

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2018] NZIACDT 42

Reference No: IACDT 052/15

BETWEEN **DONG MEI XU**
Complainant

AND **YING TIAN (aka TINA QIN)**
Adviser

DECISION
Date: 26 October 2018

REPRESENTATION:

Registrar: C J Pendleton, counsel
Complainant: In person
Adviser: G C Jenkin, counsel

PRELIMINARY

[1] Ms Tian was engaged by Ms Xu to obtain a work visa. The visa was eventually obtained but this was only after it had been declined more than once by Immigration New Zealand (Immigration NZ). The complaint against Ms Tian includes allegations that she did not initially tell Ms Xu that the visa had been declined, that she failed to inform Ms Xu of her unlawful presence in New Zealand, that she failed to obtain instructions and that she misrepresented the nature of an application Ms Xu signed.

[2] Ms Tian admits she made mistakes, that she was negligent and that she breached the Code of Conduct, but denies being dishonest or misleading. The essential issue to consider is whether Ms Tian's conduct reaches the more serious threshold of dishonest or misleading behaviour.

BACKGROUND

[3] Ms Ying Tian, also known as Ms Tina Qin, is a licensed immigration adviser.

[4] Ms Dong Mei Xu has lived in New Zealand and held a work visa linked to a particular employer since about 2011. A further work visa granted on 11 April 2014 was due to expire on 11 April 2015.

[5] Ms Xu engaged Ms Tian on 16 March 2015 to assist her with an application for another work visa. Ms Xu signed the application form, presumably in Ms Tian's office, the same day.

[6] Immigration NZ received the application from Ms Tian on 19 March 2015. It then sought further information from her on 26 March as to whether the employer had engaged with Work and Income and advertised the vacancy. Some information was provided by Ms Tian on 6 April. In a letter to her on 10 April, Immigration NZ declined the application, but granted Ms Xu a visitor's visa of one month as an exception to immigration instructions. It was not satisfied there were no New Zealanders available to do the work.

[7] Ms Tian and Ms Xu exchanged texts on "WeChat" on 13 April 2015. Ms Tian said Immigration NZ required evidence of advertising.

[8] Further information in support of the application was provided by Ms Tian to Immigration NZ on 25 April 2015.

[9] On 28 April 2015, Ms Xu visited Ms Tian at her offices in order to sign certain documents. There is a dispute as to what was said by Ms Tian at the meeting, which I

will deal with later. One of the documents signed was another work visa application. Immigration NZ received the completed application from Ms Tian on the same day.

[10] Immigration NZ wrote to Ms Tian on 4 May 2015 requiring evidence that the employer had made a genuine attempt to recruit suitable New Zealanders. Ms Tian provided further information on 5 May.

[11] Immigration NZ advised Ms Tian on 8 July 2015 that the second work visa application had been declined and Ms Xu was therefore unlawfully in New Zealand. Immigration NZ again stated that it was not satisfied there were no New Zealanders available to do the work.

[12] On the following day, 9 July 2015, Ms Tian sent an email to Immigration NZ referring to the second decline letter and contesting the reason given for the outcome. Ms Tian noted that the employer had recently been successful with two similar applications and wanted to know why the assessment in relation to Ms Xu was different. Ms Tian copied this email to the employer.

[13] That afternoon, Ms Xu says she spoke to Ms Tian by telephone and was told by her that a work visa application would be approved without problem in a week or two. Ms Tian has no recollection or record of this discussion.

[14] On 21 July 2015, Immigration NZ received a letter dated 10 July from Ms Tian requesting a work visa on behalf of Ms Xu under s 61 of the Immigration Act 2009 (Ministerial discretion to grant a visa to a person unlawfully in New Zealand). It was refused by Immigration NZ on 7 August in a letter to Ms Xu, sent to Ms Tian. In the letter, Ms Xu was advised that she was unlawfully in New Zealand.

[15] Ms Xu telephoned Ms Tian on 7 August 2015 and was told that her visa application had been declined and that she had been granted a visitor's visa.

[16] On 10 August 2015, Ms Xu telephoned Immigration NZ and was told that she was then unlawfully in New Zealand.

[17] On 11 August 2015, Ms Tian asked Immigration NZ to reconsider the s 61 application.

[18] According to Ms Xu, she went to Ms Tian's office on 12 August 2015 to ask for all the documents from Immigration NZ. She received some, if not all, of the requested documents which were used to make the complaint against Ms Tian on the same day.

