

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2022] NZIACDT 14

Reference No: IACDT 016/21

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **XZ**
Complainant

AND **JUN JOHN LIU**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 27 June 2022

REPRESENTATION:

Registrar: Self-represented
Complainant: No appearance
Adviser: S Laurent, counsel

PRELIMINARY

[1] The complainant, XZ, held a New Zealand resident visa. He was delayed returning to New Zealand and resuming his employment by incorrect advice given by Jun John Liu, his immigration adviser.

[2] A complaint by the complainant against Mr Liu to the Immigration Advisers Authority (the Authority) has been referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It is alleged that Mr Liu has been negligent, a ground of complaint under the Immigration Advisers Licensing Act 2007 (the Act). Alternatively, that he breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

BACKGROUND

[3] Mr Liu is a licensed immigration adviser and director of Trusty Immigration Consultants Ltd, Auckland.

[4] On 7 May 2019, the complainant and his wife, nationals of China, entered into a client agreement with Mr Liu whereby he undertook to apply for residence for them and their daughter. The Tribunal understands that the complainant was then working in New Zealand, but his wife and daughter had remained in China.

[5] The family's residence visa application was filed by Mr Liu on 18 July 2019.

[6] On 17 January 2020, Immigration New Zealand (Immigration NZ) granted the family residence visas. A letter dated 17 January 2020 notifying Mr Liu of this, by email, was drafted by Immigration NZ but never sent. The "system" stopped the letter as the passport details did not match Immigration NZ's records.¹

[7] The complainant departed New Zealand on the following day, 18 January 2020. He intended a holiday of three months in China.

[8] A new residence approval letter with the correct passport details was generated by Immigration NZ on 21 January 2020, and dated and emailed that day to Mr Liu. The letters, one for each member of the family, recorded the start date of the visa as 17 January 2020.

[9] The world-wide COVID-19 pandemic reached New Zealand in March 2020.

¹ Email Immigration NZ manager to Authority (20 September 2021).

[10] On 31 March 2020, Immigration NZ issued an updated immigration instruction specifying those persons to be refused entry to New Zealand. The instruction allowed entry to those holding a residence visa granted in this country.

[11] On 6 April 2020, the complainant sent a text to Mr Liu to say that he had planned to leave China on 10 April, but there was no flight. Following further texts on the same day, Mr Liu asked him whether it was right that he had received the visa while in New Zealand. The complainant replied sending Mr Liu the 21 January 2020 letter from Immigration NZ. He informed Mr Liu that he had received the visa on 21 January, but left on 28 January. The complainant later corrected his departure to 18 January. Mr Liu then referred to Immigration NZ's approval in principle letter of 8 January (unseen by the Tribunal). In a subsequent text, Mr Liu advised the complainant to, "Count from the 17th (of January)" (a reference to the start of the period of two years for entering New Zealand).

[12] On 27 May 2020, the complainant and Mr Liu again exchanged texts. The complainant said he had read a social media article and wanted to know if it was true that he was not allowed to go to New Zealand. Mr Liu replied that since the complainant was in New Zealand when he received the residence visa, he did not belong to the group mentioned. He was able to enter, though his family might have to apply for permission.

[13] The texts on that day continued. The complainant said he was in China when he received the approval letter (of 21 January 2020), adding that the letter was issued a couple of days prior to his return to China. He then said that he left New Zealand when the approval letter was issued and the residence visa was granted. The complainant queried whether this meant he could go back.

Mr Liu gives incorrect advice

[14] Mr Liu replied by text on 27 May 2020 to the complainant's understanding that he could return to New Zealand. He advised it was incorrect. The complainant then confirmed he had travelled on 18 January. Mr Liu confirmed that if he had left before 21 January, he could not enter New Zealand.

[15] On 8 October 2020, Mr Liu advised the complainant by text that a new policy was out and he could apply to come back. Mr Liu would handle the application. He sent the complainant another client agreement to cover the application (unseen by the Tribunal). On the next day, the complainant and Mr Liu spoke to each other. The complainant said he was anxious. He had contacted Immigration NZ and been told his visa had been

activated and he did not need to apply. He was confused as to whether he needed to apply. Mr Liu repeated that he needed to apply.

[16] On 10 October 2020, Mr Liu asked the complainant by text for the date on which he departed New Zealand. The complainant responded that it was 18 January. Mr Liu replied saying the complainant was right and he did not need to apply. The complainant could enter the New Zealand border. Mr Liu apologised for his mistake. But his family would need to apply. Mr Liu added later that he was misled by the dates of the letter and e-visa. It was his mistake. In a further text on 10 October, Mr Liu recorded that the complainant's visa was activated on 17 January 2020 and he left on 18 January, so he could come back.

