IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2021] NZIACDT 14

Reference No: IACDT 01/21

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**YC** Complainant
AND	**JIALE WILLIAM WAN** Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
(Sanctions)
Dated 29 June 2021

REPRESENTATION:

Registrar:	Self-represented
Complainant:	H Gu, immigration adviser
Adviser:	Self-represented

INTRODUCTION

[1] Mr Jiale William Wan, the adviser, entered into an agreement with YC, the complainant, to seek a work visa. However, he delegated the work to Ms Yujuan Janelle Han, a provisionally licensed adviser employed by his consultancy, who was not identified in the agreement as an adviser. He also failed to reply to a letter from Immigration New Zealand resulting in a visa application being declined.

[2] A complaint to the Immigration Advisers Authority (the Authority) was referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It was upheld in a decision issued on 19 May 2021 in *YC v Wan*.[1] Mr Wan was found to have breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code). Ms Han was also found to have breached the Code in a separate decision.[2]

[3] It is now for the Tribunal to determine the appropriate sanctions. A separate sanctions decision concerning Ms Han will be issued at the same time as this decision.

BACKGROUND

[4] The narrative leading to the complaint is set out in the earlier decision of the Tribunal concerning Mr Wan and will only be briefly summarised here.

[5] Mr Wan, a licensed immigration adviser, is a director of PJ Education & Immigration Services Ltd (the consultancy), of Auckland. At the material time, he supervised Ms Han, then a provisionally licensed adviser, but who has since obtained a full licence.

[6] The complainant, a national of China, had been in New Zealand on student or work visas since 2014. She contacted Ms Han in early June 2019 as she wished to apply for an essential skills work visa.

[7] A written client agreement was entered into between Mr Wan and the complainant on 10 June 2019. On the following day, the complainant paid $1,995 to the consultancy, comprising a fee of $1,500 and Immigration New Zealand's fee of $495.

[8] It was, however, Ms Han who worked exclusively with the complainant to prepare and, on 28 June 2019, to file the visa application.

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[1] *YC v Wan* [2021] NZIACDT 10.
[2] *YC v Han* [2021] NZIACDT 11.

[9] On 31 July 2019, Immigration New Zealand wrote to Ms Han identifying a number of issues which could have a negative impact on the outcome of the application. The deadline to reply was 7 August 2019. Ms Han obtained an extension of time until 15 August 2019 to file a reply.

[10] On about 6 August 2019, Ms Han went on maternity leave and handed the file over to Mr Wan. While Mr Wan was aware of Immigration New Zealand's letter, he was not aware of the extension. He did not send a reply to Immigration New Zealand. Accordingly, on 21 August 2019, the application for a work visa was declined by Immigration New Zealand because it did not meet the requirements of the immigration instructions. The letter recorded that no reply had been received to the letter of 31 July 2019.

[11] Mr Wan immediately advised the complainant of Immigration New Zealand's decision, meeting her for the first time on 22 August 2019. Mr Wan took full responsibility for the decline. He reminded her that her interim visa expired on 11 September 2019and offered to lodge a reconsideration for no charge. If that was not successful, he could lodge a request under s 61 of the Immigration Act 2009 (for a discretionary visa for a person unlawfully in New Zealand), also for no charge. A full refund was additionally offered. The complainant did not give Mr Wan any instructions at the meeting.

[12] On the following day, 23 August 2019, the complainant instructed solicitors. They requested her file from Mr Wan's consultancy on 26 August 2019. Mr Wan provided the file electronically on 29 August 2019.

[13] On 25 September 2019, Mr Harris Gu, a licenced immigration adviser, advised Mr Wan and Ms Han that he was acting for the complainant. He sought a copy of the complainant's complete file. Mr Wan replied on 27 September 2019 attaching (electronically) certain files. Mr Gu made a further comprehensive request for documents on 11 October 2019, but Mr Wan did not provide any additional documents.

[14] An appeal to the Immigration and Protection Tribunal (IPT) was made by Mr Gu, on behalf of the complainant, on 23 October 2019. It was presumably unsuccessful.

[15] On 7 November 2019, Mr Gu made a complaint against Mr Wan and Ms Han to the Authority, on behalf of the complainant.

