

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

Decision No: [2015] NZIACDT 38

Reference No: IACDT 004/14

**IN THE MATTER**

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

**BY**

**The Registrar of Immigration Advisers**

Registrar

**BETWEEN**

**David Slinger**

Complainant

**AND**

**Na (Fiona) Zhou**

Adviser

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**DECISION**

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**REPRESENTATION:**

**Registrar:** In person

**Complainant:** In person

**Adviser:** In person

Date Issued: 15 April 2015

## DECISION

### Introduction

- [1] This complaint involves a family. The older members of the family are a couple living in New Zealand (the complainant and his wife “the complainants”); they had a business here, and considered retirement. The younger members of the family (the applicants) wanted to migrate from the United Kingdom and planned for one of them to take employment in the business, using that to qualify for residence.
- [2] They approached the immigration practice of Richard Martin Immigration Ltd. (the Practice). Ms Zhou is the licensed immigration adviser subject to the complaint. Ms Zhou was the sole licensee in the Practice during the events leading to the complaint. Mr Martin controlled the company that owned the Practice and was personally active in the Practice. Mr Martin had previously been a lawyer, but was struck off the roll of barristers and solicitors for misconduct. He has a history of criminal offending against clients and, at the time Ms Zhou commenced employment, he was facing criminal charges for breaches of the Immigration Advisers Licensing Act 2007 (the Act).
- [3] The younger members of the family dealt with Mr Martin and he encouraged them to apply for residence, telling them a position of employment in the business would qualify them to migrate to New Zealand. The older members of the family dealt with Ms Zhou. As it transpired, Immigration New Zealand declined the application because the position of employment did not meet the requirements.
- [4] The Registrar investigated the complaint and referred it to the Tribunal on the basis that Ms Zhou failed in her professional obligations as:
  - [4.1] She did not attend to the documentation and disclosure requirements to commence a professional relationship;
  - [4.2] She did not provide correct advice; and
  - [4.3] She allowed Mr Martin to provide immigration advice when the Act prohibits that.
- [5] The Tribunal is required to consider:
  - [5.1] Whether Ms Zhou did properly commence the professional relationship. Ms Zhou says she did attend to all of the requirements, and the Tribunal must determine whether that is factually correct.
  - [5.2] Whether Ms Zhou gave adequate advice, despite Immigration New Zealand ultimately finding the application could not succeed.
  - [5.3] Whether Ms Zhou failed in her professional obligations by allowing Mr Martin to provide immigration advice (in the extended sense used in the Immigration Advisers Licensing Act 2007) unlawfully.
- [6] The Tribunal has upheld each of the grounds of complaint.

### The complaint

- [7] The Registrar filed a statement of complaint, she put forward the following background as the basis for the complaint:
  - [7.1] The complainants were proposing to employ their daughter in law; and she would be the principal visa applicant so she and her husband (the applicants) could seek residence visas.
  - [7.2] In July 2011, the complainants engaged Ms Zhou to assist with the immigration process by submitting an expression of interest, and intending that would progress to visa applications. The plan was to use the skilled migrant category to gain residence visas for New Zealand.

