agent while saying Ms Aasa was his adviser.

[11] In the alternative, rather than dishonest or misleading behaviour, the conduct may amount to negligence or incompetence, which is also a ground for complaint under section 44(2) of the Act.

[12] In addition, Mr Tan breached the Licensed Immigration Advisers Code of Conduct 2010 (the 2010 Code) in that he:

[12.1] failed to obtain informed instructions, and perform his services with due diligence and professionalism: clauses 1.1(a) and (b);

[12.2] failed to ensure the client relationship was initiated in accordance with the 2010 Code, including failing to take personal responsibility for ensuring that the written agreement, Code of Conduct and complaints procedures were provided and explained to the complainant: clauses 1.4(a), 1.5(a), 9(b) and 9(c); and

[12.3] failed to uphold the integrity of New Zealand's immigration system and the Immigration Advisers Authority: Clause 2.1(f).

**Complaint against Ms Aasa**

[13] The Tribunal upheld a complaint against Ms Aasa arising out of her dealings with the complainant in the decision *Ram v Aasa* [2016] NZIACDT 9 (4 February 2016) (www.justice.govt.nz). The full reasoning is set out in that decision, for present purposes it is sufficient to note the Tribunal found that Ms Aasa:

[13.1] dishonestly took money through a pretence she would provide services when she would not provide the services;

[13.2] then perpetuated the deception after failing to provide the services by failing to inform her client of the inevitable and serious consequences of that failure; and

[13.3] retained the passports she held for her client; again, to prevent her client detecting her deception.

[14] The complaint against Ms Aasa is relevant in that Mr Tan says Ms Aasa also deceived him.

**The responses**

[15] The complainant did not respond to the statement of complaint. The standard notice to the parties does not require a response if he accepted the Registrar's statement of complaint.

[16] Mr Tan, after an initial response, provided his full response with the assistance of counsel; it includes an affidavit in support. The key area of dispute is whether Mr Tan was dishonest. He accepts he gave incorrect information to the complainant and failed to fulfil his professional obligations. However, he says he was honest and that Ms Aasa actively misled him.

[17] The essential narrative Mr Tan provided was:

*The practice*

[17.1] Mr Tan was a lawyer; mainly working as a union organiser and doing some part-time work for a senior lawyer.

[17.2] He went into business with Ms Aasa and others. Mr Tan and Ms Aasa were directors of the company operating the practice where they, and others, worked. Until August 2011, Mr Tan did not hold a licence under the Act. Ms Aasa was a licensed immigration adviser (as were other people in the practice at times, but they had no relevant role). Mr Tan only undertook non-professional roles in the practice before he had a licence.

[17.3] In July 2011, Ms Aasa left the practice and joined a different practice. Ms Aasa was to continue to provide services for her existing clients. Mr Tan says he relied on Ms Aasa's integrity. She continued to have a minority shareholding in, and was a director of, the company conducting the practice where Mr Tan worked.

[17.4] From mid 2011 to the end of December 2012, Ms Aasa continued as a director. However, she failed to perform the responsibilities of a director, and was difficult to contact. Ms Aasa had access to her existing clients from the time she left until some point in 2013, and used an email address associated with Mr Tan's practice to contact them.

*The complainant's work*

[17.5] Mr Tan said Ms Aasa never told him she failed to tell the complainant Immigration New Zealand had declined his application, or that she charged fees for work she did not carry out. More recently, Mr Tan has become aware of this Tribunal's decision in *Samuelu v Aasa* [2014] NZIACDT 89 (16 September 2014) and [2014] NZIACDT 67 (30 May 2014) in which she acted in a similar way, and as a result of which, the Tribunal cancelled her licence.

[17.6] Mr Tan accepts he failed to protect himself, his practice, and the clients of his practice from Ms Aasa's conduct.

