

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

Decision No: [2017] NZIACDT 18

Reference No: IACDT 039/15

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

BY **The Registrar of
Immigration Advisers**

Registrar

BETWEEN **Salesh Ram**

Complainant

AND **Wei-Xiang Shawn (Shawn)
Tan**

Adviser

DECISION
(IMPOSING SANCTIONS)

REPRESENTATION:

Registrar: Mr M Denyer, lawyer, MBIE, Auckland.

Complainant: In person.

Adviser: In person.

Date Issued: 26 September 2017

DECISION

The decision in this case

- [1] This decision makes the following orders against Mr Tan in relation to Mr Ram:
- [1.1] Mr Tan is censured.
 - [1.2] Mr Tan pay Mr Ram compensation of \$5,000;
 - [1.3] Mr Tan is to pay a monetary penalty of \$1,000;
 - [1.4] Mr Tan is prevented from applying for any licence under the Immigration Advisers Licensing Act 2007 until:
 - [1.4.1] he has enrolled in and successfully completed the requirements for the Graduate Diploma in New Zealand Immigration Advice (Level 7); and
 - [1.4.2] he has satisfied all orders made against him under s 51 of the Immigration Advisers Licensing Act 2007.
- [2] These orders are set out at the beginning of this decision because I go on to discuss the three complaints where the Tribunal is currently imposing sanctions against Mr Tan.

Background

- [3] This is one of three complaints the Tribunal upheld against Mr Tan. The respective grounds for the complaints the Tribunal upheld were:

This complaint – Ram v Tan

- [3.1] In *Ram v Tan* [2016] NZIACDT 39, the Tribunal upheld the complaint on the basis that:
- [3.1.1] Mr Tan engaged in dishonest and misleading behaviour in relation to his client. It included fabrications regarding Immigration New Zealand, which amounted to denigration of it; he failed to uphold the integrity of New Zealand's immigration system. It involved overt dishonesty in relation to his client's immigration affairs;
 - [3.1.2] aspects of Mr Tan's conduct were negligent;
 - [3.1.3] Mr Tan failed to comply with the Code of Conduct in relation to client engagement; and

- [3.1.4] Mr Tan failed to properly notify the outcome of failed applications for visas, and follow up regarding the consequences.

Sidhu v Tan

- [3.2] In *Sidhu v Tan* [2016] NZIACDT 62 the Tribunal upheld the complaint on the basis that Mr Tan:

- [3.2.1] did not complete the client engagement process; and

- [3.2.2] failed to act with due care, diligence and professionalism. He failed to properly deal with a non-compliant transmission of funds (critical for his client's immigration status), lodged a non-compliant application and failed to notify his client of the issues promptly or properly.

- [3.3] There was a complete failure to complete the client engagement process, and it related to a substantial instruction involving a fee of \$10,000. The transmission of funds related to a critical element of compliance for a Long-term Business Visa. Accordingly, the effect of not providing proper guidance and advice was very serious for the complainant. Fortunately, the severe consequences were ultimately avoided.

Peng v Tan

- [3.4] In *Peng v Tan* [2016] NZIACDT 63, the Tribunal upheld the complaint on the basis that Mr Tan:

- [3.4.1] did not complete the client engagement process; and

- [3.4.2] failed to properly notify the outcome of failed applications for visas and follow up regarding the consequences.

- [4] The circumstances are set out fully in the respective decisions.
- [5] I will discuss both the positions taken by the respective complainants, Mr Tan, and the Registrar for each of the three complaints in this decision. I will also apply the totality principle¹. Mr Tan's personal circumstances require consideration of the overall position

¹ See *R v Strickland* [1989] 3 NZLR 47 (CA) at p 49-51 for a discussion of the totality principle; it applies by way of analogy in the professional disciplinary context.

- [6] Accordingly, I set out the reasoning and effect of the sanctions decisions in the three matters, but will issue separate decisions with the respective orders relating to each complaint.

The Registrar and the complainant's positions in relation to *Ram v Tan*

- [7] The Registrar sought:
- [7.1] censure;
 - [7.2] a monetary penalty of up to \$10,000;
 - [7.3] compensation for the complainant; and
 - [7.4] an order preventing Mr Tan from reapplying for a licence until he has completed the full Graduate Diploma in New Zealand Immigration Advice.
- [8] The complainant sought repayment of fees of \$2,350. He also sought compensation for loss of the opportunity to work, being unable to attend his father's funeral, anxiety issues developed by his wife and children, and long-term harm to his immigration prospects.
- [9] The basis for the compensation claim was the dishonest and misleading advice Mr Tan provided, and its effects on the complainant and his family.

