

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 46

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
(Sanctions)
Dated 8 July 2019**

REPRESENTATION:

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

INTRODUCTION

[1] The Tribunal upheld this complaint against Mr Zhu, the adviser, in a decision issued on 20 May 2019 in *KIT v Zhu*.¹ It found that Mr Zhu had permitted an unlicensed employee to engage with his client, the complainant, when she first sought assistance and to give her immigration advice. There were other professional violations as well. Mr Zhu was found to have breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

BACKGROUND

[2] The narrative leading to the complaint is set out in the decision of the Tribunal upholding the complaint and will only be briefly summarised here.

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

[4] The complainant approached Pioneer on about 2 or 3 November 2016 in order to obtain entry to an education institute in this country and therefore also a student visa. Her working holiday visa was due to expire about the same time and she had already been granted an interim visitor visa, to come into effect on expiry of her working holiday visa.

[5] Until late November or mid December 2016, the complainant dealt with employees of Pioneer, not with Mr Zhu.

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

[7] On 30 November 2016, the complainant notified Mr Zhu's staff of the visitor visa application she had made earlier. Mr Zhu promptly emailed Immigration New Zealand on the same day seeking to withdraw it.

[8] On 5 December 2016, Immigration New Zealand wrote to the complainant, through Mr Zhu, expressing concerns regarding the student visa application made on 28 November. In particular, immigration instructions did not allow the holder of an interim visa to apply for another type of visa. The complainant had applied for the student visa while holding an interim visa. She had said in her earlier application that she intended holidaying and sightseeing in New Zealand, so there were concerns about her claimed plans to study.

¹ *KIT v Zhu* [2019] NZIACDT 34.

[9] Mr Zhu responded to Immigration New Zealand's concerns in a letter to the agency on 9 December 2016.

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

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

[12] A complaint against Mr Zhu was lodged by the complainant with the Immigration Advisers Authority (the Authority) on 20 February 2017. 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 student visa was declined, her status became unlawful. The complainant said she had therefore spent a lot on professional fees, but had been unable to resolve her immigration situation in New Zealand. She wanted recovery of her lawful status, as well as compensation for her legal costs.

[13] The Registrar of Immigration Advisers (the Registrar), the head of the Authority, referred the complaint to the Tribunal.

[14] In its decision of 20 May 2019, the Tribunal found that Mr Zhu had allowed an unlicensed employee to engage with the complainant when she first sought assistance. Someone other than Mr Zhu had been discussing visa options with her, as well as the information needed to support the student visa. This was contrary to cl 2(e) of the Code. Furthermore, Mr Zhu did not ensure that there was a written agreement between Pioneer and the complainant relating to the immigration services provided, in breach of cl 18(a). Nor did Mr Zhu have an adequate written record of all communications, including material oral communications with the complainant, in breach of cl 26(a)(iii) and (c) of the Code.

SUBMISSIONS

[15] Counsel for the Registrar, Ms Pragji, in her submissions (11 June 2019) contends that Mr Zhu should be:

- (1) cautioned or censured; and
- (2) ordered to complete the New Zealand Immigration Advice Refresher Course provided by Toi-Ohomai Institute of Technology.

[16] In his submissions (7 June 2019) on behalf of the complainant, Mr Kim seeks first, to remedy the complainant's visa status and second, a refund of the following fees and expenses:

Visitor visa fee (Immigration New Zealand)	\$	151.00
Student visa fee (Immigration New Zealand)	\$	260.00
Service fee*	\$	1,500.00
Disbursement*	\$	8.00
Airfares	\$	329.00
Service fee*	\$	575.00
Visitor visa fee (Immigration New Zealand)	\$	211.00
Service fee*	\$	2,875.00
Airfares	\$	1,653.53
	\$	7,562.53

* Charged by the new adviser, Mr Kim.

[17] Mr Zhu, in his submissions (11 August 2017 and 11 June 2019) expresses a willingness to attend the refresher course and to pay the following fees and expenses of the complainant as an expression of sympathy:

Student visa fee (Immigration New Zealand)	\$	260.00
Service fee	\$	1,500.00
Airfares	\$	329.00
	\$	2,089.00

[18] Mr Zhu sets out in some detail the steps undertaken by himself and his staff, including other licensed advisers employed by him, to ensure they all understand the relevant legislation, immigration criteria and the professional obligations of those subject to the Code. This includes training (formal and internal discussions), supervision, office layout and template letters. His education consultants are reminded daily that they may not give immigration advice, as are their clients, since the consultants' email footers now state that.

[19] According to Mr Zhu, the complaint was treated as a learning exercise. Since the complaint was received, they have modified their office procedures to ensure compliance with their professional obligations, particularly the need for a written client agreement.

JURISDICTION

[20] The Tribunal's jurisdiction to impose sanctions is set out in the Immigration Advisers Licensing Act 2007 (the Act). Having heard a complaint, the Tribunal may take the following action:²

50 Determination of complaint by Tribunal

After hearing a complaint, the Tribunal may—

- (a) determine to dismiss the complaint:
- (b) uphold the complaint but determine to take no further action:
- (c) uphold the complaint and impose on the licensed immigration adviser or former licensed immigration adviser any 1 or more of the sanctions set out in section 51.

