

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 34

Reference No: IACDT 025/17

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **KIT**
Complainant

AND **MINGXING (JASON) ZHU**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 20 May 2019

REPRESENTATION:

Registrar: Self-represented
Complainant: J Kim, licensed adviser
Adviser: Self-represented

PRELIMINARY

[1] KIT, the complainant, sought both education and immigration services from Mr Mingxing (Jason) Zhu, the adviser. The complainant was left to work with a staff member of Mr Zhu's firm and had no engagement with Mr Zhu until late in the process. Nor did Mr Zhu provide her with a written client agreement or maintain a proper file record of communications. Mr Zhu largely admits breaching his professional obligations.

BACKGROUND

[2] Mr Zhu is a licenced immigration adviser. He is a director of Pioneer Education & Immigration Services Group Ltd (Pioneer).

[3] The complainant arrived in New Zealand on 2 November 2015 on a working holiday visa.

[4] On 22 October 2016, the complainant personally applied for a visitor visa online. An interim visa was granted by Immigration New Zealand on 26 October, to come into effect when the working holiday visa expired and to expire when a decision was made on her visitor visa application.

[5] The complainant's working holiday visa expired on 2 or 3 November 2016. At about this time, she approached Pioneer to obtain entry to an education institute and an accompanying student visa. On 3 November, she signed an application form to study at the business institute on the advice of Pioneer.

[6] Until late November or mid December 2016, the complainant dealt with a staff member of Pioneer, not Mr Zhu.

[7] Immigration New Zealand sent a letter to the complainant on 7 November 2016 requesting further information and documents for the visitor visa application.

[8] On 22 November 2016, an employee of Pioneer sent the complainant an offer of place at the institute, together with a list of required documents for a student visa.

[9] On 28 November 2016, Mr Zhu lodged an application for a student visa with Immigration New Zealand on behalf of the complainant.

[10] The complainant was notified by Immigration New Zealand on 28 November 2016 that she had still not provided the information requested on 7 November. She told the agency the following day that she had not received its letter. On 30 November, Immigration New Zealand again sent the letter of 7 November to the complainant concerning the visitor visa application.

[11] The complainant promptly notified Mr Zhu's staff of the visitor visa application that day, 30 November. On the same day, Mr Zhu emailed Immigration New Zealand advising his engagement by the complainant on the visitor visa application and her desire to withdraw it.

[12] Immigration New Zealand replied on 5 December 2016 to Mr Zhu stating that he had presented no authority to act for the visitor visa, so the complainant would need to notify withdrawal herself.

[13] On the same day, the complainant and Mr Zhu signed a formal authority allowing him to act for her in relation to the visitor visa application.

[14] Also on that day, 5 December 2016, Immigration New Zealand issued a letter to the complainant, through Mr Zhu, expressing concerns regarding the student visa application. In particular, immigration instructions did not allow the holder of a current interim visa to apply for a visa of another type. She had applied for a student visa while her interim visa was current. Furthermore, in her application of 22 October, she said her intention was holidaying and sightseeing, so there were concerns about her plans for studying.

[15] The withdrawal of the visitor visa application was acknowledged by Immigration New Zealand on 8 December 2016.

[16] On 9 December 2016, Mr Zhu responded to Immigration New Zealand's concerns set out in its letter of 5 December 2016.

[17] On 14 December 2016, the student visa application was declined and the complainant became unlawful in New Zealand. Immigration New Zealand was not satisfied she was a *bona fide* and genuine student.

[18] Mr Zhu did not charge the complainant any fees for either the education services or the immigration advice.

[19] On 20 February 2017, a new licensed adviser instructed by the complainant, Mr Jerry Kim, applied to Immigration New Zealand for a student visa as an exception to instructions under s 61 of the Immigration Act 2009. He explained that the complainant's unlawful status was not entirely her fault. She had not been fully advised by her previous adviser. The complainant had never met him until Immigration New Zealand declined the student visa on 14 December 2016, since she had only dealt with the staff. This amounted to serious misconduct. Nor did she receive any signed engagement agreement from him.

