

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 24

Reference No: IACDT 004/16

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **KENTARO SHIHAKU**
Complainant

AND **KOTARO MIZOGUCHI**
Adviser

DECISION
Dated 24 April 2019

REPRESENTATION:

Registrar: A Dumbleton, counsel
Complainant: No appearance
Adviser: A Holmes, counsel

PRELIMINARY

[1] The complaint concerns the failure of the adviser, Mr Mizoguchi, to ensure that his client, Mr Shihaku (the complainant), communicated acceptance of the written service agreement and his failure to properly manage a refund of his fee when the complainant terminated his services. He was the subject of two earlier similar complaints which were upheld by the Tribunal.

[2] Following a prolonged procedural history, the Registrar of Immigration Advisers (the Registrar) and Mr Mizoguchi sent a Joint Statement (4 April 2019) to the Tribunal setting out the agreed professional wrongs and a joint position as to the appropriate sanctions.

BACKGROUND

[3] Mr Mizoguchi is a licensed immigration adviser.

[4] The following narrative is agreed by the Registrar and Mr Mizoguchi in their Joint Statement.

[5] In December 2014, Mr Mizoguchi met the complainant and provided him with a service agreement in relation to an application to Immigration New Zealand for an entrepreneur work visa.

[6] In January 2015, the complainant confirmed that he wished to proceed and made payment to Mr Mizoguchi of the first instalment of his fee (\$5,000 plus GST) as well as Immigration New Zealand's application fee (\$3,200). The total amount received was \$8,950.

[7] The complainant did not return a signed copy of the agreement to Mr Mizoguchi nor did he expressly confirm his acceptance of it in writing, but he did sign the agreement.

[8] As the complainant was not satisfied with the progress of Mr Mizoguchi's work, he requested on 5 May 2015 that the services be cancelled. Mr Mizoguchi returned the complainant's documents and provided a refund form to him.

[9] On 8 June 2015, the complainant requested a refund in euros, but did not give the information needed to make the transfer until 9 July 2015. Mr Mizoguchi refunded Immigration New Zealand's fee on 23 July 2015, after an unsuccessful attempt at transfer on 13 July.

[10] A disagreement arose as to the amount of a fair and reasonable refund, having regard to the work Mr Mizoguchi had done prior to cancellation. The complainant considered that \$3,500 (plus GST) should be refunded, but Mr Mizoguchi considered that \$2,000 (plus GST) only would be appropriate.

[11] In August 2015, the complainant requested that \$2,000 (plus GST) be refunded while the parties continued to discuss the disputed amount of \$1,500 (plus GST), but Mr Mizoguchi did not do so. Instead, he sought to refer the complainant to a mediation consultant.

[12] This is the agreed background to the complaint made by the complainant against Mr Mizoguchi.

COMPLAINT

[13] Given the joint position of the Registrar and Mr Mizoguchi, the prolonged procedural history of the complaint will only be summarised.

[14] In September 2015, the complainant made a complaint to the Authority.

[15] The complainant and Mr Mizoguchi recommenced negotiations concerning a refund of the fee in November 2015. Mr Mizoguchi proposed refunding \$2,000 (plus GST) on the basis that the complainant agreed this constituted a full and final settlement and withdrew his complaint to the Authority. That was accepted by the complainant. Mr Mizoguchi then sought legal advice on the preparation of an agreement. A deed was prepared by his solicitor and signed by the complainant and Mr Mizoguchi on 5 January 2016.

[16] Mr Mizoguchi paid \$2,300 to the complainant pursuant to the deed.

[17] The deed was provided to the Registrar, who regarded it as unsuitable. This was because of the condition requiring full and final settlement and the discontinuance of the complaint, as well as other aspects of the deed.

[18] The Registrar referred the complaint to the Tribunal on 3 March 2016.

[19] A limited hearing of the complaint went ahead on 16 December 2016 before the then Tribunal chair (Mr Pearson). It was adjourned part-heard. Directions were given by the Tribunal on 27 January 2017.

[20] An amended statement of complaint was filed by the Registrar with the Tribunal on 8 February 2017. Additional grounds of complaint relating to the deed were added.

[21] An interlocutory decision was issued by the Tribunal (Mr Pearson) on 19 June 2017.¹ It dismissed the application made by Mr Mizoguchi for the Tribunal to withdraw on the grounds of bias and misconduct. The Tribunal advised that it would complete the hearing of the complaint on 3 July 2017.

[22] The hearing on 3 July 2017 did not go ahead.