[16] On 27 November 2019, Mr Gu lodged a s 61 request with Immigration New Zealand, blaming the complainant's unlawful status on Ms Han who failed to respond to Immigration New Zealand's letter of 31 July 2019. This was successful and on 7 January 2020, Immigration New Zealand granted the complainant a work visa valid for one year.

Decision of the Tribunal

[17] It was found that Mr Wan had failed:

(1) to respond to Immigration New Zealand's letter (a breach of the obligation to be professional and diligent in cl 1 of the Code);

(2) to maintain a relationship of confidence and trust with the complainant or to provide her with advice (a breach of cl 2(a));

(3) to obtain and carry out her instructions (a breach of cl 2(e));

(4) to ensure that the written client agreement contained the name and licence number of Ms Han (a breach of cl 19(a));

(5) to insert into the written agreement the required details of Ms Han (a breach of cl 19(c));

(6) to update the complainant about the letter of 31 July or the extension granted (breaching cl 26(b)); and

(7) to provide Mr Gu with a copy of the full file on request (a breach of cl 26(f)).

SUBMISSIONS

Submissions from the Registrar

[18] The Registrar, Mr Connor, in his submissions of 10 June 2021, notes that this is Mr Wan's first appearance before the Tribunal. Mr Wan had acknowledged most of his breaches and apologised for his wrongdoing. He had also offered a refund and compensation. Furthermore, Mr Wan had changed certain practices used by his consultancy, by implementing a task management system and a new client service agreement.

[19] It was submitted by the Registrar that the appropriate sanctions would be:

(1) censure;

(2) an order that Mr Wan completes the Post Graduate Professional Practice Module (LAWS 7015) offered by Toi-Ohomai Institute of Technology within 12 months of the sanctions decision; and

(3) an order for payment of a penalty in the vicinity of $1,000.

Submissions from the complainant

[20] There are submissions and emails from Mr Gu, on behalf of the complainant, dated 8, 9 and 14 June 2021. He sets out the steps taken by the complainant to rectify her immigration status, leading to her securing a new work visa under s 61 on 7 January 2020.

[21] The complainant seeks a refund of the fees paid to Mr Wan ($1,995, plus $495 paid to Immigration New Zealand), as well as reasonable compensation of $8,935.50 made up as follows:

Consultation/uplifting file fee (PCW Law)	23/8/2019	$1,537.50
Consultation fee (Advent Ark Lawyers)	13/9/2019	$309.00
s 61 request fee (Mr Gu)	1/10/2019	$4,600.00
Translator's fee	30/9/2019	$229.00
Fee for IPT appeal (Mr Gu)	23/10/2019	$1,150.00
IPT's appeal fee	29/10/2019	$700.00
Immigration NZ s 61 processing fee	7/1/2020	$410.00
		$8,935.50

[22] It is contended by Mr Gu that it was Mr Wan and Ms Han who caused the complainant's visa application to be declined and the complainant to therefore become an overstayer. She was qualified for an essential skills work visa and had Mr Wan and Ms Han not breached the Code, it would have been granted.

[23] Mr Gu observes that Mr Turner, the solicitor previously acting for Mr Wan, had argued that the complainant should have mitigated her losses by accepting Mr Wan's offer to seek a reconsideration and later a s 61 request without charge. According to Mr Gu, this submission misses the point. It does not change Mr Wan's breaches of the Code and the claim for compensation arising from the breaches. It was understandable for the complainant to feel upset when she met Mr Wan on 22 August 2019, so it was reasonable for her to decline Mr Wan's offer, as she had lost confidence and trust in him. She was entitled to choose whomever she wished to represent her immigration interests.

Submissions from Mr Wan

[24] In their submissions of 8 June 2021, Mr Wan and Ms Han jointly apologise sincerely for the breaches of the Code. They agree with the outcome of the Tribunal's decision. They note the improvements to their business process to avoid similar

breaches. The breaches of the Code were not deliberate, but they acknowledge their responsibility for causing the complainant's visa to be declined.

[25] Mr Wan and Ms Han confirm they are prepared to undertake courses, if that is directed, though comment that the various breaches are clear to them and they have made improvements to their processes to prevent the breaches from happening again. Retraining therefore may not be necessary.