[19] The s 61 application was re-lodged by Ms Tian on 26 August 2015.

[20] Immigration NZ granted Ms Xu the work visa under s 61 on 26 or 27 August 2015.

COMPLAINT

[21] A complaint against Ms Tian was lodged by Ms Xu with the Immigration Advisers Authority (Authority) on 12 August 2015. She explained that since 13 April 2015 she had been calling Ms Tian to ask about the status of her work visa application but did not get a clear answer. She did not know her visa had been rejected until Immigration NZ told her on 10 August. She was also surprised at being told by Immigration NZ that day that she was an overstayer. Ms Xu explained that she had no intention to be illegally in New Zealand and wanted to keep her record clean. She had only been required to pay Ms Tian for the first application and not the others, as she did not know about them.

[22] On 8 September 2015, Ms Xu advised the Authority that she was withdrawing her complaint against Ms Tian, as she had been granted a work visa on 26 August.

[23] Nonetheless, the Registrar of the Authority filed a statement of complaint with the Tribunal on 17 December 2015, at the same time notifying the Tribunal that Ms Xu no longer wished to pursue the complaint.

[24] The complaint alleges that Ms Tian had been negligent in the following respects:

- (1) Not informing Ms Xu that the first work visa had been declined;
- (2) Not informing Ms Xu that she had been granted a visitor's visa;
- (3) Not obtaining Ms Xu's instructions before submitting the second work visa application;
- (4) Not informing Ms Xu that the second work visa application had been declined;
- (5) Not informing Ms Xu that she had become unlawful in New Zealand; and
- (6) Not obtaining Ms Xu's instructions before submitting a request for a visa under s 61.

[25] If the above does not amount to negligence, the Registrar contends that items (1), (2), (4) and (5) above may be a breach of cl 26(b) of the Code of Conduct 2014 (the Code) and items (3) and (6) may be a breach of cl 2(e) of the Code.

[26] The Registrar also contends that Ms Tian has engaged in dishonest or misleading behaviour in the following respects:

- (1) Advising Ms Xu that the documents she was signing were intended to explain the delay in providing information regarding the advertisement of her employment, when they were for a new work visa application;
- (2) Informing Ms Xu that the work visa application would be approved without problem in a week or two, when Ms Tian knew that Immigration NZ had already declined the first and second applications; and
- (3) Informing Ms Xu that only one work visa application had been declined when Ms Tian knew that two such applications had been declined.

[27] If the above does not amount to dishonest or misleading behaviour, the Registrar contends each may be a breach of cl 1 of the Code.

[28] The Registrar further contends that Ms Tian's conduct is a breach of cl 26(a)(iii) of the Code in the following respect:

- (1) Ms Tian did not have on her file copies of file notes of the telephone conversations with Ms Xu on 9 July and 7 August 2015, or the meetings with her on 28 April and 12 August 2015.

JURISDICTION AND PROCEDURE

[29] The grounds for a complaint to the Registrar of the Authority made against an immigration adviser or former immigration adviser are set out in s 44(2) of the Immigration Advisers Licensing Act 2007 (the Act):

- (a) negligence;
- (b) incompetence;
- (c) incapacity;
- (d) dishonest or misleading behaviour; and
- (e) a breach of the Code of Conduct.

[30] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.¹

¹ Immigration Advisers Licensing Act 2007, s 45(2) & (3).

[31] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.²

[32] After hearing a complaint, the Tribunal may dismiss it, uphold it but take no further action, or uphold it and impose one or more sanctions.³

[33] The sanctions that may be imposed by the Tribunal are set out in the Act.⁴ It may also suspend a licence pending the outcome of a complaint.⁵

[34] The burden of proving each head of complaint lies with the Registrar. It is the civil standard of proof, the balance of probabilities, that is applicable in professional disciplinary proceedings. However, the quality of the evidence required to meet that standard may differ in cogency, depending on the gravity of the charges.⁶

[35] Following the receipt of the statement of complaint against Ms Tian with supporting documents, the Tribunal issued directions on 21 October 2016 and 25 January 2017. It determined to hear the complaint on the papers. No party sought an oral hearing.

[36] Counsel for the Registrar, Ms Pendleton, provided memoranda on 7 and 14 February 2017.

