

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

Decision No: [2015] NZIACDT 33

Reference No: IACDT 012/14

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

Lingchao Kong

Complainant

AND

Yangyang (Paul) Li

Adviser

DECISION

REPRESENTATION:

Registrar: M Denyer, lawyer, Ministry of Business Innovation and Employment, Auckland.

Complainant: In person

Adviser: Mr J McDonald, lawyer, Short & Partners, Auckland.

Date Issued: 23 March 2015

DECISION

Introduction

- [1] The Registrar of the Immigration Advisers Authority referred this complaint to the Tribunal. The complaint arose when the complainant sought immigration services from Mr Li's Auckland office. Mr Li was the only licensed immigration adviser in the practice at the time; he was based in Sydney. An unlicensed employee engaged with the complainant and Mr Li filed an application for a visitor visa.
- [2] The two central issues in the complaint are whether Mr Li allowed an unlicensed employee to provide immigration advice and whether the client engagement process was satisfactory.
- [3] The parties largely agree on the facts. The dispute principally concerns the obligations that the Immigration Advisers Licensing Act 2007 (the Act) and the Licensed Immigration Advisers Code of Conduct 2010 placed on Mr Li.
- [4] The Tribunal has upheld the complaint in some respects.

The complaint

- [5] The Registrar filed a statement of complaint, she put forward the following background as the basis for the complaint:
 - [5.1] The complainant was in New Zealand; his student visa would expire on 20 May 2012. His student enrolment had been terminated the preceding November, due to poor attendance at a course.
 - [5.2] He went to Mr Li's practice in Auckland on 18 May 2012. He dealt with an employee in the practice; she was not a licensed immigration adviser. Mr Li told the Registrar he had engaged in the instructions 'by internet'. That did not extend to any direct contact with the complainant; Mr Li was in Sydney.
 - [5.3] Mr Li instructed the unlicensed employee to assist the complainant, but not to provide any immigration advice.
 - [5.4] The complainant engaged Mr Li's practice to assist him, but did not sign a written agreement.
 - [5.5] On 18 May 2012, Mr Li submitted a visitor visa application for the complainant. On the form, he stated he had assisted the complainant to: "Put all documents in order". On 8 June 2012, Immigration New Zealand queried the complainant's poor attendance while holding a student visa. The complainant answered the query, and the visitor visa was issued.
- [6] The Registrar identified potential infringements of professional standards. They were:
 - [6.1] Mr Li allowed an unlicensed person to provide immigration advice. This breached his duty to carryout lawful informed instructions from the complainant, with due care, diligence and professionalism (clauses 1.1(a) and (b) of the Licensed Immigration Advisers Code of Conduct 2010 "the Code of Conduct"). It also constituted a breach of clause 2.1(b) of the Code of Conduct, as Mr Li failed to act in accordance with immigration legislation. Further, he breached clause 3 of the Code of Conduct in failing to maintain professional business practices relating to finances, records, documents, contracts and staff management.
 - [6.2] He failed to comply with the Code of Conduct's requirements relating to client engagement. He did not have a written agreement setting out payment terms, the fees and disbursements, a full description of the services, confirmation of acceptance in writing, and it lacked an explanation of all significant matters (clauses 1.5 and 8 of the Code of Conduct).

The responses

- [7] The complainant did not file a response, and was not required to do so if he accepted the Statement of Complaint.
- [8] Mr Li filed a statement of reply with supporting documents. His lawyer earlier provided material in response to the Registrar when she was investigating the complaint. They also provided information relating to an agreement for the provision of services.
- [9] The key elements in Mr Li's response are:
- [9.1] Mr Li did not provide immigration advice, or allow or permit the unlicensed employee to do so.
 - [9.2] His practice provided only clerical assistance, in accordance with the Immigration Advisers Licensing Act 2007 (the Act).
 - [9.3] The complainant presented in urgent circumstances, the clerical assistance he received from Mr Li's practice was appropriate in that situation. Mr Li gave specific instructions so his office could provide that assistance.
 - [9.4] The complainant sought only clerical assistance, and the relevant personnel provided statements to the effect the complainant received no immigration advice.
 - [9.5] The engagement agreement was explained to the complainant, and he completed details in his own handwriting on the document. His name, which he wrote on the form, was identical to his signature.
 - [9.6] The complainant, having gained his visitor visa, later applied for a partnership visa. Immigration New Zealand declined that application because he did not provide details of his partner when applying for the visitor visa. That is, the visitor visa application to which this complaint relates.
- [10] Mr Li accordingly submitted:
- [10.1] The agreement was completed and accepted appropriately; and
 - [10.2] His practice provided no immigration advice to the complainant.