[23] Mr Mizoguchi sought judicial review in the High Court of the Tribunal's decision of 19 June 2017. In *Mizoguchi v The Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 3198, [2018] NZAR 451, the High Court determined that the Registrar should not have filed the amended complaint with the Tribunal. The Court ordered the Tribunal to remit the amended complaint to the Registrar and, if it was decided to refer it back to the Tribunal, to comply with s 47 of the Immigration Advisers Licensing Act 2007 (the Act).

[24] Accordingly, on 27 February 2018, the Tribunal (Mr Pearson) remitted the complaint to the Registrar, in compliance with the order of the High Court.

[25] The Registrar then filed a further amended statement of complaint in the Tribunal on 16 July 2018.

[26] Mr Mizoguchi replied to the amended statement of complaint on 20 August 2018.

[27] On 3 September 2018, Mr Dumbleton, on behalf of the Registrar, advised the Tribunal that he had discussed the complaint with Mr Holmes, representing Mr Mizoguchi, and they sought advice as to how any common views of the parties should be presented to the Tribunal.

[28] The Tribunal (Mr Pearson) issued a Minute on 4 September 2018 inviting the parties to present their views.²

[29] This was then followed by the Joint Statement of the Registrar and Mr Mizoguchi of 4 April 2019.

¹ *Shihaku v Mizoguchi* [2017] NZIACDT 7.

² *Shihaku v Mizoguchi* [2018] NZIACDT 16 (Minute).

Joint statement

[30] The Joint Statement records Mr Mizoguchi's acknowledgement of the following breaches of the Code of Conduct 2014 (the Code):

- (1) Failing to ensure that the complainant had signed the service agreement or confirmed its acceptance in writing, in breach of cl 18(c).
- (2) Unprofessional negotiations between Mr Mizoguchi and the complainant relating to the refund of the service fee, in breach of cl 1.
- (3) Delays in refunding the service fee and the fee of Immigration New Zealand, in breach of cl 24(c).

[31] Mr Mizoguchi accepted the negotiations were unprofessional because he should not have insisted on a full and final settlement condition before paying the refund, nor should he have requested that the complaint be withdrawn.

[32] The Joint Statement particularly records Mr Mizoguchi's acknowledgement that during the time in which this complaint and the two earlier complaints occurred, he did not properly understand his professional obligations. He is now, however, committed to his education and rehabilitation within the profession and has shown this through his participation in the courses offered by Toi-Ohomai Institute of Technology.

[33] It is accepted in the Joint Statement that Mr Mizoguchi's conduct stemmed from his lack of understanding of certain professional obligations which reflected his competence and not his honesty or other issues with his fitness to practice. The Joint Statement records the Registrar's opinion that Mr Mizoguchi is able to be rehabilitated into the profession.

[34] The Joint Statement was sent to the complainant, but no response was received from him. It is noted that a draft of the Joint Statement had previously been sent to the complainant, but he did not respond.³

[35] The Joint Statement has attached to it a personal statement from Mr Mizoguchi (1 April 2019). He advises that he has learned from the complaints made against him and has improved his knowledge and skills. He wants to continue to work as an immigration adviser and believes that he is now better at his job and in dealing with his clients.

³ Joint Statement, 4 April 2019, at [4].

[36] Mr Mizoguchi confirms that he is currently enrolled in Toi-Ohomai's Refresher Course and is seeking to re-enrol in one of the two alternative courses he failed for the institute's Graduate Diploma. He sets out in some detail what he has learned as a result of the complaints. Mr Mizoguchi also outlines the precise changes to his systems and practices since the problems with his practice were identified. This includes meeting regularly with his supervisor. In particular, he now checks and confirms that clients have signed the written agreement before he carries out any work. He also discusses any request for a refund with his supervisor and is aware that refunds must be made promptly and without conditions.

Previous complaints

[37] In agreeing to the proposed sanctions set out in the Joint Statement, the Registrar and Mr Mizoguchi had regard to the previous complaints made against him which were upheld by the Tribunal.⁴ In respect of these earlier complaints, the Joint Statement noted:

- (1) Mr Mizoguchi's conduct in question under each of the three complaints occurred in the same period, being from late 2014 through to May 2015.
- (2) There are similarities in his conduct which led to each complaint, being failures:
 - (a) to ensure that the client signed a written agreement; and
 - (b) to deal properly with refunds due to the client.
- (3) Mr Mizoguchi has actively and openly participated in the complaints process with the Registrar and complied with the orders made by the Tribunal.
- (4) No further complaints have been brought against Mr Mizoguchi.

