

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2022] NZIACDT 20

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
(Sanctions)
Dated 10 August 2022**

REPRESENTATION:

Registrar: Self-represented
Complainant: A Yang, counsel
Adviser: S Laurent, counsel

INTRODUCTION

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

[2] A complaint against Mr Liu 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 27 June 2022 in *XZ v Liu*.¹ Mr Liu 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 Liu is a licensed immigration adviser and director of Trusty Immigration Consultants Ltd, of Auckland.

[6] The complainant, a national of China, was resident in New Zealand. He returned to China in January 2020 for a holiday of three months. While still in China, the COVID-19 pandemic reached New Zealand in March 2020. As a result, Immigration New Zealand (Immigration NZ) issued an immigration instruction on 31 March 2020 specifying those persons refused entry to New Zealand. It allowed the complainant, as a residence visa holder who had left New Zealand after the approval of his visa, to re-enter New Zealand again.

[7] On 27 May 2020, Mr Liu wrongly advised the complainant that he was not allowed to return to New Zealand. It was not until 8 October 2020 that Mr Liu correctly advised the complainant that he could return. The complainant returned to New Zealand on 6 November 2020 and resumed work on 9 November.

Decision of the Tribunal

[8] The Tribunal found that Mr Liu was not diligent and did not exercise due care in advising the complainant that he could not return to New Zealand. It was regarded as an honest mistake and a momentary lapse in concentration. However, a reasonable, prudent and diligent practitioner would not have given such advice. This was a breach

¹ *XZ v Liu* [2022] NZIACDT 14.

of cl 1 of the Code. While two heads of complaint were upheld, the Tribunal noted that there was only one wrong.

SUBMISSIONS

Submissions from the Registrar

[9] In the Registrar's submissions of 19 July 2022, it is submitted that the appropriate sanctions would be:

- (1) Caution.
- (2) An order for the payment to the Registrar of a penalty in the vicinity of \$1,000.
- (3) Payment of reasonable compensation to the complainant for loss of wages from employment and inconvenience to his personal life.

[10] The Registrar noted that this was the first time Mr Liu had appeared before the Tribunal. His conduct had demonstrated a slip in professional standards. While it had serious consequences for the complainant, it was at the lower end of the scale in terms of seriousness and was a one-off mistake rather than continuing misconduct.

[11] The Registrar noted that Mr Liu had accepted the breach of the Code and was prepared to accept a finding of negligence. Additionally, he had offered to obtain MIQ spots for the complainant and his family free of charge by way of apology.

[12] It was submitted that the complainant had suffered harm in the form of loss of income from employment and that this was attributable to Mr Liu's incorrect advice that he could not return to New Zealand. However, the complainant had received the COVID-19 wage subsidy between March and May 2020 and he was therefore not entitled to compensation for that period. It was noted that he had sought compensation from 9 July 2020. In the circumstances it was submitted that a nominal sum or a contribution to the loss might be appropriate to reflect the harm caused by Mr Liu's conduct.

Submissions from the complainant

[13] The submissions of Ms Yang, counsel for the complainant, are dated 19 July 2022. It is submitted that the following sanctions would be appropriate:

- (1) An order for repayment of \$2,300 in fees.

- (2) An order for reasonable compensation to the complainant for loss of salary.
- (3) An order for compensation to the complainant for his legal costs.

[14] In respect of the loss of salary, counsel notes that the complainant had planned and agreed with his employer to come back to work after three months holiday in China. He booked a return flight to come back on 10 April 2020. It was rescheduled several times with the COVID-19 outbreak. Mr Liu then told him on 27 May 2020 that he was not allowed to come back. The complainant accepted this advice and did not continue searching for a flight back and an MIQ spot. The complainant says that had Mr Liu properly advised him, he would have booked MIQ and a flight back in order to resume work by July 2020. He should receive a reasonable contribution for his loss of salary. He works 40 hours per week and his pay rate at the relevant time was \$28 per hour.

[15] As for the legal costs, there is an invoice (19 July 2022) from the complainant's solicitor for services in relation to the complaint in the sum of \$2,802.

Submissions from Mr Liu

[16] There is a memorandum (18 July 2022) from Mr Laurent, counsel for Mr Liu. It is noted that Mr Liu previously acknowledged providing incorrect advice. He had also offered, by way of apology and recompense, to secure managed isolation places for the complainant and his family at no charge. The complainant did not, however, take up this offer.

[17] Counsel records that this is Mr Liu's first appearance before the Tribunal. The circumstances giving rise to the complaint did not demonstrate any systemic problems with Mr Liu's practice or his probity. There was no need for any order as to training.

[18] The complainant had claimed compensation of four months' salary from 9 July to 9 November 2020. He is saying he could have booked travel back to New Zealand and started work by 9 July 2020. This is speculative. In mid-2020, the ability to book flights out of China was limited. Furthermore, the ability of New Zealand to accept arrivals was constrained by the availability of managed isolation facilities. These started to open in April 2020, with more facilities added in the following months so that there were 33 by November 2020. There was also a surge of New Zealand citizens and others arriving in the country. While non-citizens could come in, they had to compete for MIQ spaces with others returning home. Counsel concludes the complainant's view of when he would have been able to return to New Zealand after May 2020 may be too optimistic.

