

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 38

Reference No: IACDT 031/18

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **ZT**
Complainant

AND **MIAO (LIZ) LI**
Adviser

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 18 September 2020**

REPRESENTATION:

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

INTRODUCTION

[1] ZT, the complainant, engaged Ms Miao (Liz) Li, the adviser, to seek residence under the investor category. It was declined by Immigration New Zealand, as the complainant did not invest his funds by the deadline. Ms Li had overlooked the deadline.

[2] A complaint 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 5 August 2020 in *ZT v Li*.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 Li is a licensed immigration adviser. She is a director of Ampass Consultants Company Ltd, of Auckland.

[6] The complainant, a national of China, engaged Ms Li to obtain residence in New Zealand under the investor 2 category.

[7] Immigration New Zealand gave approval in principle for residence on 27 July 2015. The complainant was given 12 months to transfer his nominated funds (\$1.5M attracting points) to New Zealand and place them into acceptable investments.

[8] The complainant completed the transfer of the funds to New Zealand in February 2016.

[9] On 22 February 2016, Ms Li sent the transfer documents to Immigration New Zealand and requested confirmation that the funds had been correctly transferred. She advised that once the agency had confirmed the transfer, the complainant would invest the funds in acceptable investment items.

[10] On 16 September 2016, Immigration New Zealand granted the complainant an extension of time for the transfer and investment of the funds, the new deadline being 27 January 2017.

[11] Ms Li continued to press Immigration New Zealand to approve the fund transfer.

¹ *ZT v Li* [2020] NZIACDT 34.

[12] The transfer and investment deadline of 27 January 2017 passed without any investment being made.

[13] Ms Li and Immigration New Zealand's officer continued to exchange emails regarding the validity of the transfer.

[14] On 24 August 2017, Ms Li confirmed to the officer that the complainant had invested only a certain amount in acceptable funds. The officer noted that he was \$1.2M short of the required investment.

[15] The exchange of emails, as well as phone calls, continued between Ms Li and the officer. An explanation for missing the deadline was provided and Ms Li requested an extension of time to complete investment.

[16] On 10 October 2017, Immigration New Zealand advised the complainant that his residence application had been declined because he had not completed the investment in New Zealand of \$1.5M by 27 January 2017, having invested only about \$322,000 in an acceptable fund.

[17] The complainant, who instructed a new immigration adviser and lawyers, appealed the decline of residence to the Immigration and Protection Tribunal (IPT). In a decision issued on 30 May 2018, it was found that Immigration New Zealand's decision was correct. Furthermore, while the lengthy processing of the application by the agency left much to be desired, this did not prejudice the application. As a result of incorrect advice from Ms Li, the complainant had not appreciated that he had to invest in acceptable funds before the deadline.

[18] As the IPT advised the Minister of Immigration that the complainant's circumstances were special and recommended the grant of residence, the Minister granted residence to him and his wife on 2 August 2018.

Decision of the Tribunal

[19] The Tribunal found that, while Ms Li had worked energetically and conscientiously to obtain approval for the transfer, she had been negligent in missing the deadline and failing to advise the complainant of the need to invest as the deadline approached. There was a high degree of negligence. Her mistake could not be described as mere momentary inadvertence or excusable human error. She had failed to note the criteria set out in the approval in principle letter (sent to her twice), the multiple warnings from Immigration New Zealand and from the complainant's financial adviser, as well as a query from the complainant, many of which were close to the deadline.

SUBMISSIONS

Submissions from the Registrar

[20] In his submissions of 25 August 2020, the Registrar quotes from the Tribunal's decision:²

[167] Ms Li's mistake is all the more surprising and careless in light of the express warning she received from Immigration New Zealand on 5 January 2017, about three weeks before the deadline, that the complainant had to complete his investments before 27 January 2017. Even the complainant had specifically asked her on 9 January 2017 whether he needed to invest, drawing the issue again to her attention.