[26] It is noted by Mr Wan and Ms Han that the complainant instructed solicitors on 23 August 2019, only two days after the visa decline. At that point, she still had until 4 September 2019 to lodge a reconsideration application. Furthermore, her visa was still current. It was not due to expire until 11 September 2019. While they admit their responsibility for the decline, it was the complainant's responsibility to ensure that her visa was reinstated in a timely manner. It was also her duty to minimise her costs when procuring a visa. It was understandable that the complainant lost confidence in them, but she undermined her own eligibility for a reconsideration and created further complications incurring additional unnecessary costs. They feel obliged to compensate her for some costs, though not all her expenses.

[27] Mr Wan and Ms Han offer a refund of $1,995 and additional compensation of $1,630:

Reconsideration application fee	$220
s 61 request	$410
Time and resources for them to process a reconsideration and s 61 request	$1,000
	$1,630

JURISDICTION

[28] The Tribunal's jurisdiction to impose sanctions is set out in the Immigration Advisers Licensing Act 2007 (the Act). Having heard a complaint, the Tribunal may take the following action:[3]

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

[3] Immigration Advisers Licensing Act 2007.

(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.

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

> **51 Disciplinary sanctions**
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> (1) The sanctions that the Tribunal may impose are—
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> (a) caution or censure:
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> (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.

[30] 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.

[31] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:[4]

> …It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary

[4] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

> 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.
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> …
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> 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.

[32] 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 collective reputation and public confidence in the profession itself.[5]

[33] 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.[6]

[34] The most appropriate penalty is that which:[7]

(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;

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[5] *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Bolton v Law Society* [1994] 2 All ER 486 (EWCA) 492; *Z v Dental Complaints Assessment Committee,* above n 4, at [151].

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

[7] *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], citing *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, [2013] NZAR 320 at [49].

(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

[35] The starting point is the seriousness of the breach of an adviser's duty to personally engage with clients. It is a fundamental obligation of licensed advisers to engage directly with their clients, who are entitled to deal directly with licensed advisers who are knowledgeable and subject to a professional code. Had Mr Wan identified Ms Han in the client agreement, he could have delegated all the work and engagement with the complainant to her. Since he did not do so, it was his responsibility to undertake the work and to establish and maintain a direct relationship with the complainant.

[36] However, while failing to personally engage with a client is serious misconduct, a sense of proportion must be maintained. This was not classic 'rubber stamping' where a licensed adviser leaves a client to deal with an unqualified person. Ms Han was qualified, at least provisionally. Furthermore, it was always the complainant's intention to instruct Ms Han. Mr Wan's mistake was to omit naming her in the client agreement, which meant he should have personally taken and then performed her instructions.

[37] It must also be recognised that, of the numerous breaches of the Code, most (cls 2(a), 2(e), 19(a), 19(c) and 26(b)) arise from one fundamental error. This was the failure to either personally engage with the complainant and undertake the work, or identify Ms Han in the agreement.

[38] There is additional misconduct to take into account in assessing sanctions. Mr Wan did not reply to Immigration New Zealand's letter notifying certain adverse matters (which led to the visa being declined), and he overlooked providing certain documents to Mr Gu when he sent him the file.

Caution or censure

[39] Given the seriousness of the breaches arising from the failure to personally undertake the work and engage with the complainant (or to identify her in the agreement), Mr Wan will be censured.

Training

[40] It is understandable that the Registrar seeks a course of retraining for Mr Wan, given the multiplicity of Code breaches. I have already noted that most, though not all, arise from one fundamental error.

[41] Mr Wan acknowledged his responsibility for the declined visa from the moment he was aware of it. Moreover, it is clear from his submissions that he has made improvements to his business processes to avoid similar breaches. I note also that this is Mr Wan's first appearance before the Tribunal since being licensed in November 2012.

[42] I am satisfied that Mr Wan has learned a lesson from this isolated set of mistakes. I accept his submission that in the circumstances there is no need to order any professional development.

Penalty

[43] The Registrar contends that a penalty of $1,000 would be appropriate. While the cumulative breaches would ordinarily attract a greater penalty, I accept that $1,000 is an appropriate level in this case, given that some priority should be accorded to compensating the complainant. The Tribunal takes into account the totality of the sanctions.