[17] The complainant returned to New Zealand on 6 November 2020 and resumed work on 9 November.

COMPLAINT

[18] On 12 April 2021, the complainant's then solicitor filed a complaint on his behalf with the Authority against Mr Liu. It was alleged that Mr Liu had given misleading advice. He had advised on 27 May 2020 that the complainant was not allowed to enter New Zealand. It was not until 9 October 2020, when the complainant had told Mr Liu that other advisers were saying he could enter, that Mr Liu acknowledged he had made a mistake. The complainant had lost salary from 9 July to 9 November 2020, being \$17,920.

[19] The Authority wrote to Mr Liu on 30 August 2021 formally advising him of the complaint and setting out the details. His explanation was invited.

[20] Mr Laurent, counsel for Mr Liu, replied on 22 September 2021. The Tribunal records that Mr Laurent's explanation to the Authority was based on an incomplete picture of the text and voice communications between Mr Liu and the complainant available to him then. When the complaint was referred to the Tribunal, Mr Laurent obtained professional translations of a more complete set of communications (as relied on by the Tribunal above in the 'Background' section).

[21] Counsel noted in his explanation to the Authority that when the complainant sought advice on 27 May 2020, the relevant immigration instruction (dated 31 March 2020) stated that only the holders of resident visas granted in New Zealand could enter. Mr Liu had believed that the visa had been granted on 21 January 2020 which was the date recorded on the letter and the heading of the e-visa itself. It therefore appeared to

him that the visa had been issued after the complainant left New Zealand. Immigration NZ had advised that the notification had been delayed by the mistyping of the passport details into the electronic visa system. If the initial notification had been sent on 17 January 2020, Mr Liu would have been able to inform the complainant that he had a visa before he left New Zealand and none of the subsequent confusion would have arisen.

[22] According to counsel, the timing of the complainant's departure, Immigration NZ's clerical error and the backdating of the start of the visa conspired to generate an unusual set of circumstances. Consistent with his past experience and Immigration NZ's own practice, Mr Liu assumed he could rely on the date of the approval letter and the date of issue of the e-visa visa as being the same as the grant date.

[23] Counsel noted s 62 of the Immigration Act 2009:

62 Form of visa

- (1) A visa is granted by being entered and retained in the records (whether electronic or physical) of the Department in a manner determined by the chief executive.
- (2) The entry for the visa must specify, as appropriate,—
 - (a) its start date (which may be the date of its grant or a future or past date):
 - (b) any conditions of the visa that relate to travel, including—
 - (i) whether the visa allows travel to New Zealand on a later occasion:
 - (ii) if the visa allows travel to New Zealand, the period during which the holder may travel to New Zealand:
 - (iii) if the visa allows travel to New Zealand, whether the visa gives permission to travel to New Zealand on a single journey, multiple journeys, or a set number of journeys:
 - (c) in relation to the holder's stay in New Zealand, the date or event on the occurrence of which the visa will expire, or the period after which it will expire:
 - (d) any other conditions of the visa:
 - (e) for those persons granted entry permission, the date or dates the entry permission was granted:

...

[24] It is contended that there was nothing on the face of the e-visa itself, nor the approval letter, to tell Mr Liu that the date of the grant was 17 January 2020. It would be

inappropriate to label Mr Liu's advice as negligent or lacking in due care, pursuant to the test set out in *Mercado*.² An error in the course of providing professional advice may not breach a professional standard if it is an excusable human error.³ In this case, Mr Liu overlooked what other competent and diligent advisers would have overlooked. The common experience in this type of work is that visas are issued on the date when they are communicated.

[25] In support, there was a statement (undated) from Mr Liu. He said he honestly believed he was correct when he told the complainant in May 2020 that he could not enter New Zealand because of the border closure. This was because the notice of approval was dated 21 January 2020, which was after the complainant left New Zealand on 18 January 2020. He has held a full immigration adviser's licence since 2010 and his experience in the vast majority of cases was that the start date of the visa was the date of the e-visa document and letter of approval. As the original notification was stopped by Immigration NZ's internal system, he was unaware of the grant of the visas until 21 January 2020. It was unusual for a visa to be granted several days before notification to the client or adviser.

Referral to Tribunal

[26] The Registrar referred the complaint to the Tribunal on 30 September 2021 alleging negligence by Mr Liu or alternatively the breach of the obligation to exercise diligence and due care in cl 1 of the Code by:

- (1) Failing to carefully read Immigration NZ's approval letter and explain the visa start date to the complainant.
- (2) Failing to identify the start date of the complainant's residence visa and wrongly advising him that he could not return to New Zealand without obtaining an exemption.

JURISDICTION AND PROCEDURE

[27] The grounds for a complaint to the Registrar made against an immigration adviser or former immigration adviser are set out in s 44(2) of the Act:

- (a) negligence;

² *NMS v Mercado* [2020] NZIACDT 42 at [83].

