

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 43

Reference No: IACDT 023/19

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **KX**
Complainant

AND **YAN RYAN JI**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 5 October 2020

REPRESENTATION:

Registrar: Self-represented
Complainant: J McLeod, counsel
Adviser: Self-represented

PRELIMINARY

[1] Mr Yan Ryan Ji, the adviser, was instructed by KX, the complainant, to obtain a work visa. He duly filed the application, but did not tell her that it was declined. He then filed two requests on her behalf for discretionary visas, without instructions. Nor did he inform the complainant they were unsuccessful. When she enquired about progress of the initial work visa application, he would either not reply or tell her Immigration New Zealand had made no decision.

[2] The complainant made a complaint to the Immigration Advisers Authority (the Authority). The Registrar of Immigration Advisers (the Registrar) has referred the complaint to the Tribunal. Mr Ji's conduct is alleged to be negligent and also dishonest or misleading, grounds for complaint under the Immigration Advisers Licensing Act 2007 (the Act). He is also alleged to have breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] Mr Ji has chosen not to explain his conduct to either the Authority or the Tribunal. The essential issue to consider is whether he has been dishonest.

BACKGROUND

[4] Mr Ji is a licensed immigration adviser and partner in NZ Immigration Consulting, Auckland.

[5] The complainant, a national of China, engaged Mr Ji to apply for a work visa based on her partnership with a New Zealand resident. The complainant says she signed a services agreement with Mr Ji on 15 November 2017 (the copy agreement produced to the Tribunal is unsigned and undated). The agreement provided for the preparation of a work visa under the partnership category. No fee is specified. The work would be undertaken by Mr Ji and a named provisionally licensed adviser.

[6] On 17 November 2017, Mr Ji filed with Immigration New Zealand a work visa application for the complainant.

[7] Immigration New Zealand sent a letter to Mr Ji on 27 November 2017 advising that the complainant did not appear to meet the relevant immigration instructions due to the limited evidence that she and her partner were living together in a genuine and stable relationship at the same address. She was invited to provide additional evidence.

[8] Mr Ji took instructions from the complainant and responded with a lengthy letter to Immigration New Zealand on 4 December 2017, with supporting documents which included a statutory declaration from the complainant's partner.

Immigration New Zealand decline work visa

[9] On 7 December 2017, Immigration New Zealand declined the work visa application, as it was not satisfied the partnership met the immigration criteria. The complainant had not demonstrated a strong degree of financial dependence, common ownership, significant joint commitment to a shared life together and shared responsibilities in maintaining the household.

[10] According to the complainant, Mr Ji did not tell her of the decline and did not obtain her instructions for the remedial action he subsequently unsuccessfully undertook. It is further alleged, based on text messages between them, that the complainant continually sought updates from Mr Ji but he either did not reply or replied telling her that Immigration New Zealand had not responded or that more information was being provided to the agency.

First s 61 request

[11] On 11 December 2017, Mr Ji lodged a s 61 request for a visa for the complainant, as her interim visa (granted pending the outcome of the work visa application) had expired and she was in New Zealand unlawfully.¹

[12] The complainant asked Mr Ji on 14 December 2017 about the progress of her application. He did not reply.

[13] Immigration New Zealand asked Mr Ji on 15 December 2017 for an authority to act on behalf of the complainant in respect of the s 61 request. There is no evidence he provided one.

[14] The s 61 request was refused by Immigration New Zealand on 5 January 2018. No reason was given, nor was any required to be given.

[15] On the same day, the complainant sent Mr Ji a message stating he had not responded for a long time and asking whether he had any opinion. He replied that day saying "no", but said he would call later. Three days later, Mr Ji sent another message

¹ Discretionary visa issued pursuant to s 61 of the Immigration Act 2009.

saying he would call her in the afternoon. She sent reminders to him during the course of the day but he did not call.