Discussion

The standard of proof

- [11] The Tribunal determines facts on the balance of probabilities; however, the test must be applied with regard to the gravity of the finding: *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [55].

The material before the Tribunal

- [12] The Registrar provided a chronology, and supporting documentation. Mr Li has also provided additional material. In terms of the events that occurred, there appears to be little disagreement.
- [13] A central issue in the complaint is that Mr Li says the complainant received no immigration advice; the only assistance was clerical. It was appropriate for an unlicensed employee to engage with a client in those circumstances. However, what amounts to immigration advice and clerical work relates to the use of those terms in the Act. It is necessary to review the provisions in the Act.

Immigration Advice, clerical work and publicly available information under the Act

The legislative restriction

- [14] In many areas of professional and licensed practice, there is extensive use of people who do not hold the professional qualifications required of the person primarily responsible for providing the service. In some cases those persons hold different and complementary qualifications, such as lawyers and legal executives; surgeons, nurses, and anaesthetists; pilots and first officers. Often people without formal qualifications provide essential services in these settings too, under delegation from the qualified person who is responsible for the work.
- [15] If there was no legislative direction, a licensed immigration adviser could conduct their practice using unqualified people and the case would not be easily made out that they acted unreasonably or irresponsibly in doing so. Any complaint would likely require a demonstration of failure to delegate appropriately or supervise properly, if that were the law. Unqualified people successfully provide very important skills in many areas of professional service delivery.
- [16] However, the Act was, among other things, intended to put an end to a history of a small minority of advisers who exploited vulnerable migrants. The background to the Act is discussed in *ZW v Immigration Advisers Authority* [2012] NZHC 1069 and reflected in section 3 of the Act.
- [17] It is evident the legislative scheme has been constructed in a manner designed to exclude unlicensed people from being engaged in the delivery of professional services to a degree that is far from universal in the regulation of professional service delivery.
- [18] It was foreseeable that some people who had formerly provided immigration services, and failed to gain a licence, would seek to have a licensed person “rubber stamp” their continuing activity in the industry. Unfortunately, this Tribunal’s work demonstrates that was a well-founded apprehension and an area where enforcement action has been necessary.
- [19] Against that background, the policy behind the stringent restrictions in the Act on unlicensed persons providing immigration services is evident.
- [20] Section 63 of the Act provides that a person commits an offence if they provide “immigration advice”, without being either licensed, or exempt from the requirement to be licensed.
- [21] Section 73 provides that a person may be charged with an offence under section 63, whether or not any part of it occurred outside New Zealand.
- [22] The scope of “immigration advice” is defined in section 7 very broadly. It includes:
- using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand ...
- [23] There are exceptions to consider. Section 7 provides that the definition does not include “clerical work, translation or interpreting services”. Accordingly, the question arises as to whether the work in issue came within that exception.
- [24] The scope of *clerical work* is important, as otherwise, the very wide definition of immigration advice would likely preclude any unlicensed person working in an immigration practice in any capacity.
- [25] *Clerical work* is defined in section 5 of the Act in the following manner:
- clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:
- (a) the recording, organising, storing, or retrieving of information:
- (b) computing or data entry:

- (c) recording information on any form, application, request, or claim on behalf and under the direction of another person

- [26] The definition refers to administrative tasks, such as keeping records, maintaining financial accounts and the like.
- [27] The definition deals specifically with the role an unlicensed person may have in the process of preparing applications for visas. They may record information “on any form, application, request, or claim on behalf and under the direction of another person”.
- [28] The natural meaning of those words is that the unlicensed person relying on the “clerical work” exception may type or write out what another person dictates or directs.
- [29] That other person may properly be the person who is making the application, a licensed immigration adviser, or a person who is exempt from being licensed. The person typing or writing out the form in those circumstances is not giving immigration advice. In this case, a licensed immigration adviser had an important professional task when the forms were completed.
- [30] The definition does not give any authority for the unlicensed person to make inquiries, and determine what is to be recorded on the form. Under “clerical work” they must do nothing more than “record” information as directed.
- [31] The other exception in section 7 is that immigration advice does not include “providing information that is publicly available, or that is prepared or made available by the Department”. This also excludes the possibility of an unlicensed person engaging with the specific factual situation of the person making an application as they may only provide information, not advice. This exception does not arise on the facts of this case, the complainant required, and was entitled to receive, advice on his circumstances as he had engaged professional assistance.

