

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 56

Reference No: IACDT 041/17

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **NTT**
Complainant

AND **ZHINAN (CINYEE) GONG**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 5 August 2019

REPRESENTATION:

Registrar: Self-represented
Complainant: Self-represented
Adviser: S Laurent, counsel

PRELIMINARY

[1] Ms Gong, the adviser, was instructed by the complainant to obtain a work visa for his wife. Ms Gong and the complainant's wife were already known to each other. Due to what Ms Gong regarded as the social nature of their relationship, she failed to properly document the professional relationship. She admits breaching the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

BACKGROUND

[2] Ms Zhinan (Cinyee) Gong is a licensed immigration adviser based in Auckland. She is an employee of Asia Pacific International Consulting Ltd.

[3] The complainant, NTT, is a New Zealand citizen. He met UZX, now his wife, in Auckland in March 2016. She is a Chinese national. They married in New Zealand in July 2016.

[4] On 20 December 2016, the complainant's wife first approached Ms Gong in order to obtain a partnership-based work visa application. They had already met through a tramping club.

[5] At the meeting on 20 December 2016, Ms Gong advised that the fee was \$1,150 payable in advance. She issued a receipt to the client on the same day for "service fee for WV".

[6] No written agreement for the immigration services was entered into by the parties.

[7] On 7 February 2017, another advance payment of \$413 was made by the complainant or his wife. Ms Gong issued a receipt for "the fee for WV".

[8] An application for a work visa under the partnership category was filed by Ms Gong on behalf of the complainant's wife on 9 February 2017.

[9] An interim visa was granted by Immigration New Zealand on 28 February 2017.

[10] On 13 April 2017, Immigration New Zealand raised a character concern in a letter to Ms Gong, as the complainant's wife had failed to declare a conviction in Hong Kong for overstaying.

[11] The complainant's wife informed Ms Gong on 27 April 2017 that she was terminating Ms Gong's services. She picked up the original documents being held by her.

COMPLAINT

[12] The complaint against Ms Gong was lodged with the Immigration Advisers Authority (the Authority) by the complainant on 23 April 2017.

[13] It alleged that there was no proper contract, that they were only given handwritten receipts despite having requested proper invoices and that they had also been asked to sign a blank application form which was filed with incorrect information. Various other criticisms were made of Ms Gong's conduct. Only those allegations pursued by the Registrar in his statement of complaint filed in the Tribunal will be considered by the Tribunal.

[14] The Authority wrote to Ms Gong on 5 May 2017 requesting her file in relation to the complainant's wife.

[15] On 18 May 2017, Mr Laurent, counsel for Ms Gong, replied to the Authority. He provided Ms Gong's file. The Authority was advised that there was no service agreement, that the sum of \$413 was not banked in a client account but was receipted and paid to Immigration New Zealand, and that Ms Gong could not locate her file copies of the forms lodged with Immigration New Zealand. An issue had been identified with her internet service provider possibly relating to some lost emails. Ms Gong used a paperless scanning solution to store file documents. Counsel provided Ms Gong's handwritten "Notes of material discussion" from her file.

[16] On 11 September 2017, the Authority wrote to Ms Gong formally notifying her of the details of the complaint and inviting her explanation.

[17] On 25 September 2017, Mr Laurent replied to the Authority's formal notification. Ms Gong accepted that she did not have a signed written agreement, due to the social nature of the relationship between them. She had first met the complainant's wife in March 2016 through a tramping club.

[18] According to Mr Laurent, Ms Gong also accepted that she did not keep a full client file. This was due to the problem with her internet service provider. It was also accepted that there were certain conversations which had not been confirmed in a formal way. However, much of the communication was social in nature and had been through phone calls and the messaging app WeChat. The WeChat record had already been supplied to the Authority. The reason why much of the communication had not been formalised was because of the original social nature of the relationship. Ms Gong had lost her impartiality and objective judgement in this regard.