[16] On 9 January 2018, Mr Ji sent the complainant a message stating that Immigration New Zealand could not guarantee that "it" could be handled before 11 January. He asked for a bank statement. They exchanged information about the rescheduling of her ticket back to China. Later that day, the complainant asked him what the immigration officer had said when he rang the officer. He did not reply.

Second s 61 request

[17] A second s 61 request to Immigration New Zealand for a visa was made by Mr Ji on 10 January 2018.

[18] On the same day, the complainant sent a bank statement to Mr Ji. He replied that he could not open it. Then on 16 and 19 January 2018, she asked him why he had not responded and whether he could see her message. He replied on 19 January to say that the agency had not sent a reply but he would call them the following Monday. She asked him on 22 and 23 January whether he had called and why he was not replying to her. On 23 January, he said Immigration New Zealand had not done it well and she needed to wait. He knew she was in a hurry. He would ask the agency about the progress of her application the next day.

[19] The second s 61 request was refused on 5 February 2018. No reason was given.

[20] Mr Ji told the complainant on the same day that the officers were all on holiday. He would enquire about progress that day. She then asked him on 8, 9, 26 and 27 February 2018 (multiple times on some days) what the officer had said. He gave no substantive reply.

[21] On 5 March 2018, the complainant informed Mr Ji that she was going to his office. He asked her what time. It is not known whether they met.

[22] The complainant asked Mr Ji again on 20 March 2018 what Immigration New Zealand had said. He replied that he would hand over her materials to the agency the following week and that there had been no progress. She then asked for it to be done that week. He agreed. She asked him on 21 March why he did not reply to her and also for a copy of his letters to Immigration New Zealand. He responded to say he would hand over the materials to the agency that day or the next. The agency had not replied because it was under review. Then on 29 March, Mr Ji told the complainant that the case was still awaiting review.

[23] Mr Ji exchanged messages with the complainant in May and June 2018, but the context is not apparent to the Tribunal.

[24] The complainant asked Mr Ji on 12 and 18 July 2018 whether there was any progress. He replied on 18 July to say there was none. She asked him whether he could contact the officer directly and told him to reply to her on time. He eventually told her he would contact her the following day. She asked him again on 24 July and he said she should wait another day. He did not reply to her messages on 25 July.

[25] In reply to the complainant's enquiry on 26 July 2018, Mr Ji said Immigration New Zealand had responded but effectively said nothing. She should wait. He told her they were investigating her boyfriend. She asked why but he did not respond to her. Mr Ji did not reply to her many enquiries on 27 July.

[26] On 30 July 2018, the complainant again asked Mr Ji why they were investigating her boyfriend. He said they might be investigating whether he had a criminal record, adding that the officer had said they would reply that week. She then asked him if the chance of refusal was great. He replied that day to say he did not know. She asked if the officers would telephone or visit them at home. He said they would not.

[27] Mr Ji did not reply to the complainant's messages on 8, 9, 10, 13 August, 5 and 8 October 2018. On 11 October, he told her he was a little busy. He did not reply on 12 October. On 9 November, the complainant pointed out that the matter had been "handled for a year" and asked him to consult the agency as soon as possible that day. He appears to have met her at a café on 4 December 2018, but it is not known what he said.

[28] In a message on 11 January 2019, the complainant again referred to a year having passed and asked him to contact Immigration New Zealand. He replied saying he had seen her material and wanted to know whether there was more. She responded saying letters and photos had been sent to him. He asked her to give him the materials so he could handle them quickly. On the 16th, she asked to see him. He agreed. It is not known what he said.

[29] The complainant and Mr Ji met again on 4 February 2019. She says Mr Ji asked her to provide further updated relationship evidence for filing with the agency. Once again, she asked him on 15 February whether he had submitted the file. He replied that he had not. There was an exchange concerning the use of a joint bank account. He failed to reply to her messages on 1 and 2 March 2019.