[21] The Registrar submits that Ms Li should be:

- (1) censured;
- (2) ordered to refund \$700 to the complainant, being the IPT fee;
- (3) ordered to pay the Registrar a penalty in the range of \$2,000–\$3,000; and
- (4) ordered to pay reasonable compensation to the complainant.

Submissions from the complainant

[22] The complainant seeks \$182,057.60, itemised in a schedule sent to the Tribunal with supporting documents (see schedule to this decision). It will be discussed in detail below. Further explanation was given by the complainant on 31 August and 7 September 2020.

Submissions from Ms Li

[23] There is an amended memorandum from Mr Laurent (4 September 2020).

[24] Ms Li confirms her acceptance of the Tribunal's finding that she was negligent. She had admitted such an error early in the complaint process. While it is accepted that Immigration New Zealand's considerable delays did not of itself cause the failure of the application or excuse Ms Li's conduct, the delays could be considered as a mitigating circumstance relevant to sanctions.

[25] It is submitted that, as Ms Li fell foul of a very particular element of a single type of visa condition, a course of retraining would be disproportionate and unnecessary. It would traverse a broad set of subjects in which Ms Li was already competent. It is likely

² *ZT v Li*, above n 1.

that her exposure to the present complaint had forcefully driven home a lesson about the manner in which investment funds had to be transferred and invested within the time frame. She had therefore already undergone a stern but effective form of retraining on this topic.

[26] Ms Li accepts that a financial sanction is likely. She is prepared to pay, but points out the recent diminution in the level of her business income of some 30 per cent during the period of the COVID-19 response. The Authority has recommended a fine in the order of \$3,000, which would not be unreasonable, but it is submitted that any compensation which Ms Li may be ordered to pay should inform the level of the fine.

[27] There is an affirmation from Ms Li (26 August 2020). She reiterates her acceptance of the finding of negligence.

[28] As for the compensation claimed, Ms Li notes that the complainant seeks \$6,000 in fees for the residence application. In fact, he paid \$4,505 in fees (as per the three invoices attached to her affirmation). In addition, he paid \$600 (excl. GST) for two extensions of his work visa successfully obtained. She points out that she provided free services, including one work visa application and driving him and his wife to various appointments.

[29] Ms Li states in her affirmation that she was successful in a number of immigration applications for the complainant and also that he would have had to pay Immigration New Zealand's fees irrespective of whether she represented him.

JURISDICTION

[30] 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:³

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.

³ Immigration Advisers Licensing Act 2007.

[31] 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.

[32] 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.

[33] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:⁴

...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.

⁴ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citations omitted).

...

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.

[34] 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.⁵

[35] 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.⁶

[36] The most appropriate penalty is that which:⁷

- (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.

⁵ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee*, above n 4, at [151].

⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

⁷ *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].

DISCUSSION

[37] While there were numerous reminders of the deadline as it loomed which Ms Li missed, giving rise to the Tribunal's finding of a high degree of carelessness, her failure to advise the complainant to invest (even without Immigration New Zealand's approval of the transfer) can be seen as an isolated act of negligence. She missed one deadline. Ms Li advises this is the first complaint against her since she was licensed 10 years ago.

[38] I will review the potentially appropriate sanctions.

Caution or censure

[39] Despite the degree of negligence and what could have been serious consequences for the complainant had the Minister not granted residence, I propose to caution rather than censure Ms Li. The complaint should serve as a warning to Ms Li to diary immigration deadlines.

Training

[40] The Registrar does not seek any retraining and I agree with Mr Laurent that a one-off failing of this nature does not indicate any wider lack of knowledge. I accept the obvious which is that Ms Li will have learned her lesson in respect of the specific failure here, missing an investment deadline.

Financial penalty

[41] The Registrar submits that a penalty in the range of \$2,000 to \$3,000 would be appropriate. Mr Laurent accepts that a penalty of the order of \$3,000 would not be unreasonable.