Mr Tan's response in *Ram v Tan*

- [10] Mr Tan provided a substantial response. His counsel acknowledged the gravity of the finding of misleading and dishonest behaviour, and noted Mr Tan's contrition. His submission was supported by a senior member of the legal profession who had previously worked with Mr Tan. She said she was not familiar with this complaint, but she had found Mr Tan "extremely honest and trustworthy and with a high awareness of the rules of integrity". She also spoke of his competence.
- [11] Mr Tan said he would not return to the profession (licensed immigration adviser) as he was a law graduate. Accordingly, he said it was not necessary to make an order that he complete the Graduate Diploma before applying for a licence as a licensed immigration adviser.
- [12] He accepted that he would be censured and a monetary penalty would be based on the facts.

- [13] In relation to both the gravity of the complaint and compensation, Mr Tan discussed the role of Ms Aasa. He noted that the Tribunal had found the responsibility for the complainant's predicament overwhelmingly lay with Ms Aasa. The complainant was in New Zealand unlawfully for a year before the adviser obtained his licence as a licensed immigration adviser. The Tribunal has already made an order that Ms Aasa repay fees of \$1,850.
- [14] Mr Tan said he was not responsible for withholding the passports belonging to the complainant and his family.
- [15] He referred to the testimonial he supplied, and asked that the Tribunal regard his conduct as an isolated instance and that he be given credit for engaging with the complaint, which Ms Aasa did not do.
- [16] Mr Tan acknowledged the principles relating to monetary penalties, particularly, that they are not the same as fines in that they will not survive bankruptcy. However, Mr Tan provided evidence in the form of an affidavit regarding his financial circumstances. The key points being:
- [16.1] The company that operated the practice was not trading and accumulated tax losses of some \$25,000.
- [16.2] He is a full-time student without employment.
- [16.3] He has no savings.
- [17] The specific points made regarding the claim for a refund of fees and compensation were:
- [17.1] Ms Aasa's responsibility and Mr Tan's responsibility must be distinguished.
- [17.2] Any potential civil liability and liability in a professional disciplinary context must be distinguished; particularly in this case given that Mr Tan had a role in the practice before he was a licensed immigration adviser.
- [17.3] The complainant seeks a refund of fees, but the fees were paid to Ms Aasa; there was no invoice relating to Mr Tan's work.
- [17.4] The complainant's immigration difficulties arose due to him not being entitled to a visa, and some element of aggravation due to remaining in New Zealand without a visa. However, those issues arose before Mr Tan held a licence. Any responsibility for that situation lies with Ms Aasa.

[17.5] Any issues relating to loss of income do not lie against Mr Tan in this jurisdiction, as any potential liability he may does not arise out of the events to which the relevant professional disciplinary findings. In essence the point is, that while Mr Tan was involved throughout the events, most of the time Ms Aasa was the only licensed immigration adviser.

[17.6] Given the limited means Mr Tan has, compensation should be favoured over a monetary penalty.

The Registrar and the Complainant's positions in relation to *Sidhu v Tan*

[18] The Registrar sought:

[18.1] a full refund of the fees paid for the services;

[18.2] an order preventing Mr Tan from reapplying for a licence until he has completed the full Graduate Diploma in New Zealand Immigration Advice; and

[18.3] a monetary penalty of up to \$10,000.

[19] The Registrar referred to the position taken in the *Ram* complaint. She said that Mr Tan should provide a statement as to his assets, income and liabilities

[20] The complainant did not provide further submissions.

Mr Tan's response in *Sidhu v Tan*

[21] Mr Tan considered that the fee of \$10,000 (including GST) was appropriate. He says that the value of the work he provided should be taken into account. Mr Tan stated:

[21.1] the business plan and stage 1 of the instructions were completed, and had a value of \$7,567;

[21.2] the remaining work for stage 2 had a full value of \$2,433, some of which was completed; and

[21.3] a refund of \$1,825 (including GST) would be appropriate.

[22] Mr Tan said his financial position was the same as it was when he filed his affidavit in the *Ram* complaint.

