

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 14

Reference No: IACDT 016/16

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **LL**
Complainant

AND **JIANYA SUN**
Adviser

**DECISION
(Sanctions)
Dated 12 March 2019**

REPRESENTATION:

Registrar: S Carr, counsel

Complainant: No appearance

Adviser: G Aulakh, counsel

INTRODUCTION

[1] The Tribunal upheld this complaint in a decision issued on 30 January 2019 in *LL v Sun* [2019] NZIACDT 3. It found that Mr Sun had breached his professional obligations under the Code of Conduct 2010 and the Code of Conduct 2014 (the Codes).

BACKGROUND

[2] The narrative is set out in the earlier decision of the Tribunal and will only be very briefly summarised here.

[3] At all material times, Mr Sun was resident in Shanghai.

[4] In 2010, Mr Sun entered into a memorandum of understanding with a Shanghai migration company which was licensed under Chinese law to advise potential migrants. Under that memorandum, Mr Sun would advise the company as to the eligibility of the company's clients to migrate to New Zealand or other countries. If migration was pursued by the client, Mr Sun was responsible for compiling the immigration application, filing it with the appropriate government agency in the foreign country and generally representing the client in supporting that application. Under Chinese law, Mr Sun, as a foreign licensed immigration adviser, was not permitted to directly communicate with the client.

[5] The complainant instructed the company in September 2012 with a view to migrating to New Zealand. Mr Sun provided initial advice to the company as to her eligibility and in July 2013 filed an expression of interest in the investor category of residence on her behalf. As Immigration New Zealand invited the complainant to apply for residence, Mr Sun filed an application with Immigration New Zealand in August 2013. In support, he provided documentation concerning her business experience and financial position.

[6] In June 2014, Immigration New Zealand wrote to the complainant (through Mr Sun) expressing concern that she had provided false or misleading financial information.

[7] The complainant terminated her agreement with the company about two weeks later. She then engaged a new licensed immigration adviser. This adviser provided to Immigration New Zealand a declaration by the complainant (dated 30 June 2014) stating that she had signed a blank page on both the expression of interest and later residence application forms and that she had not been fully informed of the documents submitted to Immigration New Zealand. The new adviser told Immigration New Zealand that it was

Mr Sun who had asked the complainant to sign the blank forms. Furthermore, he had filed a false audit report without her knowledge as well as a statement allegedly signed by her but also without her knowledge.

[8] The new adviser wrote to Immigration New Zealand in August 2014 alleging that Mr Sun had seriously breached the advisers' Code as the complainant's application had been handled by unlicensed persons. According to him, she was the victim of criminal activity. Further declarations from the complainant (dated 11 December 2014) were provided by the new adviser to Immigration New Zealand in January 2015. The complainant confirmed that both the expression of interest and residence application forms had been blank at the time she signed them, and that neither the "Personal Business Experience" document nor her statement of 3 March 2014 had been signed by her.

[9] Immigration New Zealand advised the complainant in November 2015 that her residence application was declined.

[10] The complainant lodged a complaint against Mr Sun with the Immigration Advisers Authority (the Authority) on about 31 August 2015. She advised that she had had no contact with Mr Sun, had been asked to sign a blank application form, that information had been supplied without her knowledge and that her signature had been forged on documents.

[11] The Authority formally notified Mr Sun of the complaint on 27 May 2016. A comprehensive response was provided by his counsel, Mr Aulakh, on 1 July 2016.

[12] The Registrar of Immigration Advisers (the Registrar), being the head of the Authority, filed a complaint with the Tribunal on 27 November 2016.

[13] In its decision on 30 January 2019, the Tribunal upheld the complaint and found that Mr Sun had breached cls 1.1(a), 1.1(b) and 2.1(b) of the Code of Conduct 2010 and cls 1, 2(e) and 3(c) of the Code of Conduct 2014. In particular, he had:

- (i) allowed unlicensed individuals within the company to provide immigration services that only a licensed immigration adviser is permitted to provide; and
- (ii) failed to take charge of the engagement with the complainant.