- [7.3] During the period from 30 May 2011 until 24 January 2013, Ms Zhou was the sole licensed immigration adviser in the practice she conducted. Richard Martin Immigration Ltd (RMI) owned the Practice, and employed Ms Zhou.
- [7.4] There was no written agreement relating to the services Ms Zhou was to provide to the applicants.
- [7.5] Between August 2011 and December 2011, the female applicant corresponded with Mr Richard Martin who was an officer of RMI, and active in the Practice.
- [7.6] In August 2011, the Practice lodged an expression of interest in which Ms Zhou was the nominated licensed immigration adviser; Immigration New Zealand selected it and an application for a visa followed. Ultimately, some 11 months later on 21 July 2012 Immigration New Zealand declined the visa application as the position of employment relied on did not meet the requirements.
- [7.7] In August 2012, Mr Martin told the applicants he would lodge a request for intervention with the Minister of Immigration the following month. Ms Zhou knew Mr Martin was doing this, and left him to arrange it through a personal contact in the office of a member of parliament.
- [7.8] Mr Martin reported to the applicants he had submitted the request. He did not provide evidence of doing so and, in November 2012, the applicants contacted Ms Zhou, requesting confirmation that the request was with the Minister's office. Ms Zhou then submitted a request to the Minister on 23 November 2012 as Mr Martin had not done so.
- [8] The Registrar identified potential infringement of professional standards by Ms Zhou during the course of the dealings. Namely:
- [8.1] Ms Zhou breached clauses 1.5(a), (b) and (d) and 8(b) of the Licensed Immigration Adviser Code of Conduct 2010 (the 2010 Code). Those provisions required her to undertake various documentation and disclosure processes in the course of engaging clients. The particulars of the alleged breaches of that obligation were:
- [8.1.1] She breached the requirement to have a written agreement containing a full description of the services to be provided (clause 1.5(b) of the 2010 Code);
- [8.1.2] She failed to have her clients confirm their acceptance in writing of the terms of an agreement for the provision of services (clause 1.5(d));
- [8.1.3] She failed to make her clients aware of the terms of the agreement and all significant matters relating to it (clause 1.5(a)); and
- [8.1.4] She did not set out the fees and disbursements before commencing work that incurred costs (clause 8(b)).
- [8.2] That Ms Zhou breached clauses 1.1(a) and (b) of the 2010 Code; those provisions required Ms Zhou to perform her services and carryout the lawful informed instructions of clients with due care, diligence, respect and professionalism. The particulars of the alleged breaches of those obligations were:
- [8.2.1] In July 2011, the applicants engaged Ms Zhou to submit an expression of interest and an application for a residence visa.
- [8.2.2] The complainants met with Mr Martin, and he advised them that the applicants could proceed to apply in reliance on the female applicant having an offer of employment as an office manager.
- [8.2.3] Immigration New Zealand later declined the application for visas, as the offer of employment did not meet the requirements for an office manager's position, as claimed.

- [8.2.4] Ms Zhou failed to assess whether the position of employment met the requirements to apply successfully for residence and, in doing so, she failed to exercise due care, diligence and professionalism (clause 1.1(a) and (b)).
- [8.3] That Ms Zhou committed a further breach of clauses 1.1(a) and (b) and, in addition, she breached clause 2.1(b) of the 2010 Code, which required her to act in accordance with the Immigration Act 2009 and the Licensed Immigration Advisers Act 2007 (the Act). The particulars of the alleged breaches of those obligations were:
- [8.3.1] Mr Martin did the work to lodge the expression of interest and the residence application, not Ms Zhou.
- [8.3.2] Ms Zhou initially instructed Mr Martin to lodge the request for ministerial intervention.
- [8.3.3] Ms Zhou failed to provide updates regarding the request for ministerial intervention, until the applicants made inquiries with her. At that point she realised Mr Martin was not progressing the request, and did it herself.
- [8.3.4] Those circumstances breached Ms Zhou's obligation to exercise due care, diligence and professionalism (clause 1.1(a) and (b)); as she unprofessionally instructed an unlicensed person to provide immigration advice rather than doing the work herself in breach of the Act (clause 2.1(b)).
- [9] The complainant has not sought to pursue the wider grounds included in his original complaint.

### **Ms Zhou's response**

- [10] Ms Zhou filed a statement of reply.
- [11] In relation to the facts, the key elements in Ms Zhou's response were:
- [11.1] She fully engaged with the issues in July 2011 and evaluated the applicant's circumstances and the merits of their application.
- [11.2] On 8 August 2011, Mr Martin placed a copy of the completed expression of interest form on Ms Zhou's desk. He said it was in the form emailed to him by the applicants; she completed and lodged the document online.
- [11.3] In August 2011, Immigration New Zealand selected the expression of interest, and the applicants told Ms Zhou the process of collecting documents was in progress. On 22 November 2011, Ms Zhou told the applicants she had lodged their residence application. She reported by telephone again on 29 November 2011.
- [11.4] On 9 December 2011, Ms Zhou contacted the applicants regarding information required by Immigration New Zealand. Ms Zhou does not now have access to the email.
- [11.5] On 15 December 2011, Ms Zhou posted additional documents to Immigration New Zealand.
- [11.6] On 24 February 2012, Ms Zhou contacted Immigration New Zealand by email, and reported to the applicants. She followed up again on 20 March 2012 and again reported to the applicants by telephone.
- [11.7] On 30 March 2012, Ms Zhou emailed comments and document to Immigration New Zealand.
- [11.8] On 1 May 2012, Ms Zhou emailed Immigration New Zealand asking for an update, but Mr Martin had already done so. Ms Zhou requested him not to do so again.
- [11.9] On 2 May 2012, Ms Zhou reported to the applicants and included correspondence from Immigration New Zealand refusing to deal with Mr Martin, as he was not a licensed

