

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 36

Reference No: IACDT 003/19

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **Y(O)R**
Complainant

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

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 7 August 2020**

REPRESENTATION:

Registrar: Self-represented
Complainant: No appearance
Adviser: Self-represented

INTRODUCTION

[1] Ms Ying Tian (aka Tina Qin), the adviser, acted for Y(O)R, the complainant, in regard to multiple visa applications. There were numerous professional failures by Ms Tian in her relationship with the complainant and her record keeping, including a failure to provide written disclosure of a conflict of interest.

[2] A complaint by the complainant to the Immigration Advisers Authority (the Authority) was referred by the Registrar of Immigration Advisers (the Registrar), to the Tribunal. It was upheld in a decision issued on 8 June 2020 in *Y(O)R v Tian*.¹

[3] It is now for the Tribunal to determine the appropriate sanctions.

BACKGROUND

[4] 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.

[5] Ms Tian, a licensed immigration adviser, is a director of Abstract Solution Limited, of Auckland.

[6] On 30 September 2014, Ms Tian lodged an entrepreneur work visa application for the complainant. It was declined by Immigration New Zealand on 7 August 2015, but she did not advise the complainant of the decision. Eventually, the complainant found out from Immigration New Zealand on 30 August 2017 that the application had been declined two years previously.

[7] Meanwhile, on 31 March 2017, Ms Tian had filed a visitor visa application for the complainant. It was declined on 14 April 2017. The complainant therefore became unlawful in New Zealand, but Ms Tian did not inform her of the decline or of her unlawful status.

[8] On 15 May 2017, Ms Tian requested Immigration New Zealand to issue the complainant with a discretionary “visitor visa under guardian visa” in accordance with s 61 of the Immigration Act 2009, as she was unlawfully in the country. A discretionary visitor visa was issued on 10 June 2017.

[9] Ms Tian was also an education agent and therefore received commissions from the schools arranged by Ms Tian for the complainant’s son. She orally disclosed the commissions to the complainant.

¹ *Y(O)R v Tian* [2020] NZIACDT 23.

[10] The complainant made a complaint to the Authority against Ms Tian on 9 May 2018. It was referred by the Authority to the Tribunal, which issued a decision upholding the complaint on 8 June 2020 as noted above.

Decision of the Tribunal

[11] The Tribunal found that Ms Tian had breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code) in the following respects:

- (1) failed to disclose in writing a conflict of interest (commissions from schools) and failed to obtain the complainant's written consent to continue representing her and her family, in breach of cls 5 and 6;
- (2) failed to provide the complainant with written client agreements, in breach of cl 18(a);
- (3) failed to provide the complainant with invoices for fees and disbursements, in breach of cl 22;
- (4) failed to confirm in writing to the complainant when applications were lodged and to make ongoing timely updates, in breach of cl 26(b); and
- (5) failed to maintain a well-managed filing system (including copies of all written communications and records of material oral communications) and to confirm material discussions to the complainant in writing, in breach of cl 26(a)(iii), (c) and (d).

SUBMISSIONS

Submissions from the Registrar

[12] The Registrar notes that Ms Tian is an experienced practitioner, having been licensed since May 2009. It is therefore reasonable to expect high standards, knowledge and adherence to the Code. It is further noted by the Registrar that the Tribunal has previously upheld a complaint of negligence and breach of the Code by Ms Tian in a similar fashion. Ms Tian has not complied with the earlier training sanction directed by the Tribunal, which is being addressed by the Registrar through the licensing renewal process.

[13] It is submitted that Ms Tian appears to have either little knowledge or little regard for her professional obligations in regard to client engagement and file management. She should therefore undertake further training.

[14] The Registrar submits that the appropriate sanctions would be:

- (1) censure;
- (2) a requirement to undertake the LAWS7015 Professional Practice paper through Toi-Ohomai Institute of Technology; and
- (3) payment of a penalty in the range of \$3,000.

Submissions from the complainant

[15] There are no submissions from the complainant.

Submissions from Ms Tian

[16] In her letter to the Tribunal, Ms Tian sincerely apologises to the complainant and her family, described as close friends, because her work affected their lives. She accepts that she should be punished in some way. Ms Tian also accepts that as an experienced adviser who has been in the industry for 19 years, she should not behave unprofessionally in this way.

[17] It is further accepted by Ms Tian that she does not have a good client file management system. She lodged more than 350 applications in 2019 and continues to suffer a crisis of staff shortage and work load pressure. It is understood by her that such factors do not excuse her unprofessional behaviour.

[18] Ms Tian said she applied for entry into the graduate diploma in February last year but there was no space left and, in the meantime, she decided to study art history. She did not pay much attention to the immigration program and mistakenly missed it, so is going to enrol in the July intake.

[19] Ms Tian accepts that she failed in the level of service provided to the complainant who should have been informed step by step what was happening with her application.

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] There are remarkable similarities between this complaint and the earlier one upheld against Ms Tian where it was found she had been negligent and/or breached the Code in the following ways:⁷

- (1) twice failed to inform her client of the decline of a work visa and once of the grant of a visitor's visa;
- (2) failed to inform her client of Immigration New Zealand's notification that she was unlawfully in New Zealand;
- (3) failed to obtain her client's express instructions to lodge an application pursuant to a statutory discretion; and
- (4) failed to have a written record of telephone conversations and meetings with her client, in breach of cl 26(a)(iii).

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 *Xu v Tian* [2018] NZIACDT 42 & 49.

[28] The sanctions imposed in the earlier complaint were censure and a direction to complete the New Zealand Immigration Advice Refresher Course at Toi-Ohomai Institute of Technology.

[29] The conduct in the earlier complaint was between April and August 2015. The conduct in the present complaint occurred between August 2015 and April 2017 and is a continuation of Ms Tian's poor professional practice concerning client engagement and record keeping.

[30] It is not clear whether Ms Tian's unprofessional conduct is caused by a casual attitude to her clients or simply overwork. Even if the latter, that does not mitigate her wrongdoing. Ms Tian is responsible for regulating her workflow so she can professionally attend to every client instruction. If she cannot find staff, she should turn work away.

[31] These professional obligations are not unimportant because they relate to record keeping and client communications. It is a serious breach of the Code not to have a written agreement with the client and the failure to keep a client updated can have grave consequences, particularly if the client is unaware of their unlawful status.

[32] Ms Tian appears to have learned nothing from the previous complaint, which had been made to the Authority as early as 12 August 2015 and lodged with the Tribunal on 17 December 2015. I note, however, that the Tribunal did not issue its decision upholding the complaint until 26 October 2018, after the events at issue in this complaint.

[33] Turning then to the potential sanctions, it is appropriate that Ms Tian is censured for her continued unprofessional practice.

[34] It is self-evident that Ms Tian needs further training in an adviser's professional practice obligations, particularly regarding the relationship with clients and proper record keeping. Despite a request from the Tribunal, she has not produced any evidence of enrolment in a course.

[35] It is appropriate that Ms Tian be directed to pay a financial penalty. It must reflect the multiple breaches and her earlier disciplinary history. I agree with the Registrar that it should be in the vicinity of \$3,000. The penalty will be \$3,500.

OUTCOME

[36] Ms Tian is:

- (1) censured;

- (2) directed to enrol and complete the LAWS7015 (Professional Practice) paper from Toi-Ohomai Institute of Technology at its next available intake; and
- (3) ordered to pay immediately to the Registrar \$3,500.

ORDER FOR SUPPRESSION

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

[38] There is no public interest in knowing the name of Ms Tian's client.

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

D J Plunkett
Chair

⁸ Immigration Advisers Licensing Act 2007, s 50A.