Refund

[44] Mr Wan has always made it clear he would refund his fee ($1,500) and that of Immigration New Zealand ($495) for the failed visa application.[8] Mr Gu's figure of $1,995 as the professional service fee is incorrect. There will be an order for payment to the claimant of $1,995.

Compensation

[45] The Tribunal will award reasonable compensation for losses or expenses arising out of misconduct upheld by the Tribunal.[9] It is not an indemnity, but a contribution reflecting harm to the client and expressing the adviser's remorse.

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[8] Clause 9 of the service agreement also provides for a full refund of the service fee if the application is unsuccessful.
[9] *KIT v Zhu* [2019] NZIACDT 46 at [35]–[36], *NLT v Coetzee* [2020] NZIACDT 7 at [47]–[49].

[46] On behalf of the complainant, Mr Gu seeks $8,935.50, as itemised earlier in this decision. He contends the various expenses arise from Mr Wan's breaches of his professional obligations.

[47] In reply, Mr Wan acknowledges that he and Ms Han were responsible for the decline of the complainant's visa and therefore some compensation would be appropriate, but he argues the complainant failed to mitigate her expenses. This is because when he met her on 22 August 2019 to advise her of the decline, he offered a free reconsideration (available until 4 September 2019) and a free s 61 request, if Immigration New Zealand declined the reconsideration (bearing in mind that she would not need to make such a request until becoming unlawful after 11 September).

[48] Mr Gu responds that the complainant had lost trust in Mr Wan and had a right to refuse his assistance and seek immigration representation elsewhere. He submits that a reconsideration would have been unsuccessful and, in any event, would not have been decided by 11 September 2019.

[49] I agree with Mr Gu that the complainant could reasonably reject Mr Wan's further assistance, having lost confidence in him, but Mr Wan is correct in pointing out that the complainant failed to mitigate her losses or expenses. Despite taking the appropriate step of immediately instructing a solicitor who uplifted the file, nothing seems to have happened. The complainant then went to another law firm, but again no steps were taken to rectify the complainant's immigration situation. I do not accept Mr Gu's submission that a reconsideration would have been unsuccessful. Indeed, the later successful s 61 request by Mr Gu suggests (though does not prove) that a timely reconsideration might have had a positive outcome. He is probably correct though in contending that it would not have been decided by 11 September 2019, so the complainant's unlawful status became almost inevitable once the visa was declined.

[50] By the time the complainant instructed Mr Gu on about 25 September, it was too late for a reconsideration and she had become unlawful, requiring a s 61 request and/or an appeal to the IPT. Hence, I find that the complainant was late rectifying her immigration situation. The s 61 request on 27 November 2019 could have been made by one of the solicitors in September 2019. As for the appeal to the IPT, I understand why it was made, but I regard it as optional. It is not for me to assess its merits, but on the information presented to the Tribunal, it would not have been compelling.

[51] Accordingly, I find that neither Mr Wan nor Ms Han are responsible for most of the expenses incurred.

[52] Turning now to the specific items of expense listed, there appears to be considerable duplication in the professional fees incurred. The complainant instructed two solicitors and then Mr Gu. The solicitors no doubt gave advice but took no active steps. Mr Gu presumably reviewed the same documents as the solicitors and all three professionals charged for doing so.

[53] The starting point for calculating reasonable compensation is the $1,630 accepted by Mr Wan. To this, I will add the fee of $230 for consultation charged by the first solicitor on 23 August 2019. It was reasonable for the complainant to take immediate legal advice. I will also add $500 to Mr Wan's estimate of his own fee of $1,000 for a reconsideration and s 61 request. His estimate is somewhat light. The total compensation awarded is therefore $2,360. This will be Mr Wan's contribution to the complainant's expenses.

[54] The total that will be awarded to the complainant will therefore be:

Refund	$1,995
Compensation	$2,360
	$4,355

OUTCOME

[55] Mr Wan is:

(1) censured;

(2) ordered to immediately pay to the Registrar $1,000; and

(3) ordered to immediately pay to the complainant $4,355.

ORDER FOR SUPPRESSION

[56] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[10]

[57] There is no public interest in knowing the name of Mr Wan's client, the complainant.

[10] Immigration Advisers Licensing Act 2007, s 50A.

[58] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration New Zealand.

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D J Plunkett
Chair