

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

Decision No: [2016] NZIACDT 41

Reference No: IACDT 038/15

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Zhenying Feng

Complainant

AND

Jin Yan (Jenny) Zhang

Advisers

DECISION
(SANCTIONS)

REPRESENTATION:

Registrar: Geraldine Kelly, lawyer, Legal Group, MBIE, Auckland.

Complainant: In person.

Adviser: No appearance

Date Issued: 12 August 2016

DECISION

Complaint admitted

- [1] This decision imposes sanctions following a decision upholding a complaint against Ms Zhang (refer decision *Feng v Zhang* [2016] NZIACDT 35; www.justice.govt.nz).
- [2] The essential findings were:
- [2.1] Ms Zhang engaged in dishonest and misleading behaviour, which is a ground for complaint pursuant to section 44(2) of the Immigration Advisers Licensing Act 2007 (the Act).
- [2.2] In particular:
- [2.2.1] Ms Zhang, with her business associate (who is also her husband) Mr Young, were licensed immigration advisers. They operated their practice through a company named Ancheng International Group Limited.
- [2.2.2] The complainant, who was in China, engaged Ms Zhang and Mr Young to obtain a job offer and a work visa for New Zealand.
- [2.2.3] Ms Zhang led the complainant to believe he had employment in New Zealand as a chef and that his annual income would be \$31,200. He paid approximately \$24,000 for Ms Zhang's services; relying on the offer of employment and Ms Zhang's assurances of his immigration prospects.
- [2.2.4] Ms Zhang obtained a work visa for the complainant.
- [2.2.5] When he arrived in New Zealand, Ms Zhang took the complainant to work in a restaurant, which was not the one on his work visa. He received approximately \$5 per hour for his work. The complainant objected, and Ms Zhang took him to a series of work places where the employers paid him less than the minimum wage.
- [2.2.6] On 27 November 2009, Ms Zhang submitted an application to vary the complainant's work visa conditions; in a cover letter she said that he was still working for the employer named on the visa. In fact, he never worked there.
- [2.3] Accordingly, the complaint involved Ms Zhang misleading the complainant, providing false information to Immigration New Zealand, and charging fees that were more than fair or reasonable. Inevitably, the conduct also amounts to a systematic breach of several aspects of the Licensed Immigration Advisers Code of Conduct 2010.
- [3] I note, as it is a factor to consider, Ms Zhang was convicted of a representative criminal charge as a party to breaching a condition of a work permit (Immigration Act 1987 section 142(1)(ea)), and knowingly providing false or misleading information to an immigration officer (section 142(1)(c) of that Act). Her sentence on those charges, and other immigration matters, included \$30,000 reparation (\$5,000 for the complainant), 10 months home detention, and 300 hours community work. The starting point for the sentence was imprisonment for three years and three months; various mitigating factors resulted in the non-custodial sentence.
- [4] The full circumstances are set out in the substantive decision.

The Parties' Positions on Sanctions

- [5] The parties did not provide submissions on sanctions following the substantive decision. At the substantive hearing, Ms Zhang did indicate she is in a difficult financial position; her dishonesty has led to long-term unemployment, and has the burden of reparations.
- [6] The Tribunal did make observations regarding its jurisdiction, powers, and discretions regarding sanctions in the substantive decision. Accordingly, the parties may have chosen not

to make submissions based on those observations. I note accordingly, that as indicated in the substantive decision:

- [6.1] The Tribunal's approach to financial hardship is that, for the reasons discussed in decisions such as *Prakash v Zhou* [2015] NZIACDT 86; its orders are different from orders made under the Sentencing Act 2002. The Tribunal's orders are provable in bankruptcy, unlike orders made under the Sentencing Act. Accordingly, the Tribunal's orders are like other civil debts and do not endure through a bankruptcy. Accordingly, the ability to pay does not affect orders in the same way it does for reparation orders.
- [6.2] The Tribunal has regarded its orders for financial penalties as matters where it has some discretion; it does consider the adviser's financial circumstances. However, in relation to claims for compensation that are recoverable in the Disputes Tribunal or civil court jurisdictions, the Tribunal will usually make orders that would be available in those jurisdictions if parties seek them. Similarly, costs are a civil liability that will turn on the conduct of the proceedings, rather than on the adviser's means, except perhaps in exceptional cases.
- [6.3] The professional dimension of Ms Zhang's dishonesty has distinct aspects arising from the breach of trust in a privileged position that go beyond the criminal offending. It is routine in professional disciplinary matters to impose additional penalties where criminal offending occurs in the course of professional misconduct. Nonetheless, it is usually appropriate to have regard to criminal sanctions.