[14] In the decision, the Tribunal accepted that Mr Sun had not intentionally set out to circumvent the Immigration Advisers Licensing Act 2007 (the Act). While he must have been aware that unlicensed staff were assisting the complainant, he did not believe that was contrary to the Act. He genuinely believed they were only carrying out permitted clerical work.

[15] The head of complaint concerning the alleged insertion on the application forms of information after they had been signed was dismissed for lack of evidence. For the purpose of the complaint, the Tribunal accepted that Mr Sun was not aware of any falsity or forgery of any document filed with Immigration New Zealand.

SUBMISSIONS

[16] Counsel for the Registrar, Ms Carr, submits that Mr Sun should be:

- (1) cautioned or censured;
- (2) ordered to pay a penalty;
- (3) ordered to pay part or all of the costs of an investigation or hearing. A nominal figure of \$1,000 is sought for the investigation; and
- (4) prevented from reapplying for a licence unless he completes the full Graduate Diploma in New Zealand Immigration Advice.

[17] There were no submissions from the complainant.

[18] Mr Aulakh advises that Mr Sun accepts the decision of the Tribunal. Mr Sun had admitted from the outset that he did not have direct engagement with the complainant, since he was obliged to comply with Chinese law. The Tribunal itself had accepted that the Codes required Mr Sun to comply with Chinese law.

[19] According to Mr Aulakh, Mr Sun has always been mindful of his professional obligations, having had an unblemished record of providing competent advice concerning New Zealand for six years. As a layman, Mr Sun lacked the expertise to reconcile the conflict between the laws of China and those of New Zealand relating to his professional obligations. From the time that he was alerted to an alleged breach by the Authority, he did not accept instructions from the company nor did he lodge applications with Immigration New Zealand.

[20] Indeed, Mr Sun has not renewed his contract with the company. He is now resident in Australia and being over 65 years old, has retired from the profession. He will not be renewing his licence.

[21] Mr Aulakh points out that the complaint has been pending now for nearly two and a half years and Mr Sun has been under constant stress and anxiety during this extended period.

[22] It is noted that the complainant withdrew her complaint.

[23] Counsel contends that it would be fair and just to issue a caution only.

JURISDICTION

[24] The Tribunal's jurisdiction to award sanctions is set out in 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.

[25] 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:
 - (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:

¹ Immigration Advisers Licensing Act 2007.

- (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.

[26] 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.

[27] 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.

...

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.

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

[28] 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

[29] 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

[30] The most appropriate penalty is that which:⁵

- (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.

DISCUSSION

[31] Mr Sun's mode of professional practice enabled unlicensed persons, the company's staff, to provide services only a licensed adviser is lawfully permitted to perform. The staff may have committed offences.⁶ Mr Sun's misconduct is therefore serious as he facilitated unlicensed people to provide services only a licensed adviser could lawfully perform. The obligation to personally discharge the professional obligations and hence to personally engage with the client is a critical feature of the Codes.

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

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

⁵ *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].

⁶ Immigration Advisers Licensing Act 2007, ss 8(1), 63(1) & 73.

[32] In saying that, I record having accepted that there was no wilful violation of the Act or the Codes by Mr Sun. He did not personally engage with the complainant because Chinese law did not permit him to do so. While Chinese law does not qualify his obligations under New Zealand law applicable to licensed advisers, it does explain his conduct. I found that he must have known what the staff were doing but he believed, albeit wrongly, that it was merely permitted clerical work.

[33] I acknowledge also that Mr Sun ceased representing potential migrants to New Zealand early after receiving the complaint filed in the Tribunal, pending clarification of the law as to his obligations. Furthermore, Mr Sun acknowledged early in the complaints process the underlying misconduct, the lack of engagement with the complainant, though he maintained it was lawful.