³ *DMX v Guich* [2020] NZIACDT 19 at [53].

- (b) incompetence;
- (c) incapacity;
- (d) dishonest or misleading behaviour; and
- (e) a breach of the code of conduct.

[28] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.⁴

[29] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.⁵ It has been established to deal relatively summarily with complaints referred to it.⁶

[30] After hearing a complaint, the Tribunal may dismiss it, uphold it but take no further action or uphold it and impose one or more sanctions.⁷

[31] The sanctions that may be imposed by the Tribunal are set out in the Act.⁸ The focus of professional disciplinary proceedings is not punishment but the protection of the public.⁹

[32] It is the civil standard of proof, the balance of probabilities, that is applicable in professional disciplinary proceedings. However, the quality of the evidence required to meet that standard may differ in cogency, depending on the gravity of the charges.¹⁰

[33] The Tribunal has received from the Registrar a statement of complaint (30 September 2021), with a bundle of paginated support documents.

[34] There are no submissions from the complainant.

Submissions of Mr Liu

[35] Mr Laurent has filed a statement of reply (23 October 2021), a memorandum of submissions (27 October 2021), a statement from Mr Liu (26 October 2021) and

⁴ Immigration Advisers Licensing Act 2007, s 45(2) & (3).

⁵ Section 49(3) & (4).

⁶ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁷ Section 50.

⁸ Section 51(1).

⁹ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

¹⁰ *Z v Dental Complaints Assessment Committee*, above n 9, at [97], [101]–[102] & [112].

additional documentation. Counsel notes the new evidence in the form of professional translations of the communications between Mr Liu and the complainant.

[36] Counsel contends that the first head of complaint is not made out. On 8 (actually 6) April 2020, Mr Liu noted the 17 January date as the start of the period of two years to enter New Zealand. Counsel said Mr Liu had therefore read and properly interpreted the approval letter.

[37] The second head of complaint refers to the interchange of texts on 27 May 2020. Counsel noted that Mr Liu correctly assured the complainant that he was not caught (by the new policy) because he was in New Zealand when he received the visa and so he could enter the country. According to counsel, the interchange then became confused. Mr Liu told the complainant that he could not enter. Mr Liu was referring to the date of the approval letter, rather than the visa start date. His advice now differed from that given on 6 April and he had fallen into error.

[38] It is submitted by Mr Laurent that Mr Liu's mistake may not have crossed the threshold of negligence or lack of care. Mr Liu was faced with a number of obstacles:

- (1) The re-issue of Immigration NZ's letter was a result of its own clerical error.
- (2) The communication medium was not ideal, being an exchange of text and voice messages by phone. Mr Liu referred to the date at the top of the approval letter, rather than "scrolling down". He was acting in reliance on past experience, in which the date of the letter equalled the start date of the visa.
- (3) At the time, Mr Liu was dealing with illness and injury in his family. This does not lessen his obligation of diligence, but it explains why he fails to consistently refer back to the knowledge displayed on 6 April 2020.

[39] In conclusion, Mr Laurent submits that what Mr Liu overlooked was a mistake which other competent and diligent advisers could have made.

[40] In his statement (26 October 2021), Mr Liu confirms that he did not receive an email from Immigration NZ on 17 January 2020. It was clear to Mr Liu on 6 April 2020 that the visa start date was 17 January 2020 and that his advice was correct. And again at the beginning of the conversation on 27 May 2020, he told the complainant that his residence visa was issued while he was in New Zealand and that he could therefore return.

[41] According to Mr Liu, it was after further exchanges on 27 May 2020 that he became confused by what the complainant had said, which was that he had received the 21 January letter while in China. Mr Liu explains how he came to believe the complainant was already in China before the visa was issued. Mr Liu says he referred to the date of the approval letter (21 January) and not the visa start date (on p3 of the letter) and mistakenly gave the wrong advice.

[42] Mr Liu says his concentration at the time might have been affected by medical issues being faced by his son and mother.

[43] Mr Liu concludes by admitting his mistake on 27 May 2020. He had offered to obtain MIQ spots for the complainant and his family free of charge by way of apology. He is prepared to accept the Tribunal's finding if it decides this was sufficiently serious to be negligent or a breach of cl 1.

ASSESSMENT

[44] The Registrar relies on cl 1 of the Code:

General

1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.