Discussion

The principles to apply

- [7] 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.
- [8] When imposing sanctions, those statutory purposes require consideration of at least four factors which may materially bear upon maintaining appropriate standards of conduct:
- [8.1] *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 ..."
- [8.2] *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.
- [8.3] *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).
- [8.4] *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).

This case

- [9] Ms Zhang's conduct was egregious and exploitative; such conduct makes the starting point close to the maximum financial penalty, and exclusion from the profession is inevitable. 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 paragraphs [13]-[14].

- [10] In this case, the professional and the criminal offending are wholly inconsistent with Ms Zhang having the privileged status of a licensed immigration adviser. While exclusion from the profession is a last resort, it is inevitable in a case such as this, where the breach of trust while holding the status of a licensed immigration adviser is comprehensive. Consumers of immigration advice are entitled to know that the Act excludes persons such as Ms Zhang.
- [11] Rehabilitation is not a realistic possibility now, and it appears that it will never be a possibility. However, the Tribunal and the Registrar have separate roles. The Tribunal can impose conditions that a practitioner must fulfil before applying again for a licence. However, the Registrar deals with fitness requirements if a former licence holder ever applies for a licence in the future; disciplinary history is potentially a relevant factor. These are issues for the Registrar; the Tribunal has no interest in them beyond their relevance to the orders it should make regarding applying for a licence.
- [12] In this case, it is sufficient to note that Ms Zhang would appear to be unfit to hold any licence under the Act. If that were to change, the circumstances are beyond what the Tribunal could presently contemplate. Accordingly, it is neither necessary nor appropriate to make any orders beyond the maximum two-year prohibition on applying for a licence.
- [13] The starting point for a financial penalty would be close to the maximum of \$10,000. However, I have regard to Ms Zhang's financial situation, and the penalties flowing from the criminal sanctions. The outcome is of Ms Zhang's own making; however, a penalty that Ms Zhang cannot pay will have little effect. I regard exclusion from the profession as the primary consequence of the current proceedings. In all the circumstances, I will impose a financial penalty of \$2,500, which I regard as simply recognition of the breach of Ms Zhang's professional duties that goes beyond the criminal component of her conduct.
- [14] I am conscious that there may be differences in the professional offending between Mr Young, and Ms Zhang. However, Ms Zhang has been subject to a harsher penalty in the criminal proceedings; more significantly, I have discounted the penalty for each of them, accordingly it is not necessary to attempt to distinguish between them in relation to the level of the financial penalty.
- [15] The complainant and the Registrar have not provided evidence in relation to the refund of fees and compensation, or to what extent the existing reparation orders cover those potential claims. The Tribunal cannot speculate on the scope of the reparation order in relation to the refund of fees and compensation. Accordingly, I make no orders for those matters. I expressly do so on the basis I have not determined the issue, and accordingly if the complainant wishes to pursue the matter in another jurisdiction I have not made a determination on that issue in this decision.
- [16] The profession is levied to fund the disciplinary regime. A disciplinary tribunal will consider the financial burden of a complaint on the profession as a whole. It is appropriate to require some, or all, of the burden to be borne by the person responsible for professional misconduct.
- [17] The principles 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 \$76,000 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.

- [18] Those principles appear to apply, with necessary modifications, to the Act and the present proceedings.
- [19] In *O'Connor v Preliminary Proceedings Committee HC Wellington AP280/89*, 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.

- [20] Under the Act, the mechanism is less direct as the Authority and the Tribunal are statutory bodies. Nonetheless, members are levied through an obligation to pay licensing fees and there can be little doubt that the purpose of section 51(1)(g) is the same in effect as applied in the authorities discussed. The costs of investigation, prosecution, and the costs of the Tribunal are all part of costs awards.
- [21] Neither the Registrar nor the complainant has applied for costs; there will be no order for their costs. Mr Young and Ms Zhang, without merit, denied responsibility for their conduct, and required the Tribunal to convene an oral hearing, notwithstanding their criminal convictions. The defence of the complaint, down to after the oral hearing commenced and witnesses attended, imposed a cost to the Tribunal and accordingly the Crown, Mr Young and Ms Zhang should bear at least a portion of it. They will each be required to pay costs of \$1,200 toward the Tribunal's own costs.

Determination and Orders

- [22] Ms Zhang is:
- [22.1] Censured;
 - [22.2] Ordered to pay a penalty of \$2,500;
 - [22.3] Ordered to pay a contribution of \$1,200 for the Tribunal's costs of hearing the matter;
 - [22.4] Pursuant to section 51(1)(e) of the Act, Ms Zhang is prevented from applying for any category of licence under the Licensed Immigration Advisers Act 2007 until two years have elapsed from the date of this decision.
- [23] The orders to pay the penalty and costs take immediate effect.

DATED at WELLINGTON this 12th day of August 2016.

G D Pearson
Chair