[17.7] Mr Tan generally accepts the narrative provided by the Registrar in her statement of complaint. However, he adds some points; particularly that he was personally honest. He said he did not know that:

[17.7.1] Ms Aasa took fees without carrying out work; and

[17.7.2] Ms Aasa knew Immigration New Zealand had declined the complainant's application and that she had not told the complainant (from late 2010).

[17.8] Mr Tan says his first significant contact with the complainant occurred in March 2012. At this point, the complainant contacted him regarding Ms Aasa's failure to respond to him. He says he made a misjudgement, thinking as a licensed immigration adviser and person responsible for the practice, that he could allow Ms Aasa to maintain professional responsibility and act as a conduit between the complainant and Ms Aasa. He accepts that was not an option consistent with his professional responsibilities.

[17.9] On 9 March 2012, Mr Tan emailed the complainant saying his application was pending allocation to a case officer. He accepts that was false, but was an accurate reflection of what Ms Aasa had told him and what he believed at the time. He does accept he should have been sceptical, and should not have accepted Ms Aasa's word without inquiry; but did not believe at the time Ms Aasa would potentially lie to him.

[17.10] Mr Tan also accepts that in providing this information on 9 March 2012, he inevitably caused the complainant to see him as his professional adviser. Mr Tan did not, at the time, recognise he had triggered the obligation to undertake the professional engagement process. He now recognises that was required and that he breached clauses 1.4(a), 1.5(a), and 9(c) of the 2010 Code.

[17.11] Mr Tan accepts he had a written authority to act for the complainant from September 2012 and should have used it to contact Immigration New Zealand and get accurate information regarding the complainant's circumstances. It was at about this time that Ms Aasa reengaged with the matter; Mr Tan understood she would act properly. In January 2013, Mr Tan obtained a form to change the complainant's adviser in Immigration New Zealand's records, and made a request for a copy of his file. At this point, for the first time, Mr Tan had access to the complainant's file. Immigration New Zealand's records show a work permit application "pending" with a lodgement date of 11 August 2010 (the print out date is 24 January 2013). Mr Tan says he took the information at face value but now realises that there was a letter received by Ms Aasa and that the database is incorrect, which does occur from time to time. In March 2013, Mr Tan gained access to the complete file that did show the decline in December 2010.

[17.12] Mr Tan says that at this point in March 2013, he made inquiries; he did not tell the complainant and thought there may have been an error. He referred to an email to show he did make inquiries with Immigration New Zealand.

[17.13] Mr Tan also acknowledges Ms Aasa's reprehensible behaviour in hiding the complainant's immigration status, and withholding his and his family's passports. Mr Tan said:

> I now also realise how reprehensible Ms Aasa's conduct was in that she did not disclose the decision to the Complainant at the time she received it and did not return his passport (and his family's passports) to him.
>
> I continued trying to do the right thing for the Complainant. I understood that he needed to obtain his and his family's passports in order to be able to depart New Zealand prior to INZ taking enforcement action.
>
> This was essential to avoid the disadvantages that flow from being a deported person, such as the prohibition on return and inability to file a visa application even from off-shore. I did not perceive any realistic opportunity for him to regularize his immigration status while remaining on-shore.
>
> I managed over time to extract all four passports from Terry Aasa and to return these to the Complainant.
>
> It was at this stage that the Complainant's correspondence started to blame me for his predicament. He alleged that I had held his passports all along and made similar accusations.
>
> This greatly hurt, frustrated and angered me. I felt it was entirely unfair for him to do so, since I was spending my time on trying to assist him without asking for any fees in return.
>
> I felt entitled to reject his allegations in strong terms.
>
> I now concede that I was misguided in doing so. I regret that I suggested to him I would advise INZ of his conduct and I appreciate that it would have been inappropriate to do so. My responses to him were angry, rash and ill considered. I apologise for this.