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

Caution or censure

[35] It is appropriate to mark the Tribunal's disapproval of Mr Sun's conduct by censure. I do not accept that a caution is sufficient given the seriousness of the violations.

Training

[36] Ms Carr does not expressly seek an order requiring completion of any training but appears to believe it is necessary as she seeks an order that Mr Sun be prevented from reapplying for a licence until he has completed the full Graduate Diploma Course. I will be dealing with her request for an order that Mr Sun be prevented from reapplying for a licence in the next section.

[37] I do not see the need for any retraining. Mr Sun will now be well aware of the professional obligations violated. There is no evidence of any broader lack of knowledge or skill beyond misunderstanding the scope of the permitted clerical work exception. I note also that his licence has expired, that he has retired and is of an age where there is less chance of a return to the profession.

Preventing licence reapplication

[38] Mr Sun's licence expired two years ago in March 2017. He has retired and now lives in Australia.

[39] The Registrar seeks an order that Mr Sun be prevented from reapplying for a licence, though linked it to a condition concerning training. While I have rejected the condition, I must consider the appropriateness of an order prohibiting reapplication.

[40] I have already noted the seriousness of Mr Sun's conduct. There is evidence the staff committed offences. Depending on the offence, each could be liable for a period of imprisonment not exceeding seven years and/or a fine not exceeding \$100,000.⁷ It is only because Mr Sun held a licence that the staff could undertake such work. He therefore enabled their unlawful and potentially illegal conduct.

[41] Since Mr Sun asserts that a licensed adviser cannot have any direct contact with clients in China under Chinese law, a critical feature of the Act and the current Code, it is not appropriate for him to hold a licence. There is no evidence Mr Sun intends to resume practicing, but I will make an order preventing him from doing so for the maximum period of two years. His breach of the Codes was serious and there exists a risk that if he resumes practice, even from Australia, China-based Chinese citizens will seek to instruct him and the exigencies of practice could compel the use of unlicensed people in China to assist them. This is precisely what has occurred in many complaints upheld by the Tribunal against New Zealand based advisers.

Penalty

[42] Ms Carr seeks payment of a financial penalty. The violations of the Codes by Mr Sun arose from a serious failure by him, the lack of personal engagement with the complainant. This led to unlicensed individuals providing immigration advice, a breach of the Act.

[43] In mitigation, I have accepted that the breaches arose from a conflict between the laws of New Zealand and China, both of which he was attempting to comply with. Having recognised the conflict, he unfortunately put in place an unlawful mode of business practice as a result of misunderstanding the scope of permitted clerical work. I have noted that he ceased representing prospective migrants well before the Tribunal's decision upholding the complaint. Indeed, he ceased practice, at least so far as migration to New Zealand was concerned.

[44] I also recognise the stress of an unduly long complaints process, largely the responsibility of the Tribunal.

[45] Notwithstanding the seriousness of the breach, I will not impose a penalty.

⁷ Immigration Advisers Licencing Act 2007, s 63(5).

Costs of investigation

[46] Ms Carr seeks payment, on behalf of the Registrar, of a nominal figure of \$1,000 towards the cost of the investigation. I have not been informed of the total investigation cost as the Authority does not keep such records, but I do not consider it would have been out of the ordinary. Mr Sun was co-operative and readily admitted his conduct, albeit maintaining that it was not a breach of the Codes.

[47] It is part of the duty of the Registrar to investigate complaints and he is funded to do so by advisers' fees and most likely also some taxpayer money. I do not consider it appropriate to order any part of the costs to be paid by advisers unless the investigation of that adviser was unduly complex or the adviser's conduct in response to the investigation contributed to an unusually high cost. The Tribunal has never routinely made such orders.

OUTCOME

[48] Mr Sun is:

- (1) censured; and
- (2) prevented from reapplying for a licence for two years.

D J Plunkett
Chair