[20] Furthermore, according to Mr Kim, Mr Zhu filed a student visa application while her visitor visa application was being processed and she held an interim visa. Mr Zhu also gave her incorrect advice. Mr Kim also alleged that Immigration New Zealand's case officer was biased. He asked that the complainant's circumstances be considered as a special case, as she had never intended to stay unlawfully.

COMPLAINT

[21] A complaint (dated 20 February 2017) against Mr Zhu was lodged by the complainant with the Immigration Advisers Authority (the Authority). She said she had lost her future in New Zealand because Mr Zhu had wrongly treated her visitor visa and student visa applications. When the visa was declined, her status became unlawful. To solve this, she had to spend a lot on professional fees but she could not solve the situation in New Zealand. The complainant wanted compensation for her legal costs and sought also the recovery of her lawful status.

[22] On 16 June 2017, the Authority formally advised Mr Zhu of the complaint and set out the details. He was given the opportunity to provide an explanation.

[23] On 19 June 2017, Mr Zhu wrote to the Authority saying he had learned from the mistakes and would keep reminding himself to avoid making them. He said that in the earlier period of engagement, the staff member was not providing immigration advice, only education services. The staff were merely collecting documents. He had issued strict instructions to the education consultants to refer any ambiguous issues to him.

[24] According to Mr Zhu, the only immigration relevant document sent by email by a staff member was a student visa checklist, which was publicly available from Immigration New Zealand. It had been checked by him and translated into Korean by the employee. All of the client's documents and information had been passed to him for checking and he had personally submitted the visa application.

[25] However, it was accepted by Mr Zhu that he neglected to have a signed contract with the complainant. Nor did he provide the Code of Conduct 2014 (the Code) to the complainant. He also admitted not checking the interim visa issue with due care. He further acknowledged that his file notes were not complete, which was a vital mistake to make.

[26] Mr Zhu set out in his letter to the Authority his proposed remedial action. This included asking all 16 staff, apart from the three licensed advisers, to attend the seminar offered by the Authority on the definition of immigration advice. He would also schedule step-by-step his own professional development relating to the Code. Furthermore, he would assign colleagues to double check his cases all the time to avoid any mistake and would also recruit more licensed advisers.

[27] Mr Zhu provided the Authority with a number of testimonials from employees and licensed immigration advisers, recording his attention to his clients and emphasis on the importance of professional standards by complying with the Code.

[28] On the following day, 20 June 2017, Mr Zhu sent an email to the Authority confirming that he had double checked all the information and documents provided before the staff member had dropped the package into Immigration New Zealand's branch. He accepted that it was his fault that he did not check for an engagement agreement. His other staff were on holiday at the time and his work was overloaded.

[29] On 26 July 2017, the Registrar of Immigration Advisers (the Registrar), the head of the Authority, referred the complaint to the Tribunal. The following breaches of the Code were alleged:

- (1) By failing to obtain lawful instructions and engage with the complainant, Mr Zhu may have breached cl 2(e);
- (2) By failing to ensure there was a written agreement relating to immigration advice, Mr Zhu may have breached his obligation under cl 18(a);
- (3) By applying for a student visa during the currency of the interim visitor visa, Mr Zhu acted without due care and may have breached his obligation under cl 1;
- (4) By failing to provide an adequate explanation in response to Immigration New Zealand's concerns regarding the student visa application, Mr Zhu may not have acted with due care and diligence, in breach of his obligation under cl 1; and

- (5) By failing to have file notes of material discussions and failing to confirm them in writing, Mr Zhu may have breached his obligation under cl 26(a)(iii) and (c).

JURISDICTION AND PROCEDURE

[30] The grounds for a complaint to the Registrar 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.

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

[32] 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 It has been established to deal relatively summarily with complaints referred to it.³

[33] 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.⁴

[34] The sanctions that may be imposed by the Tribunal are set out in the Act.⁵ The focus of professional disciplinary proceedings is not punishment but the protection of the public.⁶

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

² Section 49(3) & (4).

³ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁴ Section 50.

⁵ Section 51(1).

⁶ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

[35] 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.⁷

[36] The Tribunal has received from the Registrar the statement of complaint (26 July 2017), with supporting documents. At the request of the Tribunal, the Registrar provided further information on 16 May 2019.

[37] There is a statement of reply (10 August 2017) from the complainant, with letters from her and her representative, Mr Kim (both dated 10 August 2017). She seeks monetary compensation for her suffering and the expense of remedying her legal status in New Zealand. According to the complainant, she had paid \$10,365 to the new adviser or Immigration New Zealand. The complainant sought \$27,500 in compensation. She had been living on her savings as she could not work.

[38] There is a statement of reply and letter (both dated 11 August 2017) from Mr Zhu, with supporting documents. He explains that he was extremely busy at Christmas 2016, though appreciates this is not an excuse for failing to sign a contract. He accepts this was not professional. Mr Zhu attached more recent files which he says show the changes made within his practice, since this complaint was made. He acknowledges neglecting the interim visa at the time he applied for her student visa. He set out his learning from the case.

[39] Mr Zhu expressed sympathy with the complainant's personal circumstances and had indicated to the Authority a willingness to compensate her. However, he was confused about her request for \$27,500. If she was an overstayer, she should have left New Zealand. It was not the right decision to stay. She could have applied for a new student visa offshore and would not then have incurred living expenses in New Zealand. Notwithstanding this, he will follow the Tribunal's order regarding financial support.

[40] Testimonials as to Mr Zhu's abilities, professionalism and ethical conduct are provided by a lawyer and other licensed advisers. He is described as hard-working, honest and diligent.

[41] Neither the complainant nor the adviser requests an oral hearing.

⁷ *Z v Dental Complaints Assessment Committee* at [97], [101]–[102] & [112].

ASSESSMENT

[42] The Registrar relies on the following provisions of the Code:

General

1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.

Client Care

2. A licensed immigration adviser must:

...

- e) obtain and carry out the informed lawful instructions of the client, and

...

Written agreements

18. A licensed immigration adviser must ensure that:

- a. when they and the client decide to proceed, they provide the client with a written agreement

...

File management

26. A licensed immigration adviser must:

- a) maintain a hard copy and/or electronic file for each client, which must include:

...

- (iii) copies of all written communications (including any file notes recording material oral communications and any electronic communications) between the adviser, the client and any other person or organisation

...

- c) confirm in writing to the client the details of all material discussions with the client

...

(1) *By failing to obtain lawful instructions and engage with the complainant, Mr Zhu may have breached cl 2(e)*

[43] The complainant first engaged Mr Zhu's firm on about 2 November 2016, but she says she did not meet him until 14 December 2016.⁸ Until then, she dealt only with an employee of Mr Zhu. According to the Registrar, the complainant dealt with Mr Zhu from 28 November 2016.⁹

[44] Mr Zhu says his staff were only dealing with education services, but this is not correct. On 22 November, an employee sent her the student visa application checklist. Mr Zhu's file records note that on this day the complainant discussed the visa with an employee and was advised that the visa service was free.¹⁰ Mr Zhu's file records that on 28 November, the employee helped the complainant to record information on the form.

[45] While I accept that Mr Zhu checked the information and lodged the student visa application personally, it was the unlicensed employee who had engaged with the complainant since she first sought assistance. Clearly she would have been seeking both immigration and education guidance from the beginning. Someone was discussing with the complainant on or before 28 November, visa options and what information was needed to support the student visa. It was not Mr Zhu.

[46] The Code obligations are personal to the licensed adviser and cannot be delegated.¹¹ Mr Zhu has not personally obtained the complainant's instructions and is therefore in breach of cl 2(e) of the Code.