Draft statutory declaration disclosing decline of visa

[30] On 2 May 2019, the complainant went to Mr Ji's office, but it is not known if they met. On 3 May, he said he would give her information before he finished work. He then sent a message saying he had sent it to her. Mr Ji sent another message that evening to say he had sent her a draft statutory declaration.

[31] The statutory declaration, unseen by the Tribunal, was to be signed by the parents of the complainant's partner. It was in support of her visa application. The complainant read there, for the first time, that her visa application had been declined in December 2017.

[32] The complainant sent Mr Ji a message on 8 May 2019 asking whether she had been denied a visa or was waiting for approval. He replied asking her to wait a moment. She sent him seven more messages. He replied on 9 May stating that the visa had been refused and she was in an expired state. After the refusal, he had submitted a second application but it was not approved. He was now working on a third application.

[33] The complainant then asked Mr Ji to advise her as to when the two refusals were notified. He did not reply. She later asked him to tell her when the last request was submitted and when it was refused. He said he would get it for her. He told her on 10 May 2019 he would email it to her right away. It is not known whether he did. She asked him to advise the maximum number of refusals. He said any number of applications could be submitted. He said she could stay to continue applying and if she left, it would not be easy to come back.

[34] They exchanged messages through May 2019. On 14 May, the complainant asked Mr Ji to let her know if he had time to help her. While it did not matter to him and he did not care, she had her youth, contribution, time, hope and family's expectation. She had waited for two years. Mr Ji eventually responded, telling her on 15 May that he was writing a framework for her support letters. The complainant presumably drafted the letters using the framework and sent them to Mr Ji as drafts on 20 May. They continued to exchange intermittent messages until 23 May.

[35] The complainant then instructed her present counsel. Mr McLeod wrote to Mr Ji on 2 August 2019, setting out details of a complaint against him, pursuant to Mr Ji's own client complaints procedure. There was no substantive response from Mr Ji.

COMPLAINT

[36] On 20 August 2019, the complainant made a complaint to the Authority, through her counsel. It was alleged that Mr Ji had:

- (1) failed to inform the complainant until 9 May 2019 that her work visa application had been declined on 7 December 2017;
- (2) filed two s 61 requests without her knowledge or approval;
- (3) concealed these declines from her; and
- (4) misrepresented that the application was being processed by Immigration New Zealand by requesting further supporting evidence from her.

[37] According to counsel, who had seen Immigration New Zealand's internal notes, there was no evidence that Mr Ji communicated with the agency after the decline on 5 February 2018. Mr Ji had been requested by the agency on 15 December 2017 to provide an authority to act in respect of the first s 61 request, but he did not do so.

[38] Despite requests from counsel, Mr Ji had provided no engagement agreement between him and the complainant, or any record of communications between them.

[39] The complainant required:

- (1) the complaint to be referred to the Tribunal;
- (2) compensation for legal costs in pursuing the complaint;
- (3) a refund of the fee of \$2,413; and
- (4) an acknowledgement from Mr Ji of his errors.

[40] A short statement from the complainant to the Authority (16 August 2019) was provided. She said that until 9 May 2019 she did not know that her work visa had been declined on 7 December 2017. She came to suspect it the day before when Mr Ji emailed to her a draft statutory declaration. He had earlier told her the declaration was necessary to support her visa application. The complainant confirmed that she never authorised Mr Ji to file the two s 61 requests. Indeed, she did not know about them until May 2019. During her communications with him, he would tell her that he was waiting to hear from Immigration New Zealand and that he required more evidence.

[41] The Authority wrote to Mr Ji on 4 November 2019 formally advising him of the details of the complaint and inviting his explanation.

[42] Mr Ji sent an email to the Authority's investigator on 29 November 2019 stating that he had "nothing to add in terms of a response".

Complaint referred to Tribunal

[43] The Registrar referred the complaint to the Tribunal on 9 December 2019 alleging that Mr Ji's conduct satisfied certain statutory grounