

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2021] NZIACDT 16

Reference No: IACDT 05/20

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **EM**
Complainant

AND **CHEE SENG MICHAEL YONG**
Adviser

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 13 July 2021**

REPRESENTATION:

Registrar: Self-represented
Complainant: Self-represented
Adviser: M Logan, counsel

INTRODUCTION

[1] The complainant, a New Zealand resident, sought to bring his wife, referred to as the client, to New Zealand. She then lived in Malaysia. She approached the immigration consultancy of Mr Yong, the adviser, whose business is based in Malaysia, but who was at the time resident in Australia. Mr Yong had no contact with the client and left all communications to his unqualified staff.

[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 3 June 2021 in *EM v Yong*.¹ Mr Yong was found to have breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] It is now for the Tribunal to determine the appropriate sanctions.

BACKGROUND

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

[5] Mr Chee Seng Michael Yong is a licensed immigration adviser based in Kuala Lumpur, though throughout the relevant period he was living in Australia. He is the owner of Kitson Migration Advisory (Kitson).

[6] EM, the complainant, is the husband of TU, the client. A client services agreement was entered into on 9 April 2019 between the client and Kitson.

[7] An assessment by the New Zealand Qualifications Authority (NZQA) of the client's Malaysian qualifications was arranged by Kitson's unqualified staff, Mr O and Ms T. The client and her husband dealt only with the staff. The client met Mr O. There were no communications with Mr Yong.

[8] The client's qualifications were recognised by NZQA, but on 13 May 2019, the New Zealand Teaching Council advised her that the NZQA assessment was for immigration purposes and not for registration as a teacher. She would have to ask NZQA for a teacher registration assessment.

[9] The client then met with Mr O on 11 June 2019 and requested termination of the client agreement. Following this meeting, Mr Yong immediately contacted the client for the first time.

¹ *EM v Yong* [2021] NZIACDT 12.

[10] The client wrote to Mr Yong on 14 June 2019 expressing a lack of confidence in pursuing Kitson's recommended options. Her points total had remained unchanged at 110, well below the minimum requirement of 160. She complained about their lack of expertise with New Zealand immigration, which had crippled her objective of successfully migrating and being with her husband.

[11] Kitson treated the client's communication of 14 June 2019 as a notice to terminate its services, following which it refunded RM 2,430.12 (being 30 per cent of the fee) on 11 July 2019.

Decision of the Tribunal

[12] The Tribunal noted that it was not disputed that Mr Yong had failed to personally engage with either the client or her husband. His business practice was to permit his unlicensed staff to deal with the client. This practice was found to be intentional, though it was accepted that he was not aware it was in breach of the Code. He had wrongly thought it was permitted, as such a practice is lawful for Australian migration work.

[13] It was not accepted that Mr Yong had been deceptive. There was no evidence that he had received the fee knowing or suspecting that his client could not successfully achieve the visa sought.

[14] The Tribunal found that Mr Yong:

- (1) had not personally maintained a relationship of confidence and trust or provided advice to the client, in breach of cl 2(a) of the Code;
- (2) had not personally obtained and carried out her instructions, in breach of cl 2(e); and
- (3) had not conducted himself in accordance with the Act by undertaking the immigration advice work himself, in breach of cl 3(a).

SUBMISSIONS

Submissions from the Registrar

[15] In his submissions of 28 June 2021, Mr Connor, the Registrar, notes that this is Mr Yong's first appearance before the Tribunal, that he has admitted all of the breaches and has refunded 30 per cent of the client's fee. The Registrar also acknowledges that Mr Yong has put new systems in place in his practice, including a strict requirement that

staff do not personally meet with clients seeking New Zealand immigration advice. He has also completed the refresher course from the Toi-Ohomai Institute of Technology.

[16] The Registrar submits that the appropriate sanctions would be:

- (1) censure; and
- (2) an order for payment to the Registrar of a penalty in the vicinity of \$1,500.

Submissions from the complainant

[17] In his submissions of 8 June 2021, the complainant invites the Tribunal to reconsider its dismissal of the complaints of deception and incompetence, as well as breaches of various Code obligations. While accepting that it is to Mr Yong's credit that he acknowledges his failings, they seek a full refund of the fee, the outstanding amount being AUD 1,802.50 (70 per cent of AUD 2,575).

[18] The complainant advises that his wife achieved her objective of legally joining him in New Zealand and obtained a work visa, by acting for herself. If the complainant's submissions are correctly understood, she also obtained a residence visa.

Submissions from the adviser

[19] Mr Logan is counsel for Mr Yong. In his submissions of 25 June 2021, he records that Mr Yong has learned an important lesson from the disciplinary proceedings and the Tribunal can be confident that the issues will not be repeated. The advice provided had been given in good faith.

[20] From the earlier stage of the complaint, Mr Yong has taken steps to improve compliance with the Code and has regarded the complaint as an opportunity to enhance his standards in handling client matters. He has been a licensed New Zealand immigration adviser since 2010 and has developed a successful business with an excellent reputation. This is the first complaint made against him.

[21] Counsel accepts that formal censure is appropriate to mark disapproval of Mr Yong's conduct. It is submitted that a penalty of \$1,000 would be in line with other 'rubber-stamping' decisions such as *Singh*.² As for a refund, Mr Yong refunded 30 per cent of the fee in July 2019, with previous decisions of the Tribunal in similar cases indicating 50 per cent would be appropriate.

² *HQT v Singh* [2021] NZIACDT 1.

JURISDICTION

[22] 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

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.

[23] 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:
 - (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.

³ Immigration Advisers Licensing Act 2007.

[24] 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.

[25] 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 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.

[26] 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

[27] 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

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

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) at 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].

[28] 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;
- (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

[29] 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 a licensed adviser to actually engage with their clients, who are entitled to deal directly with licensed advisers who are knowledgeable and subject to a professional code.

[30] Mr Yong's misconduct though can be seen at the lower end of the rubber-stamping spectrum. There is no evidence before the Tribunal of any pattern of such misconduct. The assumption has to be that it was an isolated occasion.

[31] It is to Mr Yong's credit that he readily admitted his wrongdoing, cooperated in the disciplinary process and partially refunded his fee.

[32] The complainant invites the Tribunal to reconsider its decision on his complaints of deception, incompetence and breaches of certain Code obligations. However, these were not the subject of the complaint filed by the Registrar in the Tribunal, so cannot be assessed. In any event, I agree with the Registrar that there was no or insufficient evidence to put these before the Tribunal. To the extent that the allegation of

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].

incompetence reflects the Registrar's negligence complaint, this was an alternative to the breaches of the Code upheld by the Tribunal, so did not require assessment.

[33] I agree with Mr Logan that there is no need to consider any further professional development, as Mr Yong voluntarily completed Toi-Ohomai's refresher course.

Caution or censure

[34] As Mr Logan acknowledges, a censure is appropriate to mark the Tribunal's disapproval of a failure to personally engage with the client.

Financial penalty

[35] The Registrar urges a penalty of NZD 1,500, but as Mr Logan points out, a penalty of NZD 1,000 was imposed for a low-end rubber-stamping complaint in *Singh*. I accept Mr Logan's submissions that NZD 1,000 would be an appropriate penalty.

Refund

[36] The total fee paid was RM 8,100.42, of which RM 2,430.12 (being 30 per cent) was refunded on 11 July 2019. The complainant seeks a refund of the balance of the fee, with Mr Logan contending that it would be appropriate to refund only 50 per cent. Mr Logan says that is what the Tribunal has indicated in similar cases.

[37] I accept that a full refund is not required, since it has not been shown that Mr Yong's wrongdoing (as upheld by the Tribunal) caused any loss to the complainant. I did not accept that there was any incompetence or negligence on his part. In other words, his unlawful delegation of work to unqualified staff does not, of itself, show that the work of the staff was faulty or unduly delayed any application. Indeed, the client had terminated Mr Yong's instructions before any application was made to Immigration New Zealand.

[38] Nor am I persuaded that there was fault on the part of the staff in their assistance to the client regarding the NZQA assessment. I have said before that it is my view that clients bear some responsibility themselves for obtaining recognition of their professional qualifications.⁸ Moreover, this was not part of the complaint the Registrar put to the Tribunal.

⁸ *KG v Registrar of Immigration Advisers* [2021] NZIACDT 5 at [76].

[39] Accordingly, it is not apparent what effect Mr Yong's wrongdoing, upheld by the Tribunal (the unlawful delegation of work), had on the substantive immigration application. I applaud the success the client had in representing herself, but there is insufficient evidence to conclude that Mr Yong and/or his staff would have failed with an application.

[40] I therefore accept Mr Logan's submission that a refund of 50 per cent of the full fee is appropriate. It follows that a further RM 1,620.09 (say RM 1,620) is to be paid to the complainant. I will make the order in RM currency, but if the complainant provides NZD currency bank account details, then payment can be made in NZD (RM 1,620 converted into NZD on the day of payment).

OUTCOME

[41] Mr Yong is:

- (1) censured;
- (2) ordered to immediately pay to the Registrar NZD 1,000; and
- (3) ordered to immediately pay to the complainant RM 1,620.

ORDER FOR SUPPRESSION

[42] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.⁹

[43] There is no public interest in knowing the name of the complainant or his wife, Mr Yong's client.

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

D J Plunkett
Chair

⁹ Immigration Advisers Licensing Act 2007, s 50A.