[42] There was a high degree of carelessness by Ms Li, though as already noted it could be described as an isolated infringement by Ms Li of her professional obligations in a career of 10 years as a licensed adviser. She admitted her mistake to the complainant almost immediately, though it was not until the complaint was filed in the Tribunal that Ms Li accepted that the mistake amounted to professional wrongdoing.

[43] No earlier decisions of the Tribunal have been cited by the parties, but I have reviewed a number of recent decisions. While some deal with similar provisions of the Code and/or the same statutory ground of complaint infringed, the circumstances of the wrong, the degree of remorse, the disciplinary history and circumstances of the adviser, and the totality of the sanctions are all different. The penalties in previous decisions are of limited guidance only.

[44] In setting the penalty, I will have regard to the amount of compensation awarded to the complainant (see below).

[45] The penalty will be \$2,000.

Compensation

[46] The complainant seeks specific losses and expenses of \$182,057.60, as itemised in the attached schedule. I will review the specific items claimed shortly, but first the general principles.

[47] In *Zhang & Cao v Chen*, the Tribunal was not persuaded that it had the power to determine large claims for compensation:⁸

[67] I agree with Mr Turner. For such a large sum of money, the complainants have to prove, on the balance of probabilities, that their losses of an ascertained or ascertainable amount were caused by Ms Chen's incompetence. They would have to prove an orthodox cause of action in contract or tort and set about proving the loss in the normal way. The incompetence (or breach of the Code) would have to amount to a legally recognised cause of action. The Tribunal's power to award reasonable compensation could not circumvent the usual criteria for civil claims for a claim of such magnitude.

[68] Indeed, I doubt that Parliament had in mind that the Tribunal should assess such significant civil claims in the context of a disciplinary process. It seems to me that s 51(1)(i) has in mind modest and more easily assessed claims for compensation only. It is intended to provide an expedient remedy for such claims when the Tribunal is seized of the relevant facts, rather than compel complainants to mount a second set of proceedings in a general court.

[69] I also have grave doubts whether causation could be established here. The 'but for' test of causation contended by Ms Smith does not establish causation in law. In particular, it would have to be established that the complainants relied on Ms Chen for more than just immigration advice and that it was reasonable to do so.

...

[74] ... I am not even persuaded that the Tribunal has jurisdiction to investigate alleged losses of such magnitude in order to determine whether Ms Chen should be legally liable for them. [footnotes deleted]

[48] In *NLT v Coetzee*, the Tribunal determined that it could award compensation for loss attributable to an adviser's wrongdoing:⁹

[47] The Tribunal can award compensation for loss attributable to an adviser's misconduct. The loss must be caused by or relate to or arise from the wrongdoing. In the case of Ms Coetzee, there were two heads of complaint upheld. The first was the lack of a client agreement. The second was incorrect advice given to the complainant that he could work as an independent contractor.

⁸ *Zhang & Cao v Chen* [2019] NZIACDT 11.

⁹ *NLT v Coetzee* [2020] NZIACDT 7.

[48] It is plain that no loss to the complainant arose out of the failure of Ms Coetzee to enter into a written client contract with him.

[49] Turning then to the incorrect advice Ms Coetzee gave, the issue is whether the various expenses and losses claimed arose in some material way from Ms Coetzee's erroneous advice.

[49] I will deal with each item in the complainant's schedule in the same order.

Item 1 – lost potential investment income

[50] The complainant claims \$108,500 in lost investment income on \$1.62M for the period from January 2016 to September 2017, based on an annual yield of 3.078 per cent (understood to be the expected yield on acceptable investments). It is doubtful that the Tribunal has jurisdiction to award such a large sum for the loss of a potential investment gain which would be more appropriately dealt with as an orthodox breach of contract action in the general courts. Moreover, it has not been proven that the alleged loss arises from Ms Li's negligent act, failing to notify the complainant of the deadline.

[51] In the earlier decision, it was found that Ms Li properly sought approval for the transfer, but then that process was unduly delayed by Immigration New Zealand. Ms Li is not responsible for those delays.