immigration adviser. During the period from 2 May 2012 through to 26 June 2012, Ms Zhou addressed issues with Immigration New Zealand.

- [11.10] On 21 July 2012, Immigration New Zealand declined the applicants' application. Ms Zhou was out of New Zealand at the time. Mr Martin accessed Ms Zhou's email account and reported to the applicants. In early August 2012, Ms Zhou arranged to meet with the complainants, and explained to them that the best approach was to apply to the Minister of Immigration.
- [11.11] In September 2012, Ms Zhou said Mr Martin would write a submission to someone with access to the Minister. Ms Zhou said she naively allowed him to do that, thinking it was the most effective way to get the submission to the Minister's office.
- [11.12] On 19 November 2012, Ms Zhou received a telephone call from the complainants, intended for Mr Martin. They wanted an update on the request to the Minister. Ms Zhou agreed to investigate. She reported what she knew and, on 22 November 2012, was able to contact Mr Martin who had been absent from the office. He had not made contact with the person he said he would, and Ms Zhou prepared and submitted the request to the Minister herself. Ms Zhou reported to the complainants regarding the request.
- [12] Ms Zhou denied there were valid grounds for complaint regarding the way she managed the applicant's immigration affairs.
- [13] In relation to the allegation that there was no written agreement (refer para.[8.1] above), Ms Zhou said there was a written agreement. She could not now produce the agreement as she did not have access to the practice. She said she engaged with the complainants who dealt with these matters for the applicants and complied with the Code of Conduct in doing so. She said the fact they paid for services confirms there was an agreement.
- [14] Ms Zhou denied she failed to exercise due care, diligence and professionalism when assessing whether the position the female applicant relied on met the requirements for residence (refer para.[8.2] above). She said she did not know Mr Martin provided advice to the applicants until she saw the complaint. She said her initial consultation was with the complainants, who she understood were agents for the applicants. She said she made thorough inquiries, and was properly satisfied the position of employment would qualify. The fact the application was later declined was not indicative of any failure to adequately investigate.
- [15] Ms Zhou denied she allowed Mr Martin to provide immigration advice in breach of the Act (refer para.[8.3] above). She said she neither authorised, nor was aware of Mr Martin providing immigration advice to the complainants or the applicants. There was some communication with Mr Martin, but Ms Zhou considered it was due to the complainants having a personal friendship with Mr Martin. She said she was absent from the practice for a period, and understood Mr Martin simply forwarded correspondence during those times.
- [16] Ms Zhou said she did not intend to allow Mr Martin to prepare the submission to the Minister. However, Mr Martin convinced her using an example of a successful intervention using his personal contact. She later discovered Mr Martin fabricated the description of the previous intervention.
- [17] The complainants persistently contacted Mr Martin, despite Ms Zhou's best endeavours to make them understand they should deal with her.

### **The complainant's response**

- [18] The complainant replied to Ms Zhou's Statement of Reply (in the form of his own statement of reply) and said the documents filed with the Statement of Complaint showed how Ms Zhou and Mr Martin were operating the Practice. He said Ms Zhou's claims in her Statement of Reply were untrue. Further, Ms Zhou lodged the application under the wrong category and her unprofessional conduct caused financial and emotional suffering.

## The Registrar's position

[19] The Registrar did not provide any further information after lodging the Statement of Complaint.

## Oral hearing

[20] The parties did not seek an oral hearing, and accordingly the Tribunal will determine the complaint on the papers pursuant to section 49(3) of the Act.