Negligence or alternatively breach of the obligation to exercise diligence and due care in cl 1:

- (1) *Failing to carefully read Immigration NZ's approval letter and explain the visa start date to the complainant*
- (2) *Failing to identify the start date of the complainant's residence visa and wrongly advising him that he could not return to New Zealand without obtaining an exemption*

[45] While there are two heads of complaint, there is essentially one alleged wrong only, being that Mr Liu's concluding advice to the complainant on 27 May 2020 was incorrect. It was on that date Mr Liu informed the complainant that he could not enter New Zealand as he had left before 21 January 2020. Mr Liu thought that was the start date of the complainant's visa. It was not. The date of the approval letter was 21 January 2020, but the visa start date was 17 January. The complainant was not caught by the

new border restriction, as he had departed on 18 January, one day after the commencement of his visa.

[46] It was an honest mistake by Mr Liu, but that does not mean that he was diligent and exercised due care, as required by cl 1. He advances a number of factors which, it is argued, justifies his wrong advice.

[47] The principal factor is the common practice of Immigration NZ to date approval letters and e-visas using the start date of the visa. The Tribunal accepts that is the common practice, but it is not an invariable practice. That much is clear from s 62 of the Immigration Act 2009. A visa need not commence on the date of the approval letter. Mr Liu accepts a different start date does unusually happen. That would suggest a diligent adviser would “scroll down” from the date at the top of the letter or e-visa and check the start date. It is plainly recorded on the letter and e-visa (which Mr Laurent noted was at p3 of the letter).¹¹

[48] The less than ideal medium of communication raised by Mr Laurent is not a good reason for wrong advice. Mr Liu may have been doing his best on his cell phone to marshal information and may not have been in his office, but that is no justification. The complainant had actually sent him the letter and attached e-visa (bearing the 17 January 2020 date) earlier in the text exchange. The advice to the complainant was not urgent. He could have ended the dialogue, checked the documents (if necessary, later when he had access to the full information) and then advised the complainant. It is to be remembered that this was an important piece of advice for the complainant. Mr Liu knew he wanted to return to New Zealand to resume his employment.

[49] Then there are the unfortunate health concerns of his son and mother which were on-going at the time. It is not for the Tribunal to belittle what may have been worrying Mr Liu, but they do not appear to have been life-threatening. They help the Tribunal to understand Mr Liu’s circumstances at the time, but as Mr Laurent observes, they did not lower the standard of professional conduct the complainant was entitled to.

[50] As for the clerical error by Immigration NZ which led to the late issue of the approval letter, that is not relevant to the standard of care the complainant was entitled to expect. It led to the letter bearing a date later than the effective date of the visa, but the latter was clearly set out in the letter.

¹¹ See Registrar’s bundle at 077.

[51] None of the reasons given by Mr Liu justify his incorrect advice. He was faced with a simple question and the relevant immigration instruction is uncomplicated. The common practice of Immigration NZ is something of a 'red herring'. Mr Liu was not misled by the date of the letter and e-visa, at least not initially. He actually knew the visa start date was 17 January 2020, as he correctly stated on 6 April 2020. Even at the beginning of the 27 May exchange, Mr Liu was aware the complainant was in New Zealand when the visa was granted and the complainant did not belong to the excluded group.

[52] It was only as the exchange developed on 27 May 2020 that Mr Liu became confused. It is irrelevant whether that was because of something the complainant said. Mr Liu, as a professional and diligent adviser, is expected to correctly know the facts and Immigration NZ's criteria when he gives advice on something as critical as whether his client can return to New Zealand to resume his employment.

[53] In some respects, the mistaken advice by Mr Liu late in the 27 May exchange can be seen as a momentary lapse in concentration. The mistake is not, however, an excusable human error. It is not accepted that a reasonable, prudent and diligent practitioner would have given such advice. As noted above, it was a simple matter and the exigencies of the occasion are not a good reason here for the bad advice. Mr Liu was not diligent and did not exercise due care. This was a breach of cl 1.

[54] The Tribunal accordingly does not need to assess the alternative ground of negligence. While both heads of complaint are upheld, there is only one wrong here.

OUTCOME

[55] The complaint is upheld. Mr Liu has breached cl 1 of the Code.

SUBMISSIONS ON SANCTIONS

[56] As the complaint has been upheld, the Tribunal may impose sanctions pursuant to s 51 of the Act.

[57] A timetable is set out below. Any request that Mr Liu undertake training should specify the precise course suggested. Any request for repayment of fees or the payment of costs or expenses or for compensation must be accompanied by a schedule particularising the amounts and basis of the claim.

Timetable

[58] The timetable for submissions will be as follows:

- (1) The Registrar, the complainant and Mr Liu are to make submissions by **19 July 2022**.
- (2) The Registrar, the complainant and Mr Liu may reply to submissions of any other party by **2 August 2022**.

ORDER FOR SUPPRESSION

[59] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.¹²

[60] There is no public interest in knowing the name of Mr Liu's client.

[61] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration NZ.

D J Plunkett
Chair

¹² Immigration Advisers Licensing Act 2007, s 50A.