[18] The Tribunal considered all of the material, and issued directions dated 10 June 2016. The directions identified that Mr Tan's explanation was not plausible for the following reasons:

[18.1] In an email of 25 September 2012, Mr Tan claimed Immigration New Zealand would not provide information. Whereas in fact Immigration New Zealand will readily provide information if requested properly; to disguise that fact, Mr Tan appears to have falsely claimed inquiries may result in capricious action by Immigration New Zealand. This conduct potentially suggests that Mr Tan knowingly misled his client.

[18.2] In an email of 31 January 2013, Mr Tan threatened to withdraw a pending application with Immigration New Zealand. Mr Tan would appear to have known such an action would be a gross breach of professional ethics if he did so without instructions; his

statement was potentially a false statement of his power and authority, made without regard to the truth of the statement, and made to manipulate his client.

[18.3] In an email of 18 April 2013, Mr Tan responded to a request from the complainant regarding a copy of a letter declining the application. Mr Tan said in his email:

[18.3.1] The Immigration New Zealand officer who informed him did not send a letter. It appears the response was potentially couched to hide the fact that Immigration New Zealand had declined the application in December 2010; he did have a copy of that letter or could have obtained a copy, and knew that a decline was always notified in writing.

[18.3.2] He blamed the complainant for providing false information, and said he could no longer act for that reason. The Tribunal expected Mr Tan to identify what that false information was. Unless such information was identified, the Tribunal may conclude that the statement was a fabrication intended to hide the true reason for Immigration New Zealand declining the complainant's application, and was intended to hide Mr Tan and Ms Aasa's professional failings.

[18.4] In an email of 28 May 2013, Mr Tan claimed fees of $600. It would appear he knew at the time Ms Aasa had not provided the professional services she promised, and accordingly the fees were not due. On 27 June 2013, Mr Tan sent another email saying that unless the complainant paid the fees it may affect his immigration prospects. Potentially, Mr Tan engaged in a dishonest attempt to collect fees knowing they were not due, and used threats he knew were ill founded and false.

[18.5] The file shows that Mr Tan denigrated his client repeatedly. The lack of respect combined with the provision of false information and attempts to gain fees that were not due potentially left open a finding that Mr Tan exploited his client, and did so dishonestly and over an extended period.

[19] Accordingly, the Tribunal requested that Mr Tan appear before the Tribunal to provide oral evidence, and to be questioned by the Tribunal regarding his evidence. When it made the request, it gave Mr Tan notice that on the papers before it "in the absence of a further explanation, the Tribunal's finding will be that Mr Tan did engage in a sustained dishonest enterprise."

[20] Mr Tan declined to appear, and instead asked the Tribunal to decide the complaint taking into account further submissions, and an unsworn statement. He said he felt unable to submit to an oral hearing; he provided no medical evidence. The affidavit and the submissions are considered below in relation to the issues. They essentially argue that Mr Tan was misguided, failed to initiate the client relationship properly, and did some imprudent things as he became distressed; but was honest.

**Discussion**

*The standard of proof*

[21] The Tribunal determines 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 at [55].

*The procedure and evidential consequences*

[22] This Tribunal has power to request information, appearances, and to summons persons to give evidence[1]. As noted, the Tribunal requested that Mr Tan appear to be questioned by the Tribunal in an inquisitorial process. He has declined.

[23] Initially, it was Mr Tan who sought an oral hearing if the Tribunal was to potentially find he was dishonest. On examining the papers to ascertain whether the hearing could simply be on the

[1] Section 49(1), (4), and the schedule to the Act.

papers, the Tribunal identified that the record did provide a foundation for finding dishonesty, and frankly gave Mr Tan notice of that.

[24] The Tribunal is mindful of the observations of the Medical Practitioners Disciplinary Tribunal[2], which applied this observation in *Bowen-James v Walten & Ors* [1991] NSWCA 29:

> In our opinion, there is no right to silence or any privilege against self-incrimination upon which a medical practitioner, answering a complaint before the Tribunal, is entitled to rely. Indeed, we would endorse the observations made by Hope AJA in Ibrahim. There is a public interest in the proper discharge by medical practitioners of the privileges which the community accords to them, and in the due accounting for the exercise of the influence which the nature of the occupation permits them, and indeed requires them, to exert over their patients. …. we are of the opinion that if a medical practitioner fails to answer by giving his or her account of the matters charged, there can be no complaint if the Tribunal draws the unfavourable evidentiary inference which absence from the witness box commonly attracts.