[52] Ms Li should have advised the complainant to invest not later than January 2017, but I do not know what would be a fair rate of return from then nor why the complainant bases his claim on a fund of \$1.62M. He was not required to invest such a sum for his residence application and had actually invested about \$322,000 in acceptable investments. Additionally, the foreign currency exchange losses would appear to be too remote. These are not matters appropriately determined in the context of disciplinary proceedings.

[53] I decline to award any sum for lost investment income. The complainant could conceivably file a breach of contract action in the District Court if he wishes to pursue this.

Items 2, 3 – fees to Ms Li for residence

[54] The complainant says he paid Ms Li \$6,000 for approval in principle, but Ms Li produces invoices showing only \$4,505 (which she accepts was paid). In any event, he cannot recover the \$10,585 sought (professional fees plus Immigration New Zealand fees) as the approval in principle application was successful (and indeed, residence based on it was eventually granted via the IPT appeal). The complainant was not

charged the further fee for residence as Ms Li failed to achieve that for him. It cannot be said that the complainant wasted his money on paying Ms Li's fee for approval in principle, or that of Immigration New Zealand.

Items 4 to 7, 12 to 14 – remedial action

[55] These appear to be various fees for advice as to what to do once the complainant was told by the immigration officer on 24 August 2017 that he had missed the deadline, and then the remedial action undertaken (communications with Immigration New Zealand, unsuccessfully negotiating a settlement with Ms Li, an appeal to the IPT and visitor visas). The complainant seems to have instructed another immigration adviser immediately, then a solicitor (who may have done no more than formally instruct the barrister), resulting in a barrister representing him on an appeal to the IPT.

[56] The total fees are \$25,975 (including \$800 in visitor visa fees), plus an airfare of \$316. I agree that these expenses arise from Ms Li's negligence, but there is duplication between immigration advisers, a solicitor and a barrister. The immigration adviser appears to have been used as a translator/interpreter, which may be an expensive use of his or her time. The total is high. I award \$16,000, which I consider to be reasonable for an appeal to the IPT (on the papers) and the other work.

Items 8 to 11, 15 – complaint against Ms Li

[57] The total sought is \$12,681.60. These are the legal fees and travel expenses arising from the complaint to the Authority and an airfare to attend the hearing in the Tribunal.¹⁰ To the extent the claim relates to the Tribunal's process, I doubt it is recoverable, since the Act does not make any provision for the award of costs. To the extent the claim relates to the Authority's process, I accept it is *prima facie* recoverable as compensation in circumstances where a complaint has been found to be justified.

[58] However, I must determine a total amount for compensation which is reasonable. The complainant is to be awarded \$18,500 in compensation, combining what may be considered special and general damages (the latter is dealt with shortly). Having regard to the one-off nature of Ms Li's negligence, the avoidance of serious consequences for the complainant through the intervention of other professionals, her early acceptance of a mistake, the modest size of her fee, the recent reduction in her income due to the current pandemic and the amount of the financial penalty, I assess \$18,500 as the total

¹⁰ There is also an additional \$110.70 for the complainant's accommodation in Auckland for the hearing, which was included in item 16.

amount of compensation which is reasonable. I therefore decline to award any further sum for expenses associated with the complaint to the Authority.

Item 16 – time of complainant and wife

[59] It is doubtful that the Tribunal has jurisdiction to award compensation for time spent by a complainant and his wife (who was included in the residence application) on remedial action and engaged in preparing a complaint before the Authority and then the Tribunal. However, this appears to be more in the nature of a claim for lost income, as it is alleged that the couple's loss of employment and hence income was caused by Ms Li's unprofessional conduct.

[60] The complainant and his wife appear to have resigned early in the immigration process and moved to New Zealand in anticipation of residence. This appears to have occurred before Ms Li's negligent act. They were then faced with Immigration New Zealand's delays which were not Ms Li's fault. I do not know when the complainant and/or his wife resumed employment or business of some nature, nor what steps were taken to obtain employment. He says it was difficult to find employment as their residence visas were declined, which I accept. However, even if they could show they were unable to earn an income for a period as a result of Ms Li's wrongful conduct, I would not award any more compensation than that awarded already.

