IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 11

Reference No: IACDT 010/16

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**FAN ZHANG & LIYUAN CAO** Complainants
AND	**SHU CHEN** Adviser

DECISION
(Sanctions)
Dated 1 March 2019

REPRESENTATION:

Registrar:	T Thompson, counsel
Complainant:	A Smith, R Kennedy, counsel
Adviser:	S Laurent, J Turner, counsel

INTRODUCTION

[1] The Tribunal (Mr Pearson) upheld this complaint in a decision issued on 16 November 2018 in *Zhang & Cao v Chen* [2018] NZIACDT 47. The Tribunal found that Ms Chen, a licensed immigration adviser, was incompetent in the way she dealt with the complainants and that she breached cl 20(a) of the Code of Conduct 2014 (the Code) in charging fees to which she was not entitled.

[2] The decision of 16 November 2018 had followed an interim decision in *Zhang & Cao v Chen* [2018] NZIACDT 11 issued on 5 April 2018 and then a Minute issued on 19 June 2018.

BACKGROUND

[3] The background to the complaint is set out in the interim decision. It is not entirely clear from the interim decision or the later decision of 16 November 2018 how much of the chronology, as alleged by the Registrar of Immigration Advisers (Registrar) or the complainant, was accepted by the Tribunal. This is not a criticism of the previous Tribunal chair as he was unable to resolve the conflicting accounts since no party desired an oral hearing and there had to be finality.[1] It is not appropriate to undertake that investigation at the sanctions stage of the process, nor do I consider it necessary.

[4] As best as I can determine, the chronology is as follows.

[5] The complainants (life partners) travelled to New Zealand in September 2013.

[6] The complainants engaged Ms Chen in October 2014 with the objective of obtaining residence in New Zealand. At a meeting with her, they told her of their proposal to purchase a motel, with financial help from the father of one of them. Ms Chen advised them to go ahead with such a purchase, submit a business plan to Immigration New Zealand and employ three New Zealanders. She informed them this would allow the couple to obtain work visas for two or three years.

[7] About two weeks later, the complainants entered into a contract with Ms Chen for the provision of services which covered applications for work visas and then later residence visas, all in the entrepreneur immigration category. A further agreement was entered into in December 2014 concerning a visitor visa application.

[8] The complainants paid Ms Chen an initial fee instalment of $17,500.

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[1] *Zhang & Cao v Chen* [2018] NZIACDT 47 at [14]–[15].

[9] In December 2014, the complainants entered into an agreement to purchase a leasehold interest in a motel for $265,000. It was Ms Chen who arranged to incorporate the company purchasing the motel. She advised them that they could not be directors. The sole director of the company was a person nominated by Ms Chen. The complainants did not meet this person, nor were they provided with his contact details when requested. He shares an address with Ms Chen.[2]

[10] In January 2015, the contract to purchase the motel lapsed.

[11] Ms Chen obtained a visitor visa on 25 February 2015 for one of the complainants. An application for the other complainant failed, as payment was declined on the credit card. Ms Chen did not rectify this when informed by Immigration New Zealand. That complainant's presence in New Zealand then became unlawful.

[12] An application was accordingly made by Ms Chen on behalf of that complainant for a visitor visa under s 61 of the Immigration Act 2009, a discretionary power. The complainants were not told of this. It was declined.

[13] Ms Chen then filed a request under the Official Information Act 1982 and this was completed in February 2015.

[14] No further immigration applications were made by Ms Chen.

[15] Following the lapse of the motel purchase contract, the complainants explored the possibility of establishing a restaurant and spent $42,000 on an assignment of a lease and business assets. Ms Chen advised the complainants to purchase more businesses to meet the visa criteria. They entered several leases and purchased goods and equipment. By this time, according to the complainants, they had spent $730,000 but had still not achieved the investment of $500,000 required for the visa.

[16] In March and April 2015, the complainants provided a business plan for a restaurant and also plans for retail shops and student accommodation. Ms Chen obtained assistance from another person for the drafting of the business plan. A revised draft was sent by her to the complainants in August 2015. The business plan was never finalised.

[17] The complainants terminated the engagement with Ms Chen on 2 September 2015.

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[2] *Zhang & Cao v Chen* [2018] NZIACDT 11 at [2.3].

[18] In August 2017, the complainants were told by Immigration New Zealand that they would not receive the requested student visas as shareholders of their investment company, so they transferred the shares to three friends at nil value.[3]

Complaint

[19] A complaint against Ms Chen was made to the Immigration Advisers Authority (Authority) by the complainants in October 2015. The Authority is headed by the Registrar. When contacted by the Authority, Ms Chen offered a refund of $17,500. The offer was rejected as the complainants regarded their complaint as serious.

[20] The Registrar referred the complaint to the Tribunal.

[21] In the interim decision of 5 April 2018, the Tribunal found that Ms Chen had accepted a significant instruction in a complex area of immigration law and practice. That instruction had to commence with a serious review of the complainants' circumstances. It required a significant evaluation of their business skill and experience, financial resources and the various immigration pathways that might have been open. It had to be accompanied by the drafting of an agreement for the provision of services by her which needed to take into account the support that might be required from other professional advisers to lodge the immigration application successfully.[4]

[22] The Tribunal further found that, aside from one successful visitor visa and two attempts to obtain one for another complainant, Ms Chen did not deliver any of the contracted services.[5]

[23] As the Tribunal additionally found *prima facie* evidence of dishonest or misleading behaviour by Ms Chen, as alleged by the complainants, the interim decision sought clarity from the Registrar as to whether the grounds of complaint should be enlarged.[6] The Tribunal was concerned that the grounds limited the Tribunal's jurisdiction as dishonesty was not a ground referred by the Registrar to the Tribunal.

[24] The Registrar advised that incompetence was the underlying issue and that the grounds of complaint would not be amended to incorporate dishonesty.[7]

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[3] Submissions of Ms Smith, 3 December 2018 at [2](iii) & (iv).
[4] *Zhang & Cao v Chen*, above n2, at [36].
[5] At [6.4.2].
[6] At [40.2] & [42].
[7] *Zhang & Cao v Chen* [2018] NZIACDT 10 (Minute) at [6]–[7].

[25] At a telephone conference on 14 June 2018, the Tribunal (Mr Pearson) noted that dishonest or misleading behaviour was not within the Tribunal's jurisdiction. It gave notice of its conclusion on the facts in relation to the statement of complaint before it:[8]

(1) Ms Chen was incompetent in the way she dealt with the complainants.

(2) Ms Chen breached cl 20(a) of the Code, as she was not entitled to any fees.

[26] The parties were given the opportunity to challenge this interim view.

[27] The Registrar and Ms Chen advised they did not oppose the interim view.

[28] The complainants opposed a final decision on the basis notified by the Tribunal. It was contended that the Registrar had failed to discharge his statutory function as the complaint filed in the Tribunal was unduly narrow. In particular, it omitted dishonest or misleading behaviour which had been alleged by the complainants in their complaint to the Authority.

[29] In the decision of 16 November 2018, the Tribunal dismissed the objection of the complainants. Accordingly, the formal finding was:

(1) Ms Chen was incompetent in the way she dealt with the complainants.

(2) Ms Chen breached cl 20(a) of the Code, as she was not entitled to any fees.

[30] In that decision, the Tribunal invited submissions on sanctions.

SUBMISSIONS

[31] Counsel for the Registrar, Ms Thompson, in her submissions of 27 November 2018, contends that the appropriate sanctions would be:

(1) caution or censure;

(2) an order directing Ms Chen to pay reasonable compensation to the complainants for losses sustained as a result of the breach; and

(3) an order preventing Ms Chen from reapplying for a licence until she undertakes and obtains the Graduate Diploma in New Zealand Immigration Advice.

[8] Minute, above n7, at [10].

[32] Counsel for the complainants, Ms Smith, in her submissions of 3 December 2018, submits that the appropriate sanctions would be:

(1) caution or censure;

(2) an order for repayment of the fees of $17,500 plus interest accrued;

(3) an order preventing Ms Chen from applying for a licence indefinitely, or at least until she has completed the Graduate Diploma in New Zealand Immigration Advice;

(4) any financial penalty that the Tribunal thinks appropriate; and

(5) an order that Ms Chen pay $251,379 compensation to the complainants for the losses flowing from her incompetence.

[33] Counsel for the adviser, Mr Turner, in his submissions of 13 December 2018, accepts that it would be appropriate to order Ms Chen to complete the Graduate Diploma and advises that she is prepared to pay a penalty, in addition to refunding the fees of $17,500 paid by the complainants. As for the claim for compensation, it has not been established that there is direct causal link between the incompetence and the alleged loss.

JURISDICTION

[34] 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:[9]

> **50 Determination of complaint by Tribunal**
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> After hearing a complaint, the Tribunal may—
>
> (a) determine to dismiss the complaint:
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> (b) uphold the complaint but determine to take no further action:
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> (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.

[9] Immigration Advisers Licensing Act 2007.

[35] The sanctions that may be imposed are set out at s 51(1) of the Act:

> **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:
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> (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
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> (d) cancellation of licence:
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> (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:
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> (f) an order for the payment of a penalty not exceeding $10,000:
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> (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:
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> (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

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

> **3 Purpose and scheme of Act**
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> 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.

[37] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:[10]

> 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.
>
> …

[10] *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.
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> …
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> 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.

[38] 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.[11]

[39] 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.[12]

[40] The most appropriate penalty is that which:[13]

(a) most appropriately protects the public and deters others;

(b) facilitates the Tribunal's important role in setting professional standards;

(c) punishes the practitioner;

(d) allows for the rehabilitation of the practitioner;

(e) promotes consistency with penalties in similar cases;

(f) reflects the seriousness of the misconduct;

(g) is the least restrictive penalty appropriate in the circumstances; and

(h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

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

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

[13] *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], relying on *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633 at [49].

DISCUSSION

[41] The grounds of complaint found against Ms Chen were incompetence and a breach of the Code.[14] It was found that Ms Chen had breached cl 20(a) of the Code, which stipulates:

> **Fees**
>
> 20. A licensed immigration adviser must:
>
> a. ensure that any fees charged are fair and reasonable in the circumstances

[42] I will deal with potentially appropriate sanctions in the order in which they appear in s 51 of the Act.

Censure

[43] I agree with Ms Thompson and Ms Smith that it is appropriate for the Tribunal to mark its disapproval of Ms Chen's conduct. A censure is justified by the level of incompetence, which will have contributed to the complainants' significant losses.

Training

[44] Counsel are all agreed that it would be appropriate to order Ms Chen to undertake the Graduate Diploma in New Zealand Immigration Advice at the Toi-Ohomai Institute of Technology. I also agree that the level of incompetence justifies this. I record here that this is the full immigration advisers qualification course and not merely the refresher course more commonly imposed by the Tribunal.

Order preventing reapplication for a licence

[45] Ms Chen's licence will apparently expire in October 2019.

[46] Ms Thompson seeks an order preventing Ms Chen from reapplying for a licence until she completes the Graduate Diploma. Ms Smith seeks such an order to apply indefinitely, or at least until Ms Chen completes the Graduate Diploma.

[47] The Tribunal has no power to make an order preventing reapplication indefinitely. The maximum period is only two years, or until any specified conditions are met.[15]

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[14] Immigration Advisers Licensing Act 2007, s 44(2)(b) & (e).
[15] Section 51(1)(e).

[48] While it is common between the parties that there has been a level of incompetence which was not minor and which contributed to the complainants' serious loss, there is no clear finding in either the interim decision or that of 16 November 2018 of the instances of incompetence, their number or nature. That would require an oral hearing and it would not be appropriate to embark on that exercise in the context of a sanctions process.

[49] In essence, the incompetence must be the failure to compile and file the entrepreneur work visa and later residence applications, including Ms Chen's contribution to the complainants investment strategy, which ultimately failed. However, I am not persuaded that Ms Chen necessarily bears all the blame for the failed investments. It must be the complainants who are primarily responsible for making investments which meet the immigration criteria.

[50] Furthermore, the Tribunal has not been informed of other instances of incompetence concerning other clients. Ms Chen has been an adviser since 2009, but only one earlier complaint was upheld by the Tribunal. It concerned the failure to have a written agreement and was regarded as at the low end, so no sanction was imposed.[16]

[51] It must also be remembered that the Registrar did not pursue the potential dishonesty ground of complaint, so I discount that allegation.

[52] It is also noted that Ms Chen has acknowledged her breach of professional standards. She made an early offer to refund the fees and accepts both full retraining and the appropriateness of a financial penalty. Acknowledgement of past wrongdoing is an important protection of the public.

[53] I conclude that the finding of incompetence warrants the adviser undertaking the course but is not sufficient to prevent re-licensing, even temporarily. This is the least restrictive appropriate penalty.

Penalty

[54] Ms Smith contends a financial penalty is appropriate. Mr Turner concedes this is somewhat inevitable. I find it is appropriate to mark disapproval of Ms Chen's management of the complainants' instructions in this way.

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[16] *Ye v Chen* [2016] NZIACDT 2.

[55] In setting the level of penalty, I take into account that it is not clear what the totality of the incompetence was, but I accept that it was not minor and that it contributed to the complainants' serious losses. In saying that though, it will be seen from my later assessment of whether Ms Chen should be ordered to pay compensation that I do not accept it has been established that she was the primary or real cause of their losses.

[56] I must also punish the charging of a high level of fees, which ultimately resulted in only a visitor visa for one of the complainants. Ms Chen clearly did some work on the entrepreneur application, at least the business plan, but the visa applications as envisaged by the complainants were never made. It was for those applications that the fees were paid, not the straight-forward visitor applications. Hence the finding of a breach of cl 20(a) of the Code.

[57] In respect of the unjustified fees, it is relevant to note in mitigation the early offer of a refund.

[58] Previously decided cases are not always helpful as the circumstances impacting on the appropriate level of a penalty are so variable.

[59] Mr Turner cites *Heng v Yap* [2014] NZIACDT 110, where a penalty of $4,000 was imposed and contends that a mid-range penalty is appropriate. I note that the complaint upheld there was not just negligence and incompetence, but also the use of unlicensed staff. The latter was regarded as the most serious offence.

[60] Another decision cited by Mr Turner is *MSC v Scholes* [2013] NZIACDT 71, where a penalty of $4,500 was ordered. While the complaint was regarded as concerning judgement and competence, there were serious elements involved including the use of unlicensed staff and a conflict of interest.

[61] I find that a penalty of $3,000 reflects the level of incompetence and the breach of cl 20(a) of the Code found in this case.

Repayment of fees

[62] Ms Smith seeks the repayment of all fees paid to Ms Chen and Mr Turner agrees this would be appropriate. Indeed, such an offer was made as early as about October 2015 by Ms Chen. Her work was of no value. Obtaining the visitor visa would have been straightforward and the complainants could have done this themselves. I will order such a refund.

[63] It would appear that the payment was kept in a trust account pending the outcome of any complaint. The complainants ask for the accrued interest. There is no evidence of any interest, but I agree any such benefit should be disgorged in favour of the complainants. However, the order I will make is not an award of interest in any event. That would not be appropriate as the complainants declined an offer of interest in June 2016, despite the offer being made without prejudice to prosecution of the complaint.[17] If the monies were not held in an interest-bearing account, no interest is payable to the complainants.

Compensation

[64] Ms Smith seeks $251,379 on behalf of the complainants. This is their estimated loss from their investments in New Zealand, though the "true loss" is said to be as high as $467,464. The balance sheet of the complainants' investment company shows negative equity of $251,379. There is no breakdown of how this figure was arrived at, though Ms Smith's submissions provide a description of how it arises.

[65] It is contended that the gravity of Ms Chen's incompetence was severe and that her advice directly caused the complainants' loss. They would not have invested in the business ventures had it not been for her advice. The complainants state that they did not have the necessary expertise to operate the business ventures.

[66] Mr Turner opposes this on the ground that there must be a direct causal link between the incompetence and the alleged losses. Furthermore, the Tribunal must evaluate this.

[67] I agree with Mr Turner. For such a large sum of money, the complainants have to prove, on the balance of probabilities, that their losses of an ascertained or ascertainable amount were caused by Ms Chen's incompetence. They would have to prove an orthodox cause of action in contract or tort and set about proving the loss in the normal way. The incompetence (or breach of the Code) would have to amount to a legally recognised cause of action. The Tribunal's power to award reasonable compensation could not circumvent the usual criteria for civil claims for a claim of such magnitude.

[68] Indeed, I doubt that Parliament had in mind that the Tribunal should assess such significant civil claims in the context of a disciplinary process. It seems to me that s 51(1)(i) has in mind modest and more easily assessed claims for compensation only. It is intended to provide an expedient remedy for such claims when the Tribunal is seized

[17] Email from complainants' solicitor to the Authority, 24 June 2016, at 1139–1140 of the Registrar's supporting documents.

of the relevant facts, rather than compel complainants to mount a second set of proceedings in a general court.[18]

[69] I also have grave doubts whether causation could be established here. The 'but for' test of causation contended by Ms Smith does not establish causation in law.[19] In particular, it would have to be established that the complainants relied on Ms Chen for more than just immigration advice and that it was reasonable to do so.

[70] Ms Chen gave advice in relation to business matters and it would appear that the complainants relied on that advice, but the obvious question is why did they did so. Ms Chen is experienced in immigration matters, but it is not known what her business qualifications and experience are. It is surprising the complainants spent $730,000, as alleged, without assessing business propositions themselves or seeking the advice of more appropriate advisers, such as a lawyer, accountant, property agent or small business broker. It is questionable whether even new migrants inexperienced in New Zealand business can reasonably claim to have entirely relied on an immigration adviser for investment advice, even one who is prepared to undertake such work.

[71] The unsigned agreement between Ms Chen's company and the complainants states under the heading "Immigration Services" that "we" will provide representation in relation to an application for a business entrepreneur work and residence application.[20] The specific services were set out in "Schedule A". The schedule stated that the company would provide the necessary advice regarding the documents for a business plan for the visa and prepare and submit the visa application. The agreement said nothing about advice concerning business investments or their evaluation.

[72] The complainants allege Ms Chen wrongly advised them that they could not be company directors. Someone associated with her was appointed as the director. They later transferred the shareholding to three friends at nil value, but this was not on the advice of Ms Chen, as it occurred about two years after her engagement had ceased. It would seem the complainants will obtain little or no value out of the business at the end.

[73] With respect to the complainants, this strategy raises many questions as to both their decision-making and their own contribution to the losses. That is so whether or not it was formulated by Ms Chen.

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[18] *Eppanapally v Zhou* [2015] NZIACDT 84 at [14].
[19] Submissions, 3 December 2018, at [5].
[20] See the Registrar's supporting documents at 62–68.

[74] On the incomplete evidence adduced to the Tribunal, I cannot find that Ms Chen's professional misconduct resulted in the losses (which are not specifically identified) for which compensation is sought. Nor do I find that the loss of a large part of the investment, approximately $250,000 as alleged, was caused by Ms Chen according to any recognised legal cause of action. I am not even persuaded that the Tribunal has jurisdiction to investigate alleged losses of such magnitude in order to determine whether Ms Chen should be legally liable for them.

[75] I decline to order any compensation. The complainants are not left without a remedy. The losses will have to be pursued in the normal way through the civil courts.

OUTCOME

[76] Ms Chen is:

(1) censured;

(2) ordered to complete the Graduate Diploma in New Zealand Immigration Advice provided by the Toi-Ohomai Institute of Technology at its next intake;

(3) ordered to pay immediately to the Registrar a penalty of $3,000; and

(4) ordered to pay immediately to the complainants $17,500 in fees paid, together with any interest earned on such monies.

D J Plunkett
Chair