Mr Mizoguchi's current licence status

[38] Mr Mizoguchi holds a provisional licence and practices under supervision. He has completed all but one of the courses required for the Graduate Diploma in New Zealand Immigration Advice at the Toi-Ohomai Institute of Technology. He is currently

⁴ *Yu v Mizoguchi* [2016] NZIACDT 28; *Kashimoto v Mizoguchi* [2016] NZIACDT 42, *Kashimoto v Mizoguchi* [2016] NZIACDT 74.

enrolled in the New Zealand Immigration Advice Refresher Course offered by the institute.

[39] The Tribunal had originally required Mr Mizoguchi to complete the Graduate Diploma and he has completed all but one paper. He has twice failed the same paper and has also once failed an alternative paper. He sought to enrol again in the alternative paper, but it was refused by the institute. The Tribunal accordingly varied its earlier order in the *Yu* complaint to enable him to complete either the Graduate Diploma or the Refresher Course.⁵

[40] Mr Mizoguchi remains subject to an order by the Tribunal that he practice under a provisional licence in full compliance with a supervision regime approved by the Registrar for a period of 12 months after completion of either the Graduate Diploma or the Refresher Course.

[41] It is noted by the parties in the Joint Statement that in the event that Mr Mizoguchi is not able to re-enrol in the remaining course in order to complete the diploma, then he may apply to the Tribunal to vary the order made in the *Kashimoto* complaint so that the requirement is to complete the refresher course only.

JURISDICTION AND PROCEDURE

[42] 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 Act:

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

[43] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.⁶

⁵ *Yu v Mizoguchi* IACDT 042/15 (27 February 2019).

⁶ Immigration Advisers Licensing Act 2007, s 45(2) & (3).

[44] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.⁷ It has been established to deal relatively summarily with complaints referred to it.⁸

[45] 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.⁹

[46] The sanctions that may be imposed by the Tribunal are set out in the Act.¹⁰ The focus of professional disciplinary proceedings is not punishment but the protection of the public.¹¹

[47] 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.¹²

[48] The most appropriate penalty is that which:¹³

- (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.

⁷ Section 49(3) & (4).

⁸ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁹ Section 50.

¹⁰ Section 51(1).

¹¹ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

¹² *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

¹³ *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], relying on *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 at [49].

[49] 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.¹⁴

ASSESSMENT

[50] 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.

Written agreements

18. A licensed immigration adviser must ensure that:

...

- c) all parties to a written agreement sign it, or confirm in writing that they accept it, and

...

Refunds

24. A licensed immigration adviser must:

...

- c) promptly provide any refunds payable upon completing or ceasing a contract for services.

[51] While the Tribunal's statutory authority to determine a complaint and any appropriate sanctions cannot be ousted by agreement between the parties, the Tribunal accepts that the position agreed between the Registrar and Mr Mizoguchi is appropriate. The Registrar's views as to how the public can best be protected carries considerable weight in the Tribunal. Furthermore, Mr Mizoguchi remains subject to supervision. It is readily apparent that he has gone to considerable lengths to undertake training and to change his systems and practices.

[52] While the Registrar and Mr Mizoguchi agree that the past complaints concern his competence rather than any honesty or fitness to practice issues, I note that the Tribunal in the *Kashimoto* complaint found the complaint to be serious, as Mr Mizoguchi had withheld funds from the Kashimotos in order to pressure them into

¹⁴ *Z v Dental Complaints Assessment Committee* at [97], [101]–[102] & [112].

signing a false document advancing his interests.¹⁵ Nonetheless I do not regard that finding as undermining the appropriateness of the agreement reached as to sanctions.

[53] Accordingly, the Tribunal formally upholds the following breaches of the Code:

- (1) Failing to ensure that the complainant either signed the service agreement or confirmed in writing its acceptance, in breach of cl 18(c).
- (2) Unprofessional negotiations between Mr Mizoguchi and the complainant relating to the refund of the service fee, in breach of cl 1.
- (3) Delays in refunding the service fee and to a lesser extent also the fee of Immigration New Zealand, in breach of cl 24(c).

ORDER

[54] The following sanctions agreed between Mr Mizoguchi and the Registrar are imposed on Mr Mizoguchi:

- (1) Censure.
- (2) Order prohibiting Mr Mizoguchi from applying for any form of licence other than a provisional licence until he has practiced under a provisional licence in full compliance with a supervision regime approved by the Registrar for 12 months following his completion of either the diploma or refresher course.
- (3) Order to immediately pay to the complainant the balance of the fee, \$1,725.

D J Plunkett
Chair

¹⁵ *Kashimoto v Mizoguchi* [2016] NZIACDT 74 at [1.3], [35], [46] & [76].