Compensation for stress and anxiety

[61] In addition to specific losses, a wronged client can be awarded compensation for the disruption and distress caused by an adviser's defective work.¹¹ This is the nature of general damages. The complainant does not expressly seek such an award, but he does state in his submission of 7 September 2020 that he and his wife have been living in constant anxiety and mental stress since the application was declined in 2017. They had started a new life in New Zealand in anticipation of residence. As they were not sure their appeal would be successful, they had considered selling their house and moving back to China. Their life was in limbo. The nightmare had lasted several years.

[62] Mr Laurent accepts that the Tribunal could award \$1,000 – \$2,000 for distress.

[63] I acknowledge that the decline of their residence application would have been very stressful for the complainant and his wife, given that they appeared to be eligible for residence and could have invested their funds in time. I consider that Ms Li should pay some recompense for delayed residence. With residence comes the ability to settle and

¹¹ *Unnikrishnan v Goldsmith* [2017] NZIACDT 22 at [30]–[31], *TI(G)M v Hanning* [2020] NZIACDT 11 at [45].

make a new home. I note though that the period between the decline of their application (10 October 2017) and the grant of residence (2 August 2018) was less than one year. Their “nightmare” may have lasted several years but such a prolonged period of stress cannot be attributed to Ms Li.

[64] The Tribunal awards only modest sums under this head. I award \$2,500.

Conclusion on compensation

[65] The total amount awarded for compensation is \$18,500, an amount which I regard as reasonable. It is not the complainant’s full loss or expenses arising out of Ms Li’s negligence, but it is a contribution which is reasonable for Ms Li to pay.

OUTCOME

[66] Ms Li is:

- (1) cautioned;
- (2) ordered to immediately pay to the Registrar \$2,000; and
- (3) ordered to immediately pay to the complainant the sum of \$18,500.

ORDER FOR SUPPRESSION

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

[68] There is no public interest in knowing the name of Ms Li’s client, the complainant.

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

D J Plunkett
Chair

¹² Immigration Advisers Licensing Act 2007, s 50A.

Schedule – complainant’s claimed losses and expenses:

No.	Description	Amount
1	Potential investment gain if the investment fund was invested timely	\$108,500.00
2	Service fee paid to Ms Li	\$6,000.00
3	Investor 2 resident visa application fee etc.	\$4,585.00
4	Service fee paid to HY Immigration for information request, review and contacting INZ	\$3,000.00
	Service fee paid to HY Immigration for contacting INZ, liaising with lawyer, assisting communication with lawyer	\$2,000.00
	Service fee paid to HY Immigration for the complainant’s visitor visa	\$400.00
	Service fee paid to HY Immigration for the complainant’s wife’s visitor visa	\$400.00
5	Fees for consulting Peter Moses, barrister	\$575.00
6	Air ticket from Queenstown to Auckland to meet Peter Moses, barrister	\$316.00
7	Legal service fee paid to Peter Moses, barrister, for appealing to IPT	\$15,082.61
8	Legal consultation fee paid to Prestige Law	\$1,150.00
	Legal consultation fee paid to Prestige Law	\$575.00
9	Air ticket from Queenstown to Auckland to consult Prestige Law	\$563.00
10	Legal fee paid to Prestige Law for making complaint against Ms Li	\$6,900.00
11	Legal fee paid to Prestige Law for making complaint against Ms Li	\$2,900.00
12	Legal fee paid to Martelli McKegg	\$610.00
13	Legal service fee paid to Peter Moses, barrister, for appealing to IPT	\$2,777.39
14	Service fee paid to HY Immigration for assisting communication with Peter Moses	\$1,130.00
15	Air ticket from Queenstown to Auckland to attend hearing	\$593.60
16	Time and cost for complainant and his wife to collect and copy documents, arrange translation and notarisation, and for expenses on taxis and accommodation in Auckland.	\$24,000.00
		\$182,057.60