## Discussion

### *Ms Zhou's professional obligations in relation to practice management*

[21] Ms Zhou was required to understand and comply with the 2010 Code. That Code has the effect of a statutory regulation. It is very prescriptive in relation to documenting client engagements and advice. Clause 3 of the 2010 Code provides:

A licensed immigration adviser must maintain professional business practices relating to finances, records, documents, contracts and staff management, including:

a) Confirming in writing to clients when applications have been lodged, with ongoing timely updates; and

...

f) confirming in writing the details of material discussions with clients; ...

[22] Accordingly, not only should Ms Zhou have recorded advice in her files and kept them for seven years, she was required to confirm oral advice by writing it down and sending it to her clients, routinely that is by email. A significant element of Ms Zhou's response to the complaint involves her saying she cannot access records. However, her clients should have received the material parts of the records.

[23] In the Tribunal's decision *JM v DTM* [2011] NZIACDT 1, the Tribunal emphasised these aspects of professional responsibility:

[38] It is evident a key element of the mechanism in the Act is that licensed immigration advisers are clearly identified; client relationships commence with the adviser identifying their standing, and providing of a copy of the Code (Code clause 1.4). The scope of section 6 is wide, and one no doubt intended to ensure licensed advisers are not able to be used as a "front" for unlicensed operators. The legislation is structured to effect functional exclusion from the professional relationship of any person who is not either licensed or exempt.

[39] The legislation provides an important privilege to licensed immigration advisers in allowing them to exclusively provide immigration advice (along with exempt persons). However, consistent with that, licensed advisers carry professional obligations. They are personally responsible for the professional relationship, regardless of whether they are employees, or otherwise.

....

[42] Accordingly, licensed immigration advisers are given the freedom to practise as employees where they have little control over the business practices of their employer. However, they do so at their peril unless they establish proper protection for their professional independence, and assurance they can ensure they manage and deliver service for all aspects of the professional relationship (alone or with another licensed adviser). It is not open to the Adviser to claim they are subordinate to an employer or contractor, or say an unlicensed person was responsible for aspects of the professional relationship.

[24] Of course, some things are truly beyond a person's control and they will not trigger professional disciplinary consequences. The usual point of difficulty is what is controllable; proper control often requires that a professional person maintain effective control over

employees and resources within a practice. Regardless, there are occasions when professional persons are blameless victims of deception, or other circumstances, and that will not trigger professional disciplinary consequences.

*Ms Zhou's working environment*

- [25] Ms Zhou commenced working in RMI's practice, where this complaint arose, on 30 May 2011; she was the only licensed immigration adviser in the Practice during the relevant period. However, Mr Richard Martin who was formerly a lawyer was active in the Practice. Mr Martin has a history of dishonesty. His dishonesty in relation to immigration matters led to his being struck off the roll of barristers and solicitors and, more recently, his conviction for offences committed in RMI resulting in a sentence of imprisonment.
- [26] I refer to these matters, as one of Ms Zhou's responses to the complaint is that Mr Martin misled her and, in some respects, she could not be responsible for failing to apprehend that at the time.
- [27] The Tribunal does accept Mr Martin was dishonest and skilled at manipulation, and will evaluate Ms Zhou's explanations recognising Ms Zhou was not well equipped to manage Mr Martin given his character and behaviour. The extent of Mr Martin's dishonesty no doubt became more evident as events unfolded, regardless I give weight to the fact Ms Zhou was subject to manipulation while she worked with Mr Martin.

*The failure to commence the professional relationship in accordance with the 2010 Code*