[25] In *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA) at [153]-[154], the Court of Appeal considered what inferences may be drawn from the absence of witnesses. The Court observed:

> The absence of evidence, including the failure of a party to call a witness, in some circumstances may allow an inference that the missing evidence would not have helped a party's case. In the case of a missing witness such an inference may arise only when:
>
> (a) the party would be expected to call the witness (and this can be so only when it is within the power of that party to produce the witness);
>
> (b) the evidence of that witness would explain or elucidate a particular matter that is required to be explained or elucidated (including where a defendant has a tactical burden to produce evidence to counter that adduced by the other party); and
>
> (c) the absence of the witness is unexplained.
>
> Where an explanation or elucidation is required to be given, an inference that the evidence would not have helped a party's case is inevitably an inference that the evidence would have harmed it. The result of such an inference, however, is not to prove the opposite party's case but to strengthen the weight of evidence of the opposite party or reduce the weight of evidence of the party who failed to call the witness.

[26] The principles are applicable to this complaint.

[27] I take account of the fact Mr Tan has provided an explanation for not attending an oral hearing. However, it is not satisfactory; he says he is pursuing further academic study so can plainly engage in an analysis of the complaint, and he has not provided a medical opinion stating that he cannot attend.

[28] Mr Tan engaged in a sustained process of denigration, made threats, and provided false information over a long period of time. The written record documenting the behaviour is neither challenged, nor less than clear. There is evidence Mr Tan engaged in deliberate, disrespectful, unprofessional and dishonest behaviour.

[29] He has not provided a plausible explanation consistent with anything short of dishonesty and unprofessional behaviour. When requested to attend and provide his explanation in an inquisitorial setting, he elected not to do so, and failed to justify his failure to do so. Accordingly, I now consider the written material, including Mr Tan's explanation but give his explanation the weight that is appropriate, given his decision not to give the Tribunal the opportunity to test it.

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[2] *Re White Cartwright*, PJ, Chair: Medical Practitioners Disciplinary Tribunal (MPDT), 87-98-36C, Aug 20, 1999 or White [1999] NZMPDT 87 (20 August 1999)

*The material before the Tribunal*

[30] The Registrar provided a chronology, and supporting documentation. As noted, the parties have not disputed this record though Mr Tan has provided additional information.

*The background and evaluation of responsibilities*

[31] The essential narrative is uncontentious, Mr Tan provided demonstrably false information to the complainant regarding his immigration status. The critical question is whether he knew it was false when he provided the information.

[32] In evaluating the evidence the first factor I consider is that responsibility for the complainant's situation lay with Ms Aasa, as the licensed immigration adviser who was responsible for the professional relationship. Until March 2012, Mr Tan did not engage with the complainant in a material way when holding the status and responsibilities of a licensed immigration adviser. I do recognise that Mr Tan as a director and shareholder of the company conducting the practice that provided immigration services did have a personal interest. Potentially, the complainant could have made a claim against the company in the Disputes Tribunal or the District Court. However, overwhelmingly the responsibility lay with Ms Aasa. Accordingly, it would be wrong to regard Mr Tan as a licensed immigration adviser who was potentially providing false information to hide his own professional failings.

[33] Mr Tan has given evidence that Ms Aasa provided him with an explanation that the matters were in order, and the complainant's application was still pending. He says at that time he viewed Ms Aasa as a trusted colleague. There is nothing in the record that Mr Tan knew of, at that time (March 2012), which showed Ms Aasa was dishonest, though in fact that was the case.