[19] Nor is there any indication that the complainant had further contact with Mr Liu until around October 2020, when the latter contacted him about applying to enter New Zealand. There was a gap of over four months during which the complainant appeared to remain passive. If he had contacted Mr Liu sooner, the issue of return might have been resolved and the complainant could have begun working on an earlier date. The complainant made his own enquiries with third parties about his ability to enter New Zealand, but he did not ask Mr Liu again until prompted by the latter's approach to him.

[20] Counsel accepts that such matters do not deflect from Mr Liu's liability for his breach of the Code, but they raise a question as to the amount of compensation which should be awarded. While there is a causal link between the complainant's loss of income and the incorrect advice given in May 2020, that liability is not unlimited. The complainant had a duty to mitigate his own loss within the bounds of reason. It is arguable that the complainant's delay before pursuing his ability to come back to the country eventually outran Mr Liu's duty to compensate him for lost income.

[21] For Mr Liu's fees, the complainant paid \$2,300 for residence for himself and his family. They obtained residence. Any compensation should be proportionate, given that Mr Liu gained residence for the family.

[22] In a further memorandum (25 July 2022) from Mr Laurent, counsel agrees with the Registrar's submission that a penalty of \$1,000 may be reasonable.

[23] Counsel infers that the complainant would have been paid the COVID-19 subsidy available from 27 March to 1 September 2020 (which would amount to \$12,887.60). The complainant could also have ameliorated his loss of earnings by taking up employment in China while awaiting a change in New Zealand's border settings. His account implies that he earned no income between late January and early November 2020, which is not entirely credible. He was employed in New Zealand as a senior metal fabricator and comes from an area in China where there are shipbuilding and other heavy industries.

[24] As for the claim for legal costs, counsel observes that the Tribunal has previously doubted it has the power to award costs. Section 51 of the Immigration Advisers Licensing Act 2007 (the Act) is prescriptive as to the sanctions which the Tribunal may impose. It does not mention legal costs. It enumerates nine types of sanction, so it was clearly not Parliament's intention to enable the award of legal fees for a complainant to be represented. The power is not explicit and cannot be implied.

JURISDICTION

[25] The Tribunal's jurisdiction to impose sanctions is set out in the Act. Having heard a complaint, the Tribunal may take the following action:²

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.

[26] 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.

² Immigration Advisers Licensing Act 2007.

[27] 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.

[28] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:³

...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.

[29] 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.⁴

[30] 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.⁵

³ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

⁴ *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 3, at [151].

⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

[31] The most appropriate penalty is that which:⁶

- (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

[32] This is Mr Liu's first appearance before the Tribunal.

[33] The wrong here was an isolated incident of wrong advice. It was a momentary lapse in concentration during an exchange of texts. Nonetheless, it had severe consequences for the complainant as it led to him remaining in China rather than return to New Zealand to resume work. Mr Liu has acknowledged his mistake.

[34] The Tribunal agrees with the Registrar that caution is appropriate, rather than censure.

[35] The Tribunal further agrees with the Registrar that given the low level of the wrongdoing, a financial penalty of \$1,000 is appropriate. Mr Liu accepts this.

[36] The complainant seeks a refund of the fees of \$2,300 paid to Mr Liu, but as Mr Laurent points out, this was largely for residence for the complainant and his family. That application was successful. There is no justification for any refund.

⁶ *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].

[37] This brings the Tribunal to the more contentious issue of compensation. The Tribunal has previously determined that it can award compensation for loss attributable to an adviser's wrongdoing, though has also noted that any such claims of magnitude could not circumvent the usual criteria for civil claims.⁷

[38] The principal claim is the loss of salary for four months from 9 July to 9 November 2020. The amount claimed is not given by Ms Yang but the complainant then worked 40 hours per week at \$28 per hour. Over 17 weeks, the gross salary would be \$19,040 on this basis, a substantial sum.

[39] As Mr Laurent contends, this head of claim presupposes that the complainant could have obtained a flight back and MIQ place in time to leave MIQ prior to 9 July. Mr Laurent points to the difficulties in obtaining flights from China and MIQ spaces at that time. There is no answer to that from the complainant. Nor is it known what, if any, efforts the complainant made to earn income in China and, if so, how much he earned. The complainant has not responded to that contention of Mr Laurent either.

[40] The Act gives the Tribunal the power to award *reasonable* compensation, not necessarily recompense for all the losses or expenses, even if they can be said to have arisen from the adviser's professional wrongdoing. The sanction is intended as a contribution towards losses and expenses, not an indemnity. That would be for the Disputes Tribunal (or the general courts for a larger sum) in an orthodox breach of contract action.⁸

[41] The Tribunal awards \$4,480 (four weeks gross remuneration) as a fair and reasonable contribution towards the complainant's loss of income.

OUTCOME

[42] Mr Liu is:

- (1) Cautioned.
- (2) Ordered to pay immediately to the Registrar \$1,000.
- (3) Ordered to pay immediately to the complainant \$4,480.

⁷ *ZT v Li* [2020] NZIACDT 38 at [47]–[48].

⁸ *Zhang v Chen* [2019] NZIACDT 11 at [67]–[68].

ORDER FOR SUPPRESSION

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

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

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

D J Plunkett
Chair

⁹ Immigration Advisers Licensing Act 2007, s 50A.