

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2018] NZIACDT 49

Reference No: IACDT 052/15

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **DONG MEI XU**
Complainant

AND **YING TIAN (aka TINA QIN)**
Adviser

**DECISION
(Sanctions)**

Date: 10 December 2018

REPRESENTATION:

Registrar: S Carr, counsel

Complainant: In person

Adviser: G C Jenkin, counsel

INTRODUCTION

[1] The Tribunal partially upheld this complaint in a decision on 26 October 2018 in *Dong Mei Xu v Ying Tian (aka Tina Qin)* [2018] NZIACDT 42. The Tribunal found Ms Tian breached her professional obligations.

[2] The complaint against Ms Ying Tian, also known as Tina Qin, a licensed immigration adviser, arose out of her representation of Ms Dong Mei Xu in respect of a work visa application. The application was twice declined by Immigration New Zealand, but Ms Xu was eventually granted such a visa on a discretionary basis.

[3] I dismissed the allegation of dishonest or misleading behaviour but found Ms Tian to have been negligent and/or to have breached the Code of Conduct 2014 (the Code) in the following respects:

- (1) Failing to inform Ms Xu of the decline of the work visa on or about 10 April 2015;
- (2) Failing to inform Ms Xu of the grant of a visitor's visa on about 10 April 2015;
- (3) Failing to inform Ms Xu of the decline of the work visa on about 8 July 2015;
- (4) Failing to inform Ms Xu of Immigration New Zealand's notification that she was unlawfully in New Zealand;
- (5) Failing to obtain Ms Xu's express instructions to lodge an application pursuant to a statutory discretion; and
- (6) Failing to have a written record of telephone conversations with Ms Xu on 9 July and 7 August 2015 and of meetings with her on 28 April and 12 August 2015, in breach of cl 26(a)(iii) of the Code.

[4] An email from the complainant to the Tribunal's case manager on 29 October 2018 is not material and has not been taken into account.

SUBMISSIONS

[5] Counsel for the Registrar, Ms Carr, submits the appropriate sanctions would be:

- (1) caution or censure;
- (2) enrolment in the next available intake and completion of the full Graduate Diploma in New Zealand Immigration Advice; and

- (3) payment of a penalty.

[6] Counsel for Ms Tian, Mr Jenkin, submits that Ms Tian is a very experienced immigration adviser who has been working continuously as an adviser for 17 years. This was her first and only complaint for the duration of her career. She failed to follow the Code because she was extremely embarrassed by the turn of events, being the inexplicable decline of the work visa by Immigration New Zealand. The eventual grant of the application under the statutory discretion was justification for the adviser's reaction.

[7] Counsel contends that Ms Tian's single purpose was to rectify the situation for the benefit of the complainant as quickly and as inexpensively as possible. The complainant did not need to take any alternate action, no harm was suffered by her and she promptly withdrew her complaint. Furthermore, Ms Tian was open and frank in her affidavit sworn on 6 December 2016. She was contrite and admitted that she had taken "her eye off the ball".

[8] It is submitted by Mr Jenkin that the principal issue, given the level of offending, is to ensure that it does not happen again. Counsel expressed his confidence that such careless acts by Ms Tian would not be repeated. It is contended that the gravity is at the lower end of the scale. Accordingly, the appropriate sanction should be:

- (1) retraining by way of a refresher course, such as the New Zealand Immigration Advice Refresher Course provided by Toi-Ohomai Institute of Technology; or
- (2) a small fine plus the usual censure.

JURISDICTION

[9] The Tribunal's jurisdiction is set out in the Immigration Advisers Licensing Act 2007 (the Act). Having heard a complaint, the Tribunal may take the following action:¹

50 Determination of complaint by Tribunal

After hearing a complaint, the Tribunal may—

- (a) determine to dismiss the complaint;
- (b) uphold the complaint but determine to take no further action;
- (c) uphold the complaint and impose on the licensed immigration adviser or former licensed immigration adviser any 1 or more of the sanctions set out in section 51.

¹ Immigration Advisers Licensing Act 2007.

[10] The sanctions that may be imposed are set out at s 51(1):

51 Disciplinary sanctions

- (1) The sanctions that the Tribunal may impose are—
- (a) caution or censure:
 - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
 - (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
 - (d) cancellation of licence:
 - (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:
 - (f) an order for the payment of a penalty not exceeding \$10,000:
 - (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
 - (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
 - (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

[11] In determining the appropriate sanction, it is relevant to note the purpose of the Act:

3 Purpose and scheme of Act

The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination, by providing for the regulation of persons who give immigration advice.

[12] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:²

It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because 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.

² *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

...

The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.

...

Lord Diplock pointed out in *Ziderman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

[13] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the profession itself.³

[14] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.⁴

DISCUSSION

[15] I am mindful of Mr Jenkin's submission that the individual heads of complaint are interlinked, notably (1) and (2) on about 10 April 2015, and (3) and (4) on about 8 July 2015.

[16] I agree with the summation of the situation Ms Tian found herself in outlined by Mr Jenkin. Ms Tian competently handled the various applications on behalf of Ms Xu and was ultimately successful. There was no delay in approval or additional cost to Ms Xu as a result of Ms Tian's conduct. I appreciate that there was some potential for prejudice to Ms Xu arising from the failure to advise her promptly of her unlawful status, as Immigration New Zealand was more likely to refuse a work visa. However, it transpired that it did not do so.

[17] However, while competently handling the multiple applications, Ms Tian failed in her relationship with her client. Essentially, she failed to obtain instructions on the application that was ultimately successful and failed to provide timely updates of the

³ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at pp 724–725, 727; *Z v Dental Complaints Assessment Committee* at [151].

⁴ *Patel v The Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

status of the various applications. Ms Tian was careless in her communication with her client. A failure to obtain instructions could have serious consequences for the client, but in this case the path chosen was the correct one. In addition to the lack of communication, there was a failure to keep proper records, also relating to client communications. While these are all important professional obligations, I accept Mr Jenkin's classification of the offending as being at the lower end of the scale.

[18] Ms Tian was prompt in admitting fault. In her first response of 15 January 2016, she accepted she had failed in the level of service provided to Ms Xu. In her affidavit of 6 December 2016, by which time she had instructed counsel, she admitted the core breaches, as found in the earlier decision. She acknowledged a failure to obtain instructions and a failure to advise her client of the outcome of at least one visa application. She also offered to undergo a refresher course which she believed would be beneficial.

[19] Ms Carr for the Registrar seeks full retraining, but Ms Tian is an experienced and apparently competent adviser whose professional failings in respect of Ms Xu appear to be an isolated case. There was no lack of competence in handling the applications, but rather a failure to properly manage the relationship with the client and to properly document communications with the client.

[20] The Registrar seeks a financial penalty. The approach of the Tribunal to a one-off violation, which is promptly admitted and where some further training is acknowledged as appropriate, is restorative rather than punitive. Therefore, a financial penalty is not warranted in this instance.

OUTCOME

[21] Ms Tian is:

- (1) censured; and
- (2) ordered to enrol and complete the New Zealand Immigration Advice Refresher Course provided by Toi-Ohomai Institute of Technology, at its next intake (currently scheduled for February 2019).