[37] There is a statement of reply from Ms Tian filed on 15 January 2016. Submissions dated 18 November 2016 and 28 February 2017 were received from Mr Jenkin on behalf of Ms Tian, with Ms Tian also providing an affidavit affirmed on 6 December 2016. In summary, Ms Tian accepts she has been negligent and breached the Code in certain respects, but denies being dishonest or misleading.

ASSESSMENT

[38] I will deal with each head of complaint in the order in which it is presented in the statement of complaint.

NEGLIGENCE

- (1) *Not informing Ms Xu that her first work visa had been declined*
- (2) *Not informing Ms Xu she had been granted a visitor's visa*

² Sections 49(3) & (4).

³ Section 50.

⁴ Section 51(1).

⁵ Section 53(1).

⁶ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55 at [97], [101]–[102] & [112].

[39] These complaints may be dealt with together.

[40] Ms Xu states that she was not aware that the first work visa had been declined or that she had been granted a visitor's visa until Ms Tian told her on 7 August 2015.

[41] The first work visa was declined on 10 April 2015. Ms Tian says in her affirmation that in her communication with Ms Xu on 13 April by "WeChat", she told her that Immigration NZ required more proof of advertising and outcomes. According to Ms Tian, it must therefore have been obvious to Ms Xu that the application had not been granted. She later called Ms Xu to make an appointment and believes that during that discussion she told her that the application had been declined and a visitor's visa granted.

[42] Ms Tian admits she did not inform Ms Xu in writing of the decline or the visitor's visa. As to her verbal communications with Ms Xu, I find Ms Tian to be vague in her recollection as to what she told her. If she kept file notes of these communications, a matter to which I will return, there would be a record. Nor do I accept that advising Ms Xu that Immigration NZ required more evidence of advertising amounts to a sufficient notification of decline. After all, Immigration NZ could have requested such information while still considering the application. Indeed, it had done so on 26 March, but on 10 April Ms Tian knew the application had been declined.

[43] I find that Ms Tian did not inform Ms Xu of the decline of the visa on or about 10 April 2015, as she was obliged to do.⁷ It is also more likely than not that Ms Tian did not inform her of the grant of the visitor's visa, since that information would mean the work visa was declined. In other words, if Ms Tian did not inform Ms Xu of the decline of the work visa, there would be no reason to inform her of the issue of a visitor's visa.

[44] Ms Tian was negligent as to her disclosures to Ms Xu. It will be seen later that I do not find her conduct to be dishonest or misleading. I find this complaint to be made out. Ms Tian was negligent in not informing Ms Xu on about 10 April 2015 that the first work visa application had been declined and she had been granted a visitor's visa.

(3) *Not obtaining the instructions of Ms Xu before submitting the second work visa application*

[45] The second work visa application was submitted on 28 April 2015. Ms Xu had earlier that day signed documents, including the application, in Ms Tian's office. Ms Xu says she did not know she was signing such an application, as Ms Tian informed her the

⁷ Code of Conduct 2014, cl 26(b) & (c).

documents were to explain the delay in sending evidence regarding the advertising of the job.

[46] Ms Tian states in her affirmation that Ms Xu came to her office on 28 April 2015 and signed the second application for a work visa in her presence. According to Ms Tian, it is obvious from the form that it was an application for a work visa. Ms Tian does not believe that Ms Xu did not know what form she was signing.

[47] I agree with Ms Tian that the nature of the form is obvious. I appreciate that Ms Xu's first language is not the English used in the application form and Ms Xu says she is not fluent in English, but later email communications between Ms Xu and the Authority show a good standard of English. There is insufficient evidence that Ms Tian misrepresented the nature of the form, which was obvious to anyone with some ability in written English. I find that it is likely Ms Xu knew she was signing a work visa application.

[48] I dismiss this head of complaint.

(4) *Not informing Ms Xu that her second work visa application had been declined*

[49] The second work visa application was declined on 8 July 2015. Ms Tian knew the same day.

[50] In her affirmation, Ms Tian accepts that she did not inform Ms Xu that the second application had been declined. She states that she is not sure why, believing this to be just an oversight. Ms Tian points out, however, that she copied to Ms Xu's employer the email to Immigration NZ sent the following day on 9 July.

[51] Ms Tian must provide on-going timely written updates of lodged applications.⁸ I find that Ms Tian was negligent in not informing Ms Xu of the second work visa decline. Ms Tian has the responsibility to advise her client promptly of the status of her application. As will be seen later, I accept that Ms Tian's immediate notification to the employer shows that she was not being dishonest or intending to mislead.