[19] It was also accepted that invoices had not been issued. This was because Ms Gong had been asked to prepare them in the name of the complainant's business, but the name was not provided and Ms Gong then forgot to issue the invoices. There was no gain to be made from not issuing the invoices which she would have done had she remembered. They are part of her normal operating procedure.

[20] Furthermore, Ms Gong acknowledged that \$1,150 had been paid in advance but had not been placed in a client account, though a receipt had been issued. A receipt had also been issued for the \$413 received on 7 February 2017, but it had not been banked as the application had been filed with Immigration New Zealand only two days later, on 9 February. Ms Gong had since updated her business practice so that clients paid Immigration New Zealand's fees directly to the agency rather than to her.

[21] Mr Laurent advised that the fee of \$1,150 had represented a discount on Ms Gong's normal fee of \$1,500, due to the social nature of the relationship. For the same reason, a partial refund had been offered on 17 January 2017 when the complainant's wife became concerned about her financial situation.

Complaint referred to Tribunal

[22] The Registrar of Immigration Advisers (the Registrar), the head of the Authority, filed a complaint with the Tribunal on 13 December 2017. The Registrar referred to the Tribunal the following possible breaches of the Code by Ms Gong:

- (1) failing to provide the client with a written agreement, in breach of cl 18(a);
- (2) failing to issue invoices to the client, in breach of cl 22;
- (3) failing to deposit advance payments into a separate client account, in breach of cl 25(c);
- (4) failing to keep a full copy of the client's file and provide it to the Authority upon request, in breach of cl 26(a)(i) and (e);
- (5) failing to confirm in writing to the client the lodgement of the work visa application, in breach of cl 26(b); and
- (6) failing to confirm in writing to the client the details of all material discussions, in breach of cl 26(c).

JURISDICTION AND PROCEDURE

[23] 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.

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

[25] 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

[26] 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

[27] 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

[28] 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

[29] The Tribunal has received from the Registrar the statement of complaint, dated 13 December 2017, with supporting documents.

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).

⁷ *Z v Dental Complaints Assessment Committee*, above n 6, at [97], [101]–[102] & [112].

[30] There are no submissions from the complainant.

[31] Ms Gong has produced a statement of reply, dated 11 January 2018, together with submissions from her counsel of 19 January 2018 and an affidavit from her dated 18 January 2018. Ms Gong does not seek an oral hearing.

[32] In her affidavit, Ms Gong says she met the complainant (presumably his wife) through a tramping club and they developed a friendship. It was due to the friendship that her impartiality and objectivity were clouded, leading to the Code breaches identified. There was no purposeful wrong-doing by her.

[33] According to Ms Gong, the fee of \$1,150 was a discount on her normal fee of \$1,500. She offered to refund half the fees on 17 and 20 January 2017. Because of the social nature of the relationship, much of the communication was by WeChat. Ms Gong accepts failing to pay advance funds into a client account and invoicing when the work was completed. She was not able to keep a client file because of a problem with her internet service provider. She regrets what happened.

ASSESSMENT

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

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
 - ...

Invoices

22. A licensed immigration adviser must, each time a fee and/or disbursement is payable, provide the client with an invoice containing a full description of the services the fee relates to and/or disbursements that the invoice relates to.

Client funds

25. A licensed immigration adviser must, if taking payment for fees and/or disbursements in advance of being payable and invoiced:
- ...
 - c. deposit any mixed funds (funds including payable payments and advance payments) into the client account at the outset and then as soon as practical withdraw from the client account the portion of the funds that were payable and for which an invoice has been issued
 - ...

File management

26. A licensed immigration adviser must:

- a. maintain a hard copy and/or electronic file for each client, which must include:
 - i. a full copy of the client's application or other immigration matter
 - ...
- b. confirm in writing to the client when applications have been lodged, and make on-going timely updates
- c. confirm in writing to the client the details of all material discussions with the client
- ...
- e. maintain each client file for a period of no less than 7 years from closing the file, and make those records available for inspection on request by the Immigration Advisers Authority, and
- ...