- [28] Ms Zhou's response to this element of the complaint is essentially factual. Clause 1.5 of the 2010 Code is clear there must be a written agreement, the client must accept it in writing, and the licensed immigration adviser must first make the client aware of the terms of the agreement and all significant matters relating to it. Clause 8 requires that fees and disbursements must be set out before incurring costs.
- [29] The Statement of Complaint puts the allegation to Ms Zhou that there was no written agreement and that she did not comply with any of the relevant provisions in the 2010 Code. The complainant says the Statement of Complaint correctly sets out the facts.
- [30] The applicants say they were in New Zealand though they normally live in the United Kingdom; they went to the Practice in July 2011 and met with Mr Martin. They had met with him in 2007, but did not advance the possibility of migrating to New Zealand until their 2011 visit. By that time, the complainants' potential retirement triggered an interest in the applicants migrating to New Zealand.
- [31] Mr Martin discussed the potential migration with the applicants; he told them there would be no problem if they wished to do so. Ms Zhou says she had a discussion with the female complainant, but did not meet the applicants. She says she completed the client engagement process with the complainants as agents. I have no difficulty accepting Ms Zhou could complete the client engagement process with the complainants acting as agents of the applicants. Indeed, it is very common for one family member to deal with a licensed immigration adviser or other professional adviser on behalf of a family where there is a common interest. The difficulty is that the complainant does not accept what Ms Zhou says, he says Ms Zhou's response is untrue and she is attempting to hide the facts.
- [32] The factual issues must be determined by the Tribunal 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).
- [33] The Act provides complaints must be determined on the papers, the Tribunal retaining the discretion to request further information, appearances before the Tribunal and the power to issue witness summonses (section 49 and the Schedule to the Act). The Tribunal gave the parties the opportunity to request an oral hearing. They chose not to do so. Significantly, the Registrar has not sought to produce oral evidence or orally examine any witnesses or parties.

[34] The agreed grounds of complaint do not extend to dishonesty and, in large part, the written record determines the factual findings. I am satisfied this is not a case where I should embark an oral inquisitorial hearing instigated on the Tribunal's own motion.

[35] There is a fundamental difficulty with Ms Zhou's claims in relation to the process of client engagement. The Code is clear, it is necessary to create a written record. Ms Zhou cannot produce one. However, she says she has difficulties accessing records. Ms Zhou did not claim she could in fact recall documenting the client engagement, she said:

I received the notification of this complaint in April 2013, which was 3 months after my resignation from [RMI]. Due to no access to previous clients' file after resignation; I am actually at a disadvantage to provide a copy of the signed agreement. However, it does not mean the agreement was not there. [The complainants] are business owners; they definitely knew it is necessary to have an agreement before entering service or providing service to their [own business clients]. The same logic applies to this Residence application. *(The quote has been modified for readability)*

[36] Ms Zhou says her clients must have known the requirements that apply to licensed immigration advisers in establishing a client relationship, so would not have proceeded without one. That is not a sound proposition; the complaint is in part that Ms Zhou failed to acquaint them with her professional obligations, as the 2010 Code requires. She also claimed the complainants had previous dealings with Mr Martin and that should have made them aware of the process. However, it is clear that in July 2011, when Mr Martin was dealing with the applicants, there was no compliance with the Code.

[37] In contrast, the complainants and the applicants say there was no process to establish the professional relationship in accordance with the Code of Conduct. If there had been they would have received documents and been well aware of the process. They say the Statement of Complaint is correct and neither Ms Zhou nor Mr Martin attempted to comply with the client engagement process.

[38] I am satisfied on the balance of probabilities the complainants and the applicants are correct, there was no process to establish the professional relationship in accordance with the Code of Conduct. There should be written evidence, Ms Zhou has not produce either the evidence or evidence of making proper and adequate inquiries to find it. Ms Zhou necessarily says the complainants and the applicants are wrong; she has no direct evidence, and relies on unsound inferences.

[39] I am accordingly satisfied Ms Zhou breached clauses 1.5(a), (b) and (d) and 8(b) of the 2010 Code. She was required to undertake documentation and disclosure processes in the course of engaging clients. I am satisfied she:

[39.1] Breached the requirement to have a written agreement containing a full description of the services to be provided (clause 1.5(b) of the 2010 Code);

[39.2] Failed to have her clients confirm their acceptance in writing of the terms of an agreement for the provision of services (clause 1.5(d));

[39.3] Failed to make her clients aware of the terms of the agreement and all significant matters relating to it (clause 1.5(a)); and

[39.4] Did not set out the fees and disbursements before commencing work or incurring costs (clause 8(b)).

*Failure to provide adequate advice on immigration prospects*

[40] The application for a residence visa failed as the position of employment relied on did not qualify, and the parties do not dispute that. The 2010 Code requires that a licensed immigration adviser evaluate the merits of an application. I accept of course that there are uncertainties, and different perspectives in many circumstances. A licensed immigration adviser is not limited to lodging applications with a certain outcome.

[41] Ms Zhou denied she failed to exercise due care, diligence and professionalism when assessing whether the position of employment met the requirements for residence. She said

she did not know that Mr Martin provided advice to the applicants until she saw the complaint. She said she dealt with the complainants. As already observed, I readily accept it was appropriate to deal with the complainants. In relation to this matter, the position of employment was in their business accordingly they had the necessary information.

- [42] Ms Zhou says she made thorough inquiries and was properly satisfied the position of employment qualified, and the fact that Immigration New Zealand later declined the application was not something she could have foreseen. I must evaluate the merits of Ms Zhou's claim.
- [43] The starting point is the grounds on which Immigration New Zealand declined the application. On 24 March 2012, Immigration New Zealand set out their initial concerns in writing. The critical issue was the position of employment. Immigration New Zealand was concerned the business did not have the financial strength to sustain the position of employment, that it may not require the skills claimed, and that the position was not necessarily genuine. Given that the position of employment was in a business owned by the applicants' family the questions are not surprising, and Ms Zhou should have been very aware of those issues when advising on and preparing the application.
- [44] Immigration New Zealand said the financial information submitted with the application did not establish the position was sustainable. That is something Ms Zhou had to ensure she properly evaluated, if necessary by getting an accountant or business adviser to provide input.
- [45] Immigration New Zealand said the nature of the position could not be assessed, as there was no job description. An accurate job description was required when submitting the application.
- [46] The third issue was that the application said the position arose due to an impending retirement, but the female applicant was to report to the retiree. There was clearly a need to explain how this was to occur (potentially through a change in hours etc.).
- [47] Accordingly, the substance of Immigration New Zealand's initial concerns are cogent evidence Ms Zhou failed to take proper care when providing the initial advice, and preparing the application. If she had done so, the application would at least have addressed these issues. The problem was not that Immigration New Zealand took a different view, rather the application failed to include elementary and essential information.
- [48] Ms Zhou responded to Immigration New Zealand's concerns in an email of 29 March 2012. The email provided information that should have been included in the original application. On 17 May 2012, Immigration New Zealand set out its conclusions regarding the application. Ms Zhou failed to satisfy any of the concerns:
- [48.1] Immigration New Zealand concluded the position was not financially sustainable;
- [48.2] The position did not involve staff management, in a way that met the requirements of a position of "Office Manager", which was necessary in the circumstances; and
- [48.3] The position was not genuine, as there was no history of attempting to find a suitable resident employee.
- [49] In her response to the complaint, Ms Zhou said she made proper inquiries and the Tribunal should simply accept there was, in effect, a difference of view between her and Immigration New Zealand. That is not a realistic response. The record shows that Immigration New Zealand immediately identified three obvious concerns arising from the reality that the critical position of employment was in the context of a family arrangement. Ms Zhou had not addressed those issues adequately, as there was information, which she failed to include with the application. I am satisfied she did not undertake a proper evaluation of the position of employment. Furthermore, when put on notice, it was clear not all of the three concerns could be answered. The applicants and the complainants were entitled to have proper and effective advice on those issues at the outset, it fundamentally affected the merits of the application they relied on to plan their migration. They were entitled to have the issues addressed, and advised of the uncertainties. What happened was that Mr Martin advised the applicants they could be confident of being able to migrate. Ms Zhou failed to undertake proper and adequate inquiries with the complainants, had she done so it would have been clear that their prospects of migration on this basis were low. She then lodged an application that was deficient in terms

of the material submitted and fatally flawed, as the position of employment was not, and could not, meet the definition of an “Office Manager’s” position for immigration purposes.

[50] I am satisfied:

[50.1] Ms Zhou breached clauses 1.1(a) and (b) of the 2010 Code as she did not perform her services and carry out the lawful informed instructions of clients with due care, diligence, respect and professionalism:

[50.1.1] Ms Zhou engaged with the complainants, but failed to make adequate inquiries into the offer of employment. Had she done so, she would have corrected Mr Martin’s advice. She lodged an expression of interest and an application for residence visas that had no realistic prospect of leading to residence visas.

[50.1.2] Ms Zhou failed to assess adequately whether the position of employment would qualify the applicants for a residence visa. She failed to exercise due care, diligence and professionalism (clause 1.1(a) and (b)). That was due to her failure to exercise appropriate professional scepticism in respect of the prospective employment in a family business. She also failed to apply or engage the necessary expertise to evaluate the financial viability of the business, in the context of the immigration rules. She further failed to establish whether the position was, for Immigration New Zealand’s purposes, that of an “Office Manager”. In addition, she did not establish the position was “genuine” in the sense required for immigration purposes. Each of those matters would have been clear to a licensed immigration adviser acting properly in applying themselves to the instructions.

*Allowing Mr Martin to provide immigration advice unlawfully*

[51] Ms Zhou generally denied allowing Mr Martin to provide immigration advice; she said she did not intend to allow Mr Martin to prepare the submission to the Minister. However, he then convinced her, through deception, to allow him to do the work. As it occurred, however, she ended up later doing the work herself in any case, as Mr Martin had failed to do it.

[52] In many areas of professional and licensed practice there is extensive use made 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.

[53] If there was no legislative direction, a licensed immigration adviser could conduct their practice making extensive use of unqualified people, and the case would not be easily made out 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.

[54] 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.

[55] 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.

[56] 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.

- [57] Against that background, the policy behind the stringent restrictions in the Act on unlicensed persons providing immigration services is evident.
- [58] 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.
- [59] 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.
- [60] 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 ...
- [61] 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.
- [62] The scope of *clerical work* is important, as otherwise, the very wide definition of immigration advice would likely preclude any non-licence holder working in an immigration practice in any capacity.
- [63] *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
- [64] The definition is directed to administrative tasks, such as keeping records, maintaining financial records and the like.
- [65] 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”.
- [66] 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 directs.
- [67] 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.
- [68] 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.
- [69] 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 is not at issue for the Tribunal on these facts
- [70] Accordingly, as Ms Zhou was the only licensee in the Practice she had an obligation to manage staff, including Mr Martin, to ensure they observed these statutory requirements in the Practice. Clause 3 of the 2010 Code requires proper staff management in a practice. Requiring

staff to act in accordance with the law is a requirement of professionalism under clause 1 of the Code. If a licensed immigration adviser encourages an unlicensed person to provide immigration advice, they may well be a party to the resulting criminal offending.