The Registrar and the Complainant's positions in relation to *Peng v Tan*

[23] The Registrar sought:

[23.1] an order directing that Mr Tan pay reasonable compensation to the complainant;

[23.2] an order preventing Mr Tan from reapplying for a licence until he has completed the full Graduate Diploma in New Zealand Immigration Advice; and

[23.3] a monetary penalty of up to \$10,000.

[24] The Registrar referred to the position taken in the *Ram* complaint. She said that Mr Tan should provide a statement as to his assets, income and liabilities.

[25] The complainant sought a refund of fees and compensation. The complainant expressed particular concern that his mother's visa expired and that affected her future immigration situation.

Mr Tan's response in *Peng v Tan*

[26] Mr Tan said there should be no orders for costs, refund of fees or compensation as the complainant suffered no loss.

[27] He said his financial position was the same as it was when he filed his affidavit in the *Ram* complaint.

Discussion

Important considerations

[28] Mr Tan appears to have been ill-equipped to manage a professional practice and offer his services to the public on his own account. I have had careful regard to the testimonial provided for him. It appears that had he been in a mentored environment, the difficulties he faces may not have occurred.

[29] However, it is inescapable that despite the positive features of his character attested to in the testimonial, Mr Tan engaged in a sustained course of behaviour where he lied to his client. He also failed to comply with the most elementary components of professional practice, such as the client engagement process, proper record keeping and client communication.

[30] It is inevitable that the Tribunal must denounce what occurred. The lamentable matters raised in the three complaints may well affect career options that are open to Mr Tan. Unless there is some significant change in circumstances, Mr Tan is no longer a member of the profession, and is unlikely to return. His disciplinary history may be a permanent barrier. However, that is a matter for the Registrar, not

this Tribunal. The complaints would likely affect his opportunities to pursue a legal career if he sought to do so. These are consequences that I will take into account.

- [31] In my view, the main focus for monetary orders should be in respect of compensating the complainants. Monetary penalties and other orders of the Tribunal are civil penalties that do not survive bankruptcy. However, when a licensed adviser engages with the complaint and is intending to pay liabilities, the Tribunal will exercise its discretion in relation to monetary penalties. However, complainants are entitled to receive an order for any compensation due, as would apply in a civil proceeding. A civil claim is not usually, if ever, subject to discretion on the basis of a defendant's ability to pay.

The starting point

- [32] The *Ram* complaint is at the higher end of disciplinary offending, as it involves dishonesty in representations made to a client. The starting point would be:

[32.1] censure,

[32.2] removal from the profession and a compulsory retraining requirement before any re-entry to the profession (re-entry would depend on the Registrar's discretion);

[32.3] a financial penalty of \$7,500;

[32.4] compensation for any loss consequent on the professional disciplinary offending; and

[32.5] costs.

- [33] If each of the other two matters stood alone:

[33.1] the *Sidhu* complaint would result in a mid-level financial penalty of \$4,000 and orders requiring training; and

[33.2] the *Peng* complaint would result in a monetary penalty of \$2,000 and either orders for training or some means of being satisfied of competence.

- [34] Aside from the ability to pay, the refund of fees and compensation would be determined on the merits in each case, and those orders would not affect the other orders.

Mr Tan's licence

The principles

- [35] The authorities indicate it is a “last resort” to deprive a person of the ability to work as a member of their profession. However, regard must be had to the public interest when considering whether a person should be excluded from a profession due to a professional disciplinary offence: *Complaints Committee of Waikato Bay of Plenty District Law Society v Osmond* [2003] NZAR 162 (HC) at 13-14.
- [36] It is only the *Ram* complaint that is of sufficient gravity to trigger that result for Mr Tan, if he were currently practising. Though, in relation to the *Sidhu* complaint, conditions on his practice, such as a supervision requirement while he retrained, could be necessary.