[34] However, Mr Tan's dealings with the complainant were not satisfactory. I find he did not knowingly provide false information in March 2012. However, he did provide false information, because and would not have done so if he made proper inquiries and respond proportionately to the situation that became evident to him.

[35] When Mr Tan emailed the complainant on 9 March 2012, saying his application was pending and it can take 6 to 12 months for a case officer to be allocated. Mr Tan's email indicates he understood the complainant was concerned about his, and his family's lawful status in New Zealand, and the right for his child to attend school.

[36] When a person is in New Zealand unlawfully, the outcome can be life changing as it may alter significant migration opportunities. The reality was the complainant and his family were not in New Zealand unlawfully when they consulted Ms Aasa; Mr Tan had been at the initial meeting when the complainant consulted Ms Aasa and if the application was still pending they would likely have been in New Zealand lawfully under an interim visa while the application was pending. However, the timeframe strongly suggested that the application was not pending.

[37] It appears that Mr Tan misunderstood the circumstances; he had a duty to deal properly with the request. He was providing immigration advice which was very important to the complainant. At this point, Mr Tan was obliged to enter into a professional relationship with the complainant, or refer inquiries to Ms Aasa. To this point, while Mr Tan's management of the situation was unsatisfactory, he is entitled to the benefit of the doubt. He was a victim of Ms Aasa's dishonesty, and accordingly I make no adverse finding to this point. However, these events did put Mr Tan on notice. Adequate reflection ought to have led Mr Tan to make further inquiries. Accordingly, this is material background to Mr Tan's responsibilities in September 2012 when he took further steps.

*Mr Tan's 4 September 2012 – negligent advice*

[38] On 4 September 2012, Mr Tan sent the complainant a form authorising him to act, which was completed by the complainant. Mr Tan advised that:

> I have spoken with [Ms Aasa] this evening. Your application is currently with the Compliance department, which is why it does not show up on the system. Think of it like the CIA investigating someone's file; if you try and find out what's going on, you will not get any information ...

[39] The advice is grossly incorrect. The simple facts are that when Mr Tan first met the complainant with Ms Aasa, he was in New Zealand lawfully with a valid application pending; Ms Aasa was to assist with the application. There is no reason why Mr Tan could not have found out what the status was from Immigration New Zealand. Furthermore if the advice he provided regarding the application being "pending" was true then apparently the complainant's file would not be with the "Compliance department" and the complainant would be in New Zealand lawfully under an interim visa.

[40] Mr Tan had ample reason to look into the complainant's circumstances properly. He had ample time to reflect after the events earlier in the year. It appears he did make inquiries with Ms Aasa, and she misled him. I find Mr Tan was negligent in failing to make proper or adequate inquiries; but this time:

[40.1] he had the advantage of time to reflect on the information Ms Aasa provided and that it appeared to be irreconcilable with normal immigration practices; and

[40.2] he must have known that Immigration New Zealand readily provides information regarding immigration status to a licensed immigration adviser holding an authority to act, it is an elementary aspect of immigration practice which Mr Tan probably understood.

*Mr Tan's email of 25 September 2012*

[41] On 25 September 2012, Mr Tan again wrote to the complainant and said:

> because your file is with the Compliance Department, there is no timeframe as to how long it will take for the processing to be completed. When it comes to investigations, it is an open-ended matter.
>
> Also, please be mindful that we cannot be ringing up every week for an update. I have already explained: think of the Compliance Department as the FBI or CIA. They have immense powers, and often conduct convert activities …

[42] Mr Tan included the statement in his 25 September 2012 email that:

> [The Compliance Department] are not the kind of officers you want to annoy, because they can make life very difficult for you. Constantly ringing them for an update is one way of annoying them.

[43] The 25 September 2012 communication is grossly misleading. If the complainant was in New Zealand unlawfully, that was likely to be inconsistent with Mr Tan's earlier explanation that an "application" was pending. At the very least, it required inquiry; if that application were pending, the complainant would likely have had an interim visa.