- [71] The first factual issue to address is whether Mr Martin or Ms Zhou did the work to lodge the expression of interest and the residence application. The first action was that Mr Martin met with the applicants, took instructions and advised them they could migrate and expect to rely on the office manager position in the family business. This obviously contravened the Act, but I am not satisfied Ms Zhou was aware of what occurred at the time. She says she did not know what was discussed, but understood there was some familiarity between Mr Martin and the family due to prior relationships. She did not see anything unusual in Mr Martin communicating with the complainants or the applicants. Accordingly, I accept Mr Martin did keep from Ms Zhou what he discussed with the applicants when taking instructions, and she could not have reasonably known of it. I accordingly make no adverse finding against Ms Zhou regarding that aspect of Mr Martin's involvement.
- [72] The Registrar lodged a documentary record with the Tribunal. It included emails between Mr Martin and the applicants when the work to prepare and lodge the expression of interest, and the residence applications was underway. The fact Mr Martin was engaging with the applicants regarding the documentation was unlawful, he was writing the emails as though he was preparing the expression of interest. Mr Martin also engaged in a series of emails with the applicants regarding the application for residence visas. He appeared to be undertaking the preparation of the applications. His emails contained specific advice regarding the content of the application. The correspondence creates a clear impression Mr Martin prepared the documentation for the expression of interest, and the application for residence visas. Ms Zhou has not answered this evidence directly other than claiming that Mr Martin's emails were "duplicated work of my emails". She neither produced the duplicates she sent, or explained how Mr Martin could sensibly email the same information for a second time. She also said that Mr Martin put the completed expression of interest form on her desk, implying that the applicants completed it themselves. She said that when Immigration New Zealand selected the expression of interest she contacted the applicants who reported they were already assembling the relevant documentation.
- [73] I am satisfied on the balance of probabilities that Mr Martin wholly or substantially consulted with the applicants and prepared the expression of interest and application. I accept that Ms Zhou reviewed them before submitting them under her name. However, there was sufficient information to put her on inquiry. She should have made inquiries as to how completed documentation was put on her desk in a finished state; inquiries would have revealed Mr Martin was engaging with the substance of the expression of interest and the application. There is no evidence Ms Zhou instructed or authorised Mr Martin to engage with the applicants, however Ms Zhou had a positive duty to take reasonable steps to ensure Mr Martin was acting in accordance with the Act. She failed to exercise responsible professional inquiry when Mr Martin presented her with completed material. She knew that clients had engaged her to do this work, and paid for her services. When she found the work presented in a complete form without her intervention, and presented to her by Mr Martin that should have put her on inquiry. She should have made direct contact with the applicants, or possibly and less satisfactorily with the complainants, and satisfied herself the information in the document was correct. It is always important to ensure clients understand the information in immigration applications must be accurate, as Immigration New Zealand will readily become concerned inaccurate information reflects adversely on the applicant. This duty is reflected in the terms of certifications that a licensed immigration adviser provides on immigration forms. That conversation would have quickly disclosed Mr Martin was directing the compilation of the information.
- [74] The final allegation is that Ms Zhou initially allowed Mr Martin to take charge of the instruction to seek ministerial intervention. The parties accept Ms Zhou later took over that work, and did it herself. Ms Zhou has admitted the factual allegation, but excused it as Mr Martin deceived her regarding his previous success in similar circumstances. For the reasons discussed, it is simply illegal to assist with providing immigration services, except in the limited exceptions allowed by the Act. Ms Zhou had a duty to ensure she was responsible for, and performed this work. As it happened, Mr Martin did not perform the work. Accordingly, the nature of Ms Zhou's professional failing was to instruct an unlicensed person to perform work and then fail for a time to do that work herself.

[75] I am satisfied Ms Zhou breached clauses 1.1(a) and (b) of the 2010 Code. The provisions required Ms Zhou to perform her services, and carry out the lawful informed instructions of clients with due care, diligence, respect and professionalism. She also breached clause 2.1(b) of the 2010 Code, which required her to act in accordance with the Act. The specific professional failings were:

[75.1] Mr Martin did the work to prepare the expression of interest and the residence application, not Ms Zhou. Her lack of care, diligence and professionalism gave Mr Martin with the opportunity to do so, and resulted in Ms Zhou not identifying what had occurred. She breached clause 1.1(a) and (b) of the 2010 Code for that reason.

[75.2] Ms Zhou initially instructed Mr Martin to lodge the request for ministerial intervention. She breached clause 2.1(b) of the 2010 Code in doing so. She instructed a subordinate in her practice to act in contravention of the Act. As it happens, he did not do the work. The fact Mr Martin did not do the work does not avoid a breach of the Code. Ms Zhou's instruction to Mr Martin was wrong, and breached clause 2.1(b) of the Code. Further, she used the improper instruction as a justification for failing to perform the professional duty herself and in that respect breached clause 1.1(a) and (b) as she failed to act with due care, diligence and professionalism in that respect.

### **Decision**

[76] The Tribunal upholds the complaint pursuant to section 50 of the Act.

[77] Ms Zhou breached the Code of Conduct in the respects identified. They are grounds for complaint pursuant to section 44(2)(e) of the Act.

[78] In all other respects, the Tribunal dismisses the complaint.

### **Submissions on Sanctions**

[79] The Tribunal has upheld the complaint accordingly; pursuant to section 51 of the Act, it may impose sanctions.

[80] The Authority and the complainants now have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation.

[81] Whether they do so or not, Ms Zhou is entitled to make submissions and respond to any submissions from the other parties.

[82] 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*

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

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

[83.2] Ms Zhou is to make any further submissions (whether or not the Authority or the complainants make submissions) within 15 working days of the issue of this decision.

[83.3] The Authority and the complainants may reply to any submissions made by Ms Zhou within 5 working days of her filing and serving those submissions.

**DATED** at WELLINGTON this 15<sup>th</sup> day of April 2015

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**G D Pearson**  
Chair