A response addressing Mr Tan's circumstances

- [37] Dishonestly misleading a client means that Mr Tan should be removed from the profession, at least for a period until he has undertaken remedial training. His abuse of his status as a licensed immigration adviser in the course of his client relationship was sustained and egregious. The aggravated elements of the conduct are discussed below at paragraph [44].
- [38] That process of removal from the profession has two dimensions. First, the Authority can remove a person by prohibiting them from applying for a licence for two years. However, re-entry to the profession, regardless of how far in the future, requires the Registrar to find that an applicant meets the statutory requirements including their fitness to hold a licence, after considering their disciplinary history. As things sit at this point, Mr Tan says he will not attempt to return to the profession.
- [39] Second, the Tribunal can make orders that prevent Mr Tan making an application to re-enter the profession, until he complies with retraining and other orders.
- [40] In this case, while there is some element of futility in making orders relating to Mr Tan applying for a licence, I will make those orders. I do so because I am willing to greatly reduce the monetary penalties to increase the prospects of Mr Tan paying his former clients what they are due. The orders prohibiting an application serve to mark out the gravity of the *Ram* complaint. The orders will:

- [40.1] prohibit Mr Tan making any application for a licence for a period of two years; and

[40.2] make any future right to apply for a licence dependent on Mr Tan undertaking full training, and discharging all the orders made against him in disciplinary proceedings in this Tribunal.

[41] Effectively, the orders are a suspension; though, as noted, Mr Tan will have to satisfy the Registrar of his fitness. In terms of the orders, I have had careful regard to the testimonial supplied. It is sufficient to cause me to accept on the basis of the material before me that Mr Tan's conduct is largely attributable to him being in a position of managing a practice as a principal when he lacked the skills and experience to do so. It would appear his lack of skills and experience led to the conduct in issue.

Sanctions – the Ram complaint

[42] In relation to compensation, the key issue is, as counsel for Mr Tan correctly points out, that the Tribunal found Mr Ram's immigration difficulties were created before Mr Tan received a licence. Ms Aasa was involved in providing services at that time. Any compensation awarded by the Tribunal must relate to harm caused by the conduct giving rise to the complaint.

[43] Similarly, I must accept that the fees paid related to the work performed, or not performed, by Ms Aasa. Accordingly, an order for the refund of fees is not appropriate.

[44] However, Mr Tan did engage in a deceitful course of conduct. He told his client his application was pending when Immigration New Zealand had declined the application some two years earlier. He should have told Mr Ram the truth, and sought his consent to fully disclose what had happened (including what Ms Aasa did) to Immigration New Zealand. He covered up his deceit (and his potential liability for Ms Aasa's behaviour in the practice he managed) by making up things relating to Immigration New Zealand. He threatened to report his client to "the relevant authorities" if he did not pay fees, when he knew Ms Aasa had not earned the fees. He disparaged his client calling him a "non-citizen", telling him he had no right to make accusations against him, that is Mr Tan, who was a "citizen". That behaviour was deplorable; it harmed the complainant's prospects of explaining what had happened to Immigration New Zealand and must have caused considerable anguish.

[45] Ordinarily, orders for a monetary penalty of \$7,500 and compensation would have been made. This Authority does make orders for compensation in the nature of general damages, but is very mindful

that such orders must not become an additional penalty. In the present case, I am conscious of Mr Tan's limited means. However, the sympathy for his situation is limited. He is a fulltime student; the victims of his professional disciplinary offending would no doubt expect him to be working to repay the damage he has caused. Nonetheless, I will make an order that is a more accurate reflection of the damage, and reduce the monetary penalty.

[46] In these circumstances, the orders in the *Ram* complaint will be:

[46.1] compensation of \$5,000;

[46.2] monetary penalty of \$1,000; and

[46.3] orders relating to Mr Tan's licence.

[47] Neither the Registrar nor the Complainant sought costs, so there is no order.

[48] The result is a significant discount below the financial consequences that would have applied, and an appropriate order relating to Mr Tan's licence will issue.

Sanctions – the Sidhu complaint

[49] As Mr Tan does not hold a licence, it is appropriate that the Registrar seeks that he complete the Graduate Diploma course before seeking a licence. If he were currently practising, it is likely that if this complaint stood alone, Mr Tan would be permitted to continue practising. His continued practising would, however, likely be subject to establishing an appropriate supervision mechanism. Given that Mr Tan is neither practising nor intending to do so at present, the order will simply be that Mr Tan meets all of the orders made in the three complaints before applying for a licence.

[50] In relation to compensation and the refund of fees, I have considered Mr Tan's claim that his fee was reasonable, and that he completed much of the work. He says that only \$1,825 of the fee remained unearned. I am satisfied that this discount is inadequate. Ultimately, the immigration issues were resolved; however, the work was performed badly. The complainant had to face serious difficulties with Immigration New Zealand, and it was only good fortune that they were resolved. Ms Sidhu and her family must have had considerable anguish arising from Mr Tan's unsatisfactory service delivery.

[51] I take the same approach as in the *Ram* complaint; the monetary penalty will be reduced and an order for compensation in the nature of

general damages and the refund of fees will take precedence. The orders in the *Sidhu* complaint will be:

[51.1] Payment of \$4,500 to Ms Sidhu it is a composite order including the refund of fees,

[51.2] A monetary penalty of \$1,000 (reduced from \$4,000); and

[51.3] orders relating to Mr Tan's licence.

[52] In my view the discount for the fees should be much closer to 50% of the work actually completed than Mr Tan's analysis. He performed the work very badly, and it had adverse consequences for his client. He did not take that into account in his calculation, his discount was only to the extent of the work he did not perform. If the fees were fully discounted, a general damages like award would be very modest. I am satisfied a total of \$4,500 reaches a reasonable balance in determining the complainant's entitlement.

[53] Neither the Registrar nor the Complainant sought costs, so there is no order.

Sanctions – the Peng complaint

[54] The comments I have made on the *Sidhu* complaint regarding Mr Tan having to comply with the orders in these three complaints before applying for a licence again, largely apply to this present complaint. However, in the present case, it would have been arguable that if it stood alone it may not have been necessary to order Mr Tan to complete the full Graduate Diploma course before applying for a licence. Some more limited training or competence review may have been appropriate.

[55] In relation to compensation and the refund of fees, Mr Tan says there is no reason to make such orders. However, his substandard service delivery and failure to properly complete the client engagement process make that submission unrealistic.

[56] In this case, for the reasons discussed, the monetary penalty will be reduced to nil. The relatively modest level of the fee (\$2,400), measured against the significance of the failure to complete the client engagement process justifies a complete refund of the fee. In this case, I am satisfied that a total of \$3,000 should be awarded for the combination of a refund of fees and a modest level of compensation in the nature of general damages. The monetary penalty that would have

applied would have been \$2,000; accordingly, there is a significant discount.

[57] In these circumstances, the orders in the *Peng* complaint will be:

[57.1] compensation and refund of fees being a total of \$3,000;

[57.2] orders relating to Mr Tan's licence.

[58] Neither the Registrar nor the Complainant sought costs, so there is no order.

Censure

[59] In accordance with the usual practice of disciplinary tribunals, censure will be an express sanction in respect of each of the complaints.

The totality principle

[60] As noted, the three complaints must be addressed having regard to the total penalty.

[61] The monetary penalty component alone has been reduced from \$13,500 to \$2,000. No costs have been awarded.

[62] The orders affecting Mr Tan's potential to hold a licence apply as they would for the complaints in issue. That is except for the *Peng* complaint where the order is for full retraining, it is amply justified when taking the other complaints into account, and the discount allowed for the monetary penalty on that basis.

[63] The balance of the orders relate to compensation and the refund of fees. The complainants are entitled to those orders. To a significant degree, the reduction of the monetary penalties relates to ensuring there is a realistic prospect of payment of those orders. That reduction significantly exceeds any reduction that would have been applied on the basis of the totality principal. Overall, I am satisfied that the orders fully allow for the fact that they arise from three complaints and the sanctions are being imposed simultaneously.

Orders in this complaint

[64] Pursuant to s 51 of the Immigration Advisers Licensing Act 2007:

[65] Mr Tan is censured.

[66] The Tribunal orders that:

[66.1] Mr Tan pay Mr Ram compensation of \$5,000;

[66.2] Mr Tan is to pay a monetary penalty of \$1,000;

[66.3] Mr Tan is prevented from applying for any licence under the Immigration Advisers Licensing Act 2007 until:

[66.3.1] he has enrolled in and successfully completed the requirements for the Graduate Diploma in New Zealand Immigration Advice (Level 7); and

[66.3.2] he has satisfied all orders made against him under s 51 of the Immigration Advisers Licensing Act 2007.

[67] The Tribunal reserves leave to apply to vary the orders relating to the Graduate Diploma, if that qualification changes, or other qualifications become available.

DATED at WELLINGTON this 26th day of September 2017.

G D Pearson
Chairperson