[44] Accordingly, the explanation about the "Compliance Department" was not, on its face, at all sensible. Mr Tan had a client making appropriate inquiries about his visa application, and he believed was still being considered. Mr Tan probably knew the timeframe was far too long for the application to be unresolved. Furthermore Immigration New Zealand does not act capriciously when proper inquiries are made regarding immigration status, it is a lack of proper inquiries that would potentially reflect adversely.

[45] The timeframe when the application was in fact resolved gives some indication. A licensed immigration adviser with the most basic experience and knowledge is required to understand that there would be truly exceptional circumstances if there were a delay of the extent in issue. Accordingly, Mr Tan probably did not believe his assurances were true; and probably knew his claim Immigration New Zealand should not be questioned was false and misleading.

[46] The complainant was making the inquiries Mr Tan should have been making; the complainant had identified the obvious discrepancy and was concerned about it. Mr Tan accordingly also had the benefit of his client's concerns to alert him to the reality of the situation.

[47] After the Tribunal put Mr Tan on notice in its directions of 10 June 2016, where it stated that it was concerned at the communication given that Immigration New Zealand readily provides the

relevant information, Mr Tan said in an unsworn statement that his comments about the "Compliance Department" were justified.

[48] Mr Tan's counsel submitted that the evidence falls short of establishing dishonesty. I do not accept that the evidence does fall short of establishing dishonesty. Mr Tan's explanation is implausible; the evidence points strongly to him making statements that any immigration adviser must understand were untrue; and that the circumstances he was in it is probable he understood they were untrue. Furthermore, he is unwilling to be examined on how he could have believed what he told his client.

[49] Accordingly, I find that when Mr Tan wrote his email of 25 September 2012, he was actively deceiving his client. I have accepted that on 4 September 2012, Mr Tan may have failed to make inquiries, and related an inadequate explanation from Ms Aasa to the complainant. However, after time for reflection and having to respond to an appropriate and serious inquiry, the email of 25 September 2012 can only be seen as a dishonest mischaracterisation of:

[49.1] what is involved in making an inquiry with Immigration New Zealand regarding an application a client initiated; and

[49.2] of what the complainant's immigration status was likely to be.

[50] These conclusions are reinforced by Mr Tan's subsequent conduct.

[51] On 13 October 2012, the complainant sent an email to Mr Tan saying:

> my employer needs the copy of an acknowledgement of receipt of the actual application by the [New Zealand] Immigration from the Compliance Dept as you have mentioned in your e mail. This will also [certify] my employer toward his part in this application.

[52] Mr Tan failed to respond properly and on 5 November 2012, Mr Tan sent an email saying "Will let you know when I am advised by INZ". That response was not only inadequate, it was misleading. Mr Tan could have readily found out his client's situation. The reality was his client's application failed, due to adviser fault in his practice. Mr Tan had already been dishonest about his client's apparent immigration status, and Mr Tan's ability to ascertain what it was. That response simply furthered his deception by pretending the matters were continuing in a regular manner.

*Threats to client, and attempt to recover fees*

[53] Mr Tan took appropriate action for the first time in January 2013 when he requested information from Immigration New Zealand. On 31 January 2013, the complainant set out his observations on Mr Tan's circumstances in an email:

> I will appreciate if you could clarify as to why my application was lodged in the mid of 2012 when I had already paid my fees in 26th October 2010. I have proof of the payments as they were made with dates with receipts signed and issued by you as well but you keep on disassociating yourself from this case when in fact you had full knowledge of my case from day one. I initially nominated your company to act on my behalf. As one of the directors of the company (Global Future Immigration Consultancy Ltd) you were responsible just as much as your partners were. All I want for you to continue with my case and speed up the case.

[54] The notification was insightful, and sets out matters that Mr Tan would have done well to reflect upon. Mr Tan's response in an email of 31 January 2013 disgracefully stated:

> You do not seem to be able to comprehend simple facts, such as:
>
> 1) [Ms Aasa] was your adviser who dealt with your case, not me.
>
> 2) [Immigration Advisers Authority] licences are attached to individuals, not companies.

> 3) I do not decide the speed at which [Immigration New Zealand] officers process applications
>
> …
>
> **Immigration Applications**
>
> Below is a list of your pending and previous applications
>
> | Visa | Type | Decision | Application Number | Lodgement Date | Expiry Date |
> |---|---|---|---|---|---|
> | Permit | Work | Pending | xx | 11 August 2010 | - |

[55] It was Mr Tan who failed to comprehend the information he set out. Mr Tan had been providing important immigration advice, including assuring the complainant, and his employer, of his legal status in New Zealand. As a director of the company, Mr Tan had engaged with the complainant from the outset and knew when Ms Aasa had been engaged; he also had access to records (or should have obtained the file from Immigration New Zealand). While Mr Tan did not decide the speed with which Immigration New Zealand processed applications, he was required to understand that there would be something wrong if an application for a work visa was pending for more than two years. In the email he also provided assurance that "The submissions [Ms Aasa] made around mid-2012 were *additional submissions* …" He obviously made no adequate inquires as Ms Aasa failed to provide those submissions despite promising to do so. He went on to say that despite the evidence before him, the application was still pending; effectively repeating the assurance the complainant could regard himself as lawfully in New Zealand and entitled to work. In this email Mr Tan went on to say:

> If you continue to make false accusations against me, I will have no choice but to:
>
> 1) Withdraw my services from you as your agent;
>
> 2) Withdraw your pending application with Immigration New Zealand; and
>
> 3) Take all necessary courses of action to protect my integrity and name.

[56] Those threats were unprofessional, as they are a disgraceful response to proper and reasonable inquires from the complainant who, properly questioned Mr Tan's wrong advice. Further, if Mr Tan carried out the threat to withdraw an application without instructions that would be a gross breach of his professional duties.

[57] Mr Tan did eventually review the file, make inquiries with Immigration New Zealand, and understood the true position. On 16 April 2013, he wrote to the complainant in an email and said the complainant's application had been declined. He failed to explain that this had occurred in December 2010 and that Ms Aasa had failed to respond to Immigration New Zealand before that occurred. He also claimed outstanding fees.

[58] In an email of 28 May 2013, Mr Tan claimed fees of $600. It would appear he knew Ms Aasa had not provided the professional services she promised and accordingly, the fees were not due. On 27 June 2013, Mr Tan sent another email stating:

> You still have outstanding fees (of $600.00) payable, which I encourage you to settle once and for all, before you depart. Otherwise, I will be left with no choice but to inform the relevant authorities of this payment default. … Please note that *when it is noted on file that you have failed to honour your contractual agreement in paying all outstanding fees to a licensed immigration adviser, this may be a factor in any character assessment conducted by INZ if/when you apply for further visas to New Zealand.*

[59] The statement is false. Mr Tan's client did not owe $600 and Immigration New Zealand was not going to regard it as a character issue if he did not pay Mr Tan for services his practice failed to deliver. On the face of it, the only explanation is that Mr Tan made up the threat, knowing it was false, so as to procure $600 from his client, which he was not entitled to have. That is gross dishonesty in a professional relationship where he owed professional and fiduciary duties to his client.

[60] Accordingly, this course of conduct involves dishonesty and misleading behaviour. The Tribunal put Mr Tan on notice that it appeared he had made statements to his client without regard to their truth, and for the purposes of manipulating him:

[60.1] Mr Tan elected not to be cross-examined on those matters and claimed he was talking about withdrawing his request for his client's file, not the application his client understood Immigration New Zealand was processing.

[60.2] His counsel submitted that while this conduct was unacceptable, the evidence fell short of dishonest or misleading behaviour. He also submitted that he was merely misguided, and reacted emotionally as the problems were of Ms Assa's making and not his; but that his conduct fell short of dishonesty.

