

**BEFORE THE IMMIGRATION ADVISERS
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2015] NZIACDT 11

Reference No: IACDT 032/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Taya Chaiyapoom

Complainant

AND

Yijun (Alex) Hu

Adviser

DECISION
IMPOSITION OF SANCTIONS

REPRESENTATION:

Registrar: Ms K England, solicitor, Ministry of Business Innovation and Employment, Auckland.

Complainant: In person.

Adviser: In person.

Date Issued: 26 February 2015

DECISION

This Complaint

- [1] This decision imposes sanctions, following a decision upholding a complaint against Mr Hu (*Chaiyapoom v Hu* [2014] NZIACDT 78; see www.justice.govt.nz).
- [2] The central element in the complaint was the defalcation of the complainant's student course fees by an employee in Mr Hu's practice. Mr Hu accepted the employee misappropriated the money and accepted he failed to have a signed agreement relating to his client engagement. However, he says he is not responsible for either the defalcation or accounting for the missing funds.
- [3] Mr Hu also said that while he did prepare an application, he did not put a date on it, so was not responsible for the client relationship and did not require a written agreement. He said the employee took the money outside of her employment, so it is was matter between the employee and the complainant.
- [4] The Tribunal found Mr Hu did have a client relationship, the misappropriation occurred in the course of it, and Mr Hu was responsible for the funds which he has failed to account for. Accordingly, he breached clauses 1.1(a), 1.5(d) and 3 of the Code of Conduct 2010 (the Code). The Tribunal dismissed an allegation he breached clause 4(c).
- [5] The full circumstances are set out in the substantive decision.

The Parties' Positions on Sanctions

- [6] Mr Hu provided submissions on sanctions. He said the employee was acting as an interpreter, so the Tribunal should not have found he failed to perform his services with due care, diligence, respect and professionalism. He also challenged the Tribunal's findings regarding his failure to maintain professional business practices relating to finances and staff management. The submissions do not engage with the reasoning set out in the substantive decision.
- [7] The Registrar provided submissions in relation to the available mechanisms that would allow Mr Hu to operate under a provisional licence while completing any required course of study; however, she expressly declined to provide submissions on her view of the appropriate sanctions. This followed notice in the substantive decision that the Tribunal considered that there had been a sustained and persistent refusal to accept the responsibilities of a licensed immigration adviser and in relation to this complaint a failure on Mr Hu's part to manage his practice to a standard required of a licensed immigration adviser operating independently. Further, that level of non-compliance could potentially attract significant sanctions including a condition that Mr Hu complete the requirements for the issue of a Graduate Certificate in New Zealand Immigration Advice Level 7, and the cancellation of his full licence restricting him to holding a provisional licence until that qualification is completed.

Discussion

The gravity of the professional offending

- [8] This decision largely turns on the gravity of the professional offending. It is not possible to regard this complaint as anything other than serious. The very purpose of the Act was to put an end to unscrupulous conduct by unlicensed persons who gained the trust of vulnerable migrants, and then exploit their vulnerability when they sought immigration services. That is what occurred to the complainant, for whom English is a second language. Mr Hu's lax management of his practice allowed that to occur and he has failed to accept his responsibility for it.
- [9] The complainant was entitled to the protection the Act envisions. I have found Mr Hu was responsible for the fact the complainant did not receive the protection the Act intended as he failed to properly manage an unlicensed person whom he had authorised to operate within his practice.

- [10] Even now Mr Hu does not accept he failed in his professional responsibilities; he blames his former employee and does not accept that he is obliged to make good the loss the complainant suffered. Accordingly, a primary objective of the sanctions must be to ensure Mr Hu gains a mature understanding of the nature of professional responsibility.

Training

- [11] I had considered cancelling Mr Hu's full licence and permitting him to apply for a provisional licence, which only allows him to practice under supervision. That would provide protection for the public in the short-term. However, the Registrar has pointed out that the Immigration Advisers Competency Standards 2013 makes that process problematic as an adviser who's licence has been cancelled must meet certain requirements before they can apply for a provisional licence. Further, the Registrar has chosen to take no position on what sanctions the Tribunal should impose and has provided no submissions that suggest it is necessary to make such an order. As the Registrar has the power to investigate and make inquiries when licensees renew their licences, I give the Registrar's silence significant weight and allow Mr Hu to continue to hold a full licence.
- [12] I have determined the appropriate course is to require Mr Hu to undertake training, but to allow him to continue to hold a full licence whilst doing so. He will be required to complete the Bay of Plenty Polytechnic's Graduate Certificate in New Zealand Immigration Advice. It is now the standard required for entry to the profession.
- [13] The Tribunal will order that Mr Hu shall, as soon as practicable, enrol in the Bay of Plenty Polytechnic course for a Graduate Certificate in New Zealand Immigration Advice Level 7.
- [14] He must successfully complete the course for the Graduate Certificate in New Zealand Immigration Advice Level 7 within 18 Months of this decision issuing. I draw Mr Hu's attention to section 51(4) that requires that Mr Hu meet the requirements, in time; and otherwise cancels his licence.

The financial penalty on this complaint

- [15] Taking account of the other aspects of the sanctions, and importantly my conclusion that Mr Hu both failed to manage his practice professionally, and then failed to take responsibility for the consequences his client suffered. The penalty will be \$3,000; I regard the matter as one where Mr Hu's lack of understanding is the primary issue, rather than defiant non-compliance.
- [16] A penalty of \$3,000 is a low to mid-range penalty, the scale of financial penalties being up to \$10,000.

Compensation and the refund of fees

- [17] The complainant sought a compensation of \$5,500 being the portion of tuition fees not returned to him, and interest.
- [18] He is entitled to an order for the \$5,500; for the reasons discussed in the substantive decision, Mr Hu is responsible for that loss. He is also entitled to compensation in the form of interest over the period from 1 September 2011 when Mr Hu should have paid the money. The rate will be the Judicature Act rate of 5% on the basis that is a reasonable reflex of value of the loss of use of the money, and there is no proof of any higher actual and foreseeable loss. The amount is calculated from 1 September 2011 to 28 February 2015 (the earliest practicable date for settling the order). The interest is \$961.37, and the total together with the principal amount of \$5,500 is \$6,461.37. Accordingly, there will be an order for the refund of expenses and compensation in that amount.

Censure

- [19] In accordance with the usual practice of disciplinary tribunals, censure will be an express sanction. It is appropriate to make that finding where conduct is not a mere lapse from minimum standards.

Caution

[20] The Tribunal cautions Mr Hu, and puts him on notice that he is required to conform to the Act and the Code of Conduct in relation to all of his professional work. He should immediately ensure that all the immigration services and advice he provides is within client relationships and service delivery structures that meet his professional obligations.

Decision

[21] Mr Hu is:

[21.1] Censured and cautioned in the terms appearing above.

[21.2] Ordered to pay the complainant \$6,461.37 as a refund of expenses and compensation.

[21.3] Ordered to pay a penalty of \$3,000.

[21.4] Required as soon as is practicable to commence and within a maximum period of 18 months from this decision successfully complete the Bay of Plenty Polytechnic course for a Graduate Certificate in New Zealand Immigration Advice Level 7.

[22] The Registrar and Mr Hu are reserved leave to apply for an amendment to the order relating to training if there are changes in the course directed, or the range of courses available. The Tribunal also reserves leave for Mr Hu to apply regarding the specified period to enrol and complete the requirements for the training.

DATED at WELLINGTON this 26th day of February 2015

G D Pearson
Chair