(1) *Failing to provide the client with a written agreement, in breach of cl 18(a)*

[35] It is important for advisers to have a written agreement complying with the Code with each client. It sets out the scope of the work and the obligations of each party, particularly relating to potentially contentious areas such as fees.

[36] Ms Gong admits not having a written agreement. The social origin of the relationship is not material. Once Ms Gong accepted instructions, the relationship became professional to the extent it concerned immigration matters and all the Code obligations applied in full.

[37] Ms Gong is in breach of cl 18(a) of the Code.

(2) *Failing to issue invoices to the client, in breach of cl 22*

[38] Ms Gong admits failing to issue invoices on the two occasions she took money from the complainant and/or his wife. I accept that there is nothing sinister in Ms Gong's informal approach to the financial aspects of the relationship or forgetting to issue invoices, but it is important to properly document all financial transactions to prevent clients from being cheated and to protect advisers from accusations of overcharging or corruption.

[39] Ms Gong is in breach of cl 22 of the Code.

(3) *Failing to deposit advance payments into a separate client account, in breach of cl 25(c)*

[40] Again, the breach in relation to both advance payments is admitted. Ms Gong is in breach of cl 25(c) of the Code.

(4) *Failing to keep a full copy of the client's file and provide it to the Authority upon request, in breach of cl 26(a)(i) and (e)*

[41] Ms Gong accepts that she failed to keep a full copy of the file and provide it to the Authority. This is partially explained by Ms Gong as relating to an internet fault. A brief Spark fault log has been produced. I have not been informed of the full details of the failings by the internet provider or the extent to which the file was compromised. The log provides few details.

[42] The breaches of these obligations are clear and are admitted. Ms Gong is in breach of cl 26(a)(i) and (e) of the Code.

(5) *Failing to confirm in writing to the client the lodgement of the work visa application, in breach of cl 26(b)*

[43] In counsel's letter of 25 September 2017, Ms Gong admits not formalising communications with the complainant's wife in breach of cl 26(b) due to the social nature of much of them. Ms Gong is in breach of cl 26(b) of the Code.

(6) *Failing to confirm in writing to the client the details of all material discussions, in breach of cl 26(c)*

[44] Ms Gong admits failing to provide written confirmation of all material discussions with the complainant and/or his wife. These discussions covered Immigration New Zealand's work visa requirements, the contents of the application form, the conviction of the complainant's wife and Immigration New Zealand's letter of concern. This was because of the social nature of the relationship. Ms Gong is in breach of cl 26(c) of the Code.

OUTCOME

[45] I uphold all heads of complaint. Ms Gong has breached cls 18(a), 22, 25(c), 26(a)(i), (b), (c) and (e) of the Code.

SUBMISSIONS ON SANCTIONS

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

[47] These failings arose from one fundamental mistake by Ms Gong. Due to the way the relationship had originally developed, she failed to treat the immigration side of the relationship objectively and professionally. She admits this. It illustrates the danger of mixing personal and professional relationships, particularly communications containing both. While it is no justification for the casual communication and file management, I will take into account in determining the sanctions that the violations all arose from that one critical mistake. I also accept counsel's contention that Ms Gong has learned a lesson from this complaint.

[48] A timetable is set out below. Any request for training must specify the course recommended. 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. Counsel is requested to provide evidence of any refund of fees or expenses made by Ms Gong.

Timetable

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

- (1) The Registrar, the complainant and Ms Gong are to make submissions by **27 August 2019**.
- (2) The Registrar, the complainant and Ms Gong may reply to submissions of any other party by **10 September 2019**.

ORDER FOR SUPPRESSION

[50] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.⁸

[51] There is no public interest in knowing the name of Ms Gong's client, the complainant's wife, or the name of the complainant.

⁸ Immigration Advisers Licensing Act 2007, s 50A.

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

D J Plunkett
Chair