[21] The sanctions that may be imposed are set out at s 51(1) of the Act:

51 Disciplinary sanctions

- (1) The sanctions that the Tribunal may impose are—
 - (a) caution or censure:
 - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
 - (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
 - (d) cancellation of licence:
 - (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:
 - (f) an order for the payment of a penalty not exceeding \$10,000:
 - (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
 - (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
 - (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

² Immigration Advisers Licensing Act 2007.

[22] In determining the appropriate sanction, it is relevant to note the purpose of the Act:

3 Purpose and scheme of Act

The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination, by providing for the regulation of persons who give immigration advice.

[23] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:³

...It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

...

The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.

...

Lord Diplock pointed out in *Ziderman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

[24] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the profession itself.⁴

[25] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.⁵

³ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citations omitted).

⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee*, above n 3, at [151].

⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

[26] The most appropriate penalty is that which:⁶

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

DISCUSSION

[27] I will consider the potentially appropriate sanctions in the order in which they are set out in s 51. I have no power to remedy the complainant's immigration status.

Caution or censure

[28] The obligation to personally engage with the client in order to take his or her instructions and then to carry them out, from the commencement of instructions to their conclusion, is personal to the adviser.⁷ No part of that process may be delegated, aside from what is regarded as clerical work under the Act.⁸ This is a critical obligation of an adviser. Additionally, the obligation to have a written agreement is important.

[29] It is therefore appropriate to mark the Tribunal's disapproval of Mr Zhu's conduct by way of censure, rather than just caution.

⁶ *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], citing *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633, [2013] NZAR 320 at [49].

⁷ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [29], [34] & [47].

⁸ Immigration Advisers Licensing Act 2007, s 7(1) "immigration advice" and s 5 "clerical work".

Training

[30] Mr Zhu has appropriately expressed a willingness to undertake the refresher course, as requested by the Registrar. I will accordingly make that order.

Financial penalty

[31] The breach of cl 2(e) of the Code would ordinarily attract a financial penalty, as would the failure to have a written agreement. It has not been sought by the Registrar in this case. I accept it is not necessary in the circumstances.

[32] In relation to the failure to personally take instructions from the client, the violation here was at the lower end of the spectrum as Mr Zhu did actually engage with the client though not at the commencement of the instructions.

[33] I also take into account Mr Zhu's strong commitment to professional development for himself, his other licensed advisers and his staff. He responsibly treated the complaint as a learning exercise. I have also taken into account his offer to pay some compensation, even where it has not been shown that the individual items of compensation claimed were caused by his conduct.

Compensation

[34] On behalf of the complainant, Mr Kim has sought compensation of \$7,562.53. Mr Zhu has offered to refund \$2,089.00, as an expression of sympathy for the complainant.

[35] I do not consider it appropriate to refund all of the complainant's fees and expenses incurred, as I do not regard any of them as arising from or caused by Mr Zhu's professional violations. Certainly, none could be said to arise from the failure to have either a written agreement or a complete file record of communications.

[36] As for the head of complaint concerning an unlicensed employee advising the complainant early in the process, it has not been shown this led to any loss to the complainant either. It is conceivable that had Mr Zhu been personally engaged earlier with the complainant, he may have discovered the interim visitor visa and therefore delayed filing the student application or better explained it at the outset. Certainly, he should have investigated the complainant's immigration status prior to lodging the student visa. I note though that this specific head of complaint, acting without due care on this matter, was not pursued by the Registrar. Furthermore, the complainant should have told him of the interim visitor visa.

[37] Immigration New Zealand's concerns arose from a statement as to intention made by the complainant herself in her visitor visa application before instructing Mr Zhu. He is not responsible for that.

[38] It has not been shown that the complainant's subsequent problems with Immigration New Zealand can be blamed on Mr Zhu's conduct.

[39] The largest item of compensation claimed is \$2,875. This was for Mr Kim to advise the complainant and representing her in relation to the complaint to the Authority and its processing by the Tribunal. However, it is doubtful that the Tribunal has the power to award costs in relation to the disciplinary process, even if they had been charged by a lawyer which is not the case here.

[40] I accordingly decline to award compensation for any items claimed, other than those agreed by Mr Zhu. In determining what would be reasonable compensation, I have also taken into account that Mr Zhu did not charge the complainant any fees or disbursements.

OUTCOME

[41] Mr Zhu is:

- (1) censured;
- (2) directed to enrol and complete the New Zealand Immigration Advice Refresher Course offered by Toi-Ohomai Institute of Technology at its next available intake; and
- (3) ordered to pay immediately to the complainant \$2,089.

ORDER FOR SUPPRESSION

[42] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.⁹

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

⁹ Immigration Advisers Licensing Act 2007, s 50A.

[44] 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