[61] Mr Tan's minimisation of his conduct is not plausible. He knew his client was concerned about his immigration status, and rightly so. He provided assurance of his client's status. He then told him he would withdraw services, and withdraw his pending application. It is elementary that if he withdrew his services he was obliged to make professional arrangements for continuity of service; he had no right to take action, without instructions, to withdraw any application his client made. The conduct was threatening; Mr Tan probably knew the threats did not reflect what he was entitled to do, but intended his client to believe the threats were real and that he was entitled to carry them out.

[62] Mr Tan dishonestly failed to disclose that his client's application had been declined two years prior to when he found out. When Mr Tan attempted to recover fees from his client, he must have known that they were unlikely to have been owed.

[63] Whether Mr Tan was talking of the original application, which his client likely thought he was, or intended to refer to his request for information from Immigration New Zealand does not change the dishonesty and abuse of power in Mr Tan's relationship with his client.

[64] After ample time for reflection, Mr Tan then attempted to procure $600 through providing false information, and threats he knew he was not entitled to realise.

[65] He threatened his client, he withheld information from him, and he attempted to recover fees that were not owed. He also disparaged his client, showing a contemptuous disrespect for him.

[66] The evidence establishes that Mr Tan on the balance of probabilities engaged in dishonest and misleading behaviour in the respects identified.

*Breaches of the Code of Conduct*

[67] The statement of complaint alleges Mr Tan failed to initiate his client relationship with the complainant. Furthermore, after the complainant signed an authority to act, Mr Tan failed to acknowledge his client relationship as he referred to himself as the complainant's agent, while asserting Ms Aasa remained his adviser. The statement of complaint contends Mr Tan was the complainant's adviser, at least from the time he obtained an authority to Act. Accordingly he:

[67.1] failed to obtain informed instructions and perform his services with due diligence and professionalism: clauses 1.1(a) and (b).

[67.2] failed to ensure the client relationship was initiated in accordance with the 2010 Code, including failing to take personal responsibility for ensuring that the written agreement, Code of Conduct and complaints procedures were provided and explained to the complainant: clauses 1.4(a), 1.5(a), 9(b) and 9(c).

[68] Further, that he failed to uphold the integrity of New Zealand's immigration system and the Immigration Advisers Authority: Clause 2.1(f).

[69] Mr Tan admitted he did have a client relationship and had failed to comply with clauses 1.4(a), 1.5(a) and 9(c) of the 2010 Code. He did not provide evidence of complying with clause 9(b) regarding his internal complaints procedure. Accordingly, I find each of those grounds of complaint established.

[70] Mr Tan effectively admitted breaching clauses 1.1(a) and (b), as his conduct failed to meet the required standards of professionalism. However, he denied that there was any deliberately misleading or dishonest conduct. I have that found Mr Tan engaged in a series of actions that were in various respects negligent, dishonest, and misleading. Accordingly, Mr Tan did breach clauses 1.1(a) and (b), however, they add nothing to the previous findings.

[71] The same applies to failure to uphold the integrity of New Zealand's immigration system. Mr Tan's dishonesty included fabrications regarding Immigration New Zealand that amounted to denigration of it. His obligations of honesty as a licensed immigration adviser are also part of enhancing the reputation of New Zealand as a migration destination. Section 3 of the Act recognises that purpose as part of the regime for licensing immigration advises. Accordingly, while Mr Tan breached clause 2.1(f) of the 2010 Code, that does not add to the findings regarding dishonest and misleading behaviour.

**Decision**

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

[73] Mr Tan engaged in dishonest and misleading behaviour, and breached the 2010 Code in the respects identified; they are grounds for complaint pursuant to section 44(2) of the Act.

**Submissions on Sanctions**

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

[75] 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, Mr Tan is entitled to make submissions and respond to any submissions from the other parties.

[76] 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*

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

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

[77.2] 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.

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

**DATED** at Wellington this 9th day of August 2016.

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**G D Pearson**
Chair