(5) *Not informing Ms Xu that she had become unlawful in New Zealand*

[52] In declining the second visa application on 8 July 2015, Immigration NZ notified Ms Tian that Ms Xu was by then unlawfully in New Zealand. Ms Xu says she did not know this until she telephoned Immigration NZ on 10 August.

⁸ Code of Conduct 2014, cl 26(b) & (c).

[53] Ms Tian concedes that she did not inform Ms Xu of the notification that she was unlawfully in New Zealand. That omission could have had potentially serious consequences for Ms Xu.

[54] Again, I find Ms Tian was negligent in not informing Ms Xu of her unlawful status in New Zealand.

(6) *Not obtaining Ms Xu's instructions before submitting a request for a visa under s 61*

[55] This allegation in the statement of complaint relates to the failure to obtain instructions before lodging the s 61 application on 21 July 2015.

[56] In her affirmation, Ms Tian accepts that she failed to obtain Ms Xu's express instructions before lodging the s 61 application. Ms Tian's explanation is that she had no choice but to go ahead with such an application given the decline of the two visa applications. Furthermore, the eventual grant vindicated her decision to proceed with a s 61 application.

[57] I appreciate that s 61 became the best or only option available, but advisers must obtain instructions before filing applications.⁹ I find that Ms Tian was negligent in failing to obtain instructions from Ms Xu for the request for a visa under s 61.

DISHONEST OR MISLEADING BEHAVIOUR

(1) *Advising Ms Xu that the documents signed were intended to explain a delay in providing information regarding the advertisement of her employment, when they were for a new work visa application*

[58] The second work visa application was signed by Ms Xu in Ms Tian's office on 28 April 2015. Ms Xu states that Ms Tian told her it was a letter to explain the delay in producing material on advertising. She signed the documents, trusting Ms Tian.

[59] Ms Tian states in her affirmation that she filled out the form in the presence of Ms Xu. I note that it records in Ms Tian's handwriting that the previous work visa application had been declined.

[60] Whether or not Ms Tian expressly informed Ms Xu of the nature of the form, as she should have, I accept Ms Tian's evidence that the nature of the form Ms Xu was signing is obvious. It is plainly not a letter. The form is lengthy and comprehensive and does not look on its face to be merely a response to an information request about advertising. The evidence shows that Ms Xu has sufficient written English language

⁹ Code of Conduct 2014, cl 2(e).

ability to communicate with the Authority. She is not a recent migrant and will have signed that form multiple times before.

[61] I do not find that Ms Tian engaged in dishonest or misleading behaviour in relation to the signing of the second work visa application. I dismiss this head of complaint.

(2) *Informing Ms Xu that her work visa application would be approved without problem in a week or two, when she knew that Immigration NZ had already declined the first and second work visa applications*

[62] According to Ms Xu, Ms Tian advised her on 9 July 2015 that the work visa application would be approved without problem in a week or two. By this time, Ms Tian had been notified by Immigration NZ that both work visa applications had been declined.

[63] I have already noted that Ms Tian has no recollection or record of this discussion. It is likely she did tell Ms Xu something along the lines that there were no problems and a work visa would be issued in a week or two. The basis of Ms Tian's optimism was her view that Immigration NZ was wrong to decline the work visas. She had responded to Immigration NZ on that day, 9 July, pointing out that two work visas had just been approved for similar positions and attaching evidence of regular recruiting advertisements, as well as the response from Work and Income.

[64] I accept that Ms Tian honestly believed the visa would be granted. Given her experience in obtaining numerous such visas for that employer and that Ms Xu had previously held such visas for a few years, it was reasonable to hold that belief. The reasonableness of the belief is also shown by the eventual grant of a visa, albeit not within a week or two. It is to be borne in mind that I have found Ms Xu to have known of the failure of the first work visa application at the time she had signed the second such application on 28 April.

[65] I do not find Ms Tian to have been deceptive in her advice that the work visa would be granted. There is no lack of good faith or probity. She has not been dishonest or misleading. I dismiss this head of complaint.

(3) *Informing Ms Xu that only one work visa application had been declined, when Ms Tian knew that two had been declined*

[66] Ms Xu states that she telephoned Ms Tian on 7 August 2015 and was told that her visa application had been declined and she had been given a visitor's visa. Ms Xu asked Ms Tian how many times she had been declined and was told once. However, by this time Ms Tian knew the application had been declined twice.