The facts in this case

- [32] The complainant attended Mr Li’s practice in Auckland. He engaged with a person, who is not a licensed immigration adviser, they provided the professional services. However, Mr Li was giving some direction. Mr Li did not engage in telephone communication or otherwise directly communicate with the complainant. In these circumstances, the complainant and the unlicensed person with Mr Li’s knowledge:
- [32.1] Initiated the professional relationship;
- [32.2] Prepared the visitor visa application; and
- [32.3] Dealt with fees.
- [33] Mr Li filed the application with Immigration New Zealand and he certified he had only “put all documents in order”. It later transpired the complainant faced difficulties over failing to include details of a relationship on the form. This became an issue when he later applied for a visa relying on the relationship.
- [34] Mr Li has provided evidence an unlicensed person asked the complainant about a woman accompanying him, and was told she was only a friend. Of this incident a statement provided by Mr Li said:

“In the course of completing the form I heard [the unlicensed employee dealing with the complainant] ask [the complainant] about his relationship with the lady that was with him. He told the [unlicensed employee] that they were merely friends and I heard her asking [the complaint] for his friend’s surname but [he] refused to tell her that and said it was inconvenient to provide that information and as a result only completed her Christian but not surname.”

Unlicensed employees provided Immigration advice

[35] I am satisfied that with Mr Li's knowledge unlicensed employees in his practice provided immigration advice in breach of the Act. They did so throughout the course of the instruction:

[35.1] First, the process of client engagement requires the provision of advice, gathering of information, and then documentation under the Code of Conduct. That amounts to the provision of immigration advice, and is not clerical work, certainly not exclusively clerical work.

[35.2] Second, the complainant had an agreement that he would receive "excellent professional services", and the statement Mr Li provided (refer quote paragraph [33] above) is an admission that the unlicensed person was not merely transcribing instructions onto a form. The unlicensed person was engaging with the complainant inquiring and taking instructions.

[36] Accordingly, the unlicensed staff were not providing only clerical work, or publicly available information. They engaged a client and attempted to provide the professional services promised to Mr Li's client.

[37] I uphold the complaint on the grounds set out in the Statement of Complaint in the following respects:

[37.1] The Code of Conduct required (clause 1.1(a) and (b)) that Mr Li with due care, diligence, respect and professionalism perform his services and carry out the lawful informed instructions of his client.

[37.2] He failed to do so in that:

[37.2.1] He did not personally engage with his client and ensure that the client received and understood appropriate advice on his immigration options. He, accordingly, failed to provide the professional services he offered with care, diligence and professionalism, and failed to carry out the lawful informed instructions of his client, as his client was not fully informed.

[37.3] The Code of Conduct (clause 2.1(b)) required that Mr Li act in accordance with immigration legislation including the Immigration Act 2009.

[37.4] He failed to do so in that:

[37.4.1] He allowed an unlicensed person to provide immigration advice in the course of engaging the complainant, and to provided assistance with his application for a visitor visa.

[37.4.2] With Mr Li's knowledge, the unlicensed person performed actions that breached section 6 of the Act.

[37.5] The Code of Conduct (clause 3) required that Mr Li maintain professional business practices relating to contracts and staff management.

[37.6] He failed to do so in that:

[37.6.1] He was not usually present in the Auckland office of his practice, and had to manage that situation.

[37.6.2] He allowed staff in his Auckland office to engage a client when he was not present, and did not use a means such as a telephone or video link to communicate with his client.

[37.6.3] He allowed the unlicensed staff to provide immigration services.

[37.6.4] He had an obligation to ensure he properly managed the staff in his practice. That required that he put reasonable practices in place to ensure that staff did not provide immigration advice or engage clients without a licensed

immigration adviser providing the essential advice and disclosure required. He permitted them to do so.

Failure to commence the professional engagement in accordance with the Code of Conduct

- [38] To commence the professional engagement properly, Mr Li was required to personally:
- [38.1] Explain and provide a copy of the Code of Conduct (clause 1.4(a) of the Code of Conduct).
 - [38.2] Explain and provide a copy of his internal complaints procedure and the complaints and disciplinary procedures that are outlined in the Immigration Advisers Licensing Act 2007 (clause 9(b) and (c) of the Code of Conduct).
 - [38.3] Set out fees and disbursements (clause 8(b) and (d) of the Code of Conduct).
 - [38.4] Make his client aware in writing of the terms of an agreement for the provision of services, and all significant matters relating to it (clause 1.5(a) and (b) of the Code of Conduct).
 - [38.5] Inform the client that they are entitled to seek independent legal advice before entering into agreements (clause 1.5(c) of the Code of Conduct).
- [39] Mr Li did not communicate directly with the complainant, oversee or supervise the steps identified in the immediately preceding paragraph; and accordingly breached those obligations in the Code of Conduct. Only a licensed immigration adviser could legally complete key steps necessary to properly commence the professional engagement, as they constitute “immigration advice” under the Act. An integral part of the engagement process was to take instructions, and understand the complainant’s circumstances. Unless that occurred, it would not be possible to make the client aware of all significant matters arising out of the agreement.
- [40] While Mr Li has purported to limit his responsibility to putting documents in order, the written agreement he produced stated the complainant would receive “excellent and professional services”. The complainant was required to pay \$1,000 for those services. The documents are not consistent with a limited engagement where clerical rather than immigration services were provided. Furthermore, the statement Mr Li provided to the Tribunal (quoted above in paragraph [33]) demonstrates the unlicensed employee was not merely providing the clerical assistance of writing what the complainant was dictating. She was actively making pertinent enquiries about a relationship that potentially affected the application. As it transpired, it appears this was important.
- [41] Accordingly, I am satisfied the complainant, with Mr Li’s knowledge, engaged with Mr Li’s practice and received more than clerical assistance. There was a professional relationship, and Mr Li had an obligation to comply with the Code of Conduct in respect of client engagement.
- [42] I accept Mr Li’s claim that the fact the complainant completed part of the written agreement, and that amounted to confirmation in writing that he accepted the terms of the agreement (refer clause 1.5 d) of the Code of Conduct).
- [43] My conclusions regarding the grounds of complaint identified in respect of client engagement in the Statement of Complaint are:
- [43.1] I do not uphold the complaint that there was no written agreement entered into. I am satisfied Mr Li has produced a document which the complainant has partially completed. The complainant has not suggested he did not accept the agreement.
 - [43.2] I also find the agreement contained the terms of payment, and the amount. There is a reference to a “processing fee”, the material does not establish whether this was a disbursement or whether it was accurate. I accordingly make no adverse finding in that regard.
 - [43.3] The agreement is not ideal in that it does not set out in detail the services to be provided. It does however state it is for the purpose of an application for an urgent

visitor visa. Given that the work was limited, I accept the description was adequate in this case.

- [43.4] The remaining issue in relation to client engagement was whether all significant matters were explained to the client before the agreement was entered into, as required by clause 1.5(a) of the Code of Conduct. I am satisfied that did not occur.
- [44] First Mr Li or another licensed immigration adviser did not provide the advice. That in itself does not mean that there was inadequate advice. However, I am satisfied on the balance of probabilities the advice was inadequate. First, Mr Li has himself admitted the application did not include the person who it transpired was or was potentially the complainant's partner. The interaction quoted in paragraph [33] above illustrates the inadequacy of the advice. The statement from which that quote is taken also said the complainant did not appear to appreciate the urgency.
- [45] The information Mr Li has himself provided indicates the complainant presented in circumstances where:
- [45.1] His visa was about to expire;
- [45.2] His immigration history was problematic as he failed to attend a course and remained under a student visa; and
- [45.3] He potentially had a partner, which could factor into future immigration initiatives.
- [46] That information in itself required that Mr Li explain the urgency of applying for a new visa, consequences of remaining in New Zealand if the visa expired and the potential difficulties arising from the student visa and non-attendance. While the complainant said he was not in a relationship, he did discuss the issue with the unqualified staff dealing with his application. An experienced licensed immigration adviser should have explained the importance of accurately identifying any relationships, as that potentially affected any subsequent applications. It was incongruous that the unqualified staff member recorded a first name as some partial recognition (refer para.[34] above).
- [47] I am satisfied the complainant's immigration circumstances were not adequately explored. Accordingly, I find Mr Li failed to personally engage with his client and make him aware of all significant matters relating to the agreement to provide professional services to apply for a visitor visa; he accordingly breached clause 1.5(a) of the Code of Conduct in that respect.

Decision

- [48] The Tribunal upholds the complaint pursuant to section 50 of the Act.
- [49] The adviser breached the Codes of Conduct, in the respects identified; they are grounds for complaint pursuant to section 44(2) of the Act.

Submissions on Sanctions

- [50] The Tribunal has upheld the complaint; pursuant to section 51 of the Act, it may impose sanctions.
- [51] The Authority and the complainant have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, Mr Li is entitled to make submissions and respond to any submissions from the other parties.
- [52] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.

Timetable

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

[53.1] The Authority and the complainant are to make any submissions within 10 working days of the issue of this decision.

[53.2] The adviser is to make any further submissions (whether or not the Authority or the complainant makes submissions) within 15 working days of the issue of this decision.

[53.3] The Authority and the complainant may reply to any submissions made by the adviser within 5 working days of him filing and serving those submissions.

DATED at Wellington this 23rd day of March 2015

G D Pearson
Chair