(2) *By failing to ensure there was a written agreement relating to immigration advice, Mr Zhu may have breached his obligation under cl 18(a)*

[47] The Code requires that there be a written agreement as to immigration services between the adviser and the client. There are numerous mandatory requirements as to what the agreement must contain. It must be entered into before the adviser commences his or her services.

⁸ Mr Kim's letter to Immigration New Zealand, 20 February 2017.

⁹ Statement of complaint, 26 July 2017 at [3.4]; Authority's letter to Mr Zhu, 16 June 2017 at 1.

¹⁰ Customer card, Registrar's supporting documents at 179.

¹¹ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [29], [34] & [47].

[48] This is a critical obligation of advisers, so there is certainty from the commencement of work as to the scope of the adviser's instructions, the fees and such essential matters as to how a complaint can be made and a refund, if warranted, made.

[49] Mr Zhu admits he did not have a written agreement with the complainant. I find Mr Zhu has breached cl 18(a) of the Code.

(3) *By applying for a student visa during the currency of the interim visitor visa, Mr Zhu acted without due care and may have breached his obligation under cl 1*

[50] Mr Zhu lodged an application for a student visa on 28 November 2016. However, the complainant already held an interim visa, which came into effect on 2 or 3 November 2016 and would have expired on 8 December 2016 when the visitor visa application was withdrawn.

[51] Immigration New Zealand expressed its concern in the letter of 5 December 2016 that she had applied for a student visa while her interim visa was current, in breach of immigration instructions.

[52] While Mr Zhu admits not checking the interim visa issue with due care, the Registrar advises that he regards the breach to be trivial or inconsequential and does not pursue it.

(4) *By failing to provide an adequate explanation in response to Immigration New Zealand's concerns regarding the student visa application, Mr Zhu may not have acted with due care and diligence, in breach of his obligation under cl 1*

[53] Immigration New Zealand set out its concerns regarding the student visa application on 5 December 2016. Mr Zhu replied on 9 December 2016. Immigration New Zealand then declined the application on 14 December. It did not regard the complainant as a genuine student.

[54] The reasons expressed in the decline letter are difficult to follow. I suspect it was because of her earlier history of a working holiday, followed by a visitor visa application for holiday and sightseeing purposes. While not well articulated by Immigration New Zealand, this appears to have led the officer to doubt the complainant actually intended to study. Immigration New Zealand's doubts precede Mr Zhu's engagement and arise from the complainant's own conduct. I also find some of the requests for information in Immigration New Zealand's letter of 5 December 2016 to be confusing.

[55] I find Mr Zhu's letter of 9 December to be adequate, and no more than that, in response to Immigration New Zealand's letter of 5 December. The evidence does not establish that Mr Zhu bears responsibility for the decline of the student visa. This head of complaint is dismissed.

(5) *By failing to have file notes of material discussions and failing to confirm them in writing, Mr Zhu may have breached his obligation under cl 26(a)(iii) and (c)*

[56] The Code requires that an adviser's file contains a record of all written communications with the client and file notes of all material oral conversations the adviser or his staff have with the client. The adviser must also confirm in writing all material discussions with a client.

[57] Mr Zhu accepts that he did not have an adequate written record of communications with the complainant.

[58] I find that Mr Zhu breached cl 26(a)(iii) and (c) of the Code.

OUTCOME

[59] The complaint is upheld. Mr Zhu has breached cls 2(e), 18(a) and 26(a)(iii) and (c) of the Code.

SUBMISSIONS ON SANCTIONS

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

[61] A timetable is set out below. Any requests that Mr Zhu 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

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

- (1) The Registrar, the complainant and Mr Zhu are to make submissions by **12 June 2019**.

- (2) The Registrar, the complainant and Mr Zhu may reply to submissions of any other party by **26 June 2019**.

ORDER FOR SUPPRESSION

[63] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.¹²

[64] There is no public interest in knowing the name of Mr Zhu's client.

[65] The Tribunal orders that no information identifying the complainant is to be published other than to the parties and Immigration New Zealand.

D J Plunkett
Chair

¹² Immigration Advisers Licensing Act 2007, s 50A.