[67] Ms Tian does not expressly answer this allegation in her affirmation, but I have already accepted that Ms Xu likely knew of the first decline when she signed the second application. Without a verbatim record of the telephone conversation, it is difficult to find that Ms Tian lied based on Ms Xu's brief description of the conversation in her email to the Authority on 8 November 2015. Perhaps Ms Tian had in mind only the second application. She may have overlooked the first application, since it is clear Ms Tian has many clients. This was a telephone call and Ms Tian may not have had immediate access to Ms Xu's file. It is also conceivable that Ms Tian may merely have said that the work visa had been declined, rather than that this had happened precisely once.

[68] There is insufficient evidence to find that Ms Tian deliberately misrepresented the number of times the work visa applications had been declined. I dismiss this head of complaint.

BREACH OF CODE

Failure to obtain lawful instructions

[69] The Registrar contends that, if not amounting to negligence, the negligence complaint at (3) above may be a breach of cl 2(e) of the Code. Clause 2(e) stipulates that an adviser must obtain and carry out the informed lawful instructions of the client.

[70] Having found that it is likely Ms Xu knew she was signing a work visa application on 28 April 2015, I could not find a breach of the Code requirement to obtain instructions.

Failure to be honest and professional

[71] The Registrar contends that, if Ms Tian's actions do not amount to dishonest or misleading behaviour, each of those complaints may be a breach of the obligation to be honest and professional in cl 1 of the Code. Clause 1 stipulates that advisers must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.

[72] Having dismissed the allegations of dishonesty in respect of Ms Tian's conduct, I could not find a breach of the Code requirement to be honest. Further, having dismissed the allegations of specific behaviour in items (1) and (3), I could not find them to amount to unprofessional conduct. As for the second complaint of dishonesty (advising Ms Xu the work visa would be approved without a problem), I do not regard this as unprofessional conduct given the reasonableness of Ms Tian's belief that the advice was correct. It must be borne in mind that I have found Ms Xu to have known of the decline of the first visa application.

[73] I dismiss this head of complaint.

Failure to have proper records

(1) *The adviser did not have copies of file notes of telephone conversations with Ms Xu on 9 July and 7 August 2015, or the meetings on 28 April and 12 August 2015*

[74] The Registrar contends that Ms Tian did not keep adequate records.

[75] Clause 26(a)(iii) of the Code requires the adviser to maintain a hard copy and/or electronic record of all written communications (including any file notes of material oral communications) between the adviser and the client. The Code also requires the adviser to make on-going timely updates of lodged applications, which must be confirmed in writing.¹⁰

[76] Ms Tian admits in her affirmation that she did not have written records of the telephone conversations or meetings with Ms Xu. Ms Tian's firm has over 1,000 clients. She provides this explanation but does not use it as an excuse for poor record keeping and nor could it be. Ms Tian is responsible for ensuring she has sufficient staff and proper processes to comply with the obligations under the Code, including maintaining file notes, irrespective of the size of her firm.

[77] The telephone conversations on 9 July and 7 August 2015 and the meetings on 28 April and 12 August 2015 are all material. There is no written or electronic record of them.

[78] I find a breach of cl 26(a)(iii) of the Code.

¹⁰ Code of Conduct 2014, cl 26(b) & (c).

OUTCOME

[79] I conclude:

- (1) Ms Tian has been negligent in respect of items (1), (2), (4), (5) and (6) in the statement of complaint, in breach of s 44(2)(a) of the Act.
- (2) Ms Tian has breached cl 26(a)(iii) of the Code in respect of the lack of file notes or electronic records in relation to the conversations on 9 July and 7 August 2015, and the meetings on 28 April and 12 August 2015.
- (3) Ms Tian has not been dishonest or misleading, nor has she breached cls 1 or 2(e) of the Code in the way alleged by the Registrar.

SUBMISSIONS ON SANCTIONS

[80] As the complaint has been partially upheld, the Tribunal may impose sanctions pursuant to s 51 of the Act.

[81] A timetable is set below. Any request that Ms Tian undertake training should specify the precise course suggested. Any request for repayment of fees or the payment of costs or expenses or for compensation must be accompanied by a schedule particularising the amounts and basis of the claim.

Timetable

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

- (1) The Authority and Ms Tian are to make submissions by **19 November 2018**.
- (2) The Authority and Ms Tian may reply to any submissions by the other party by **3 December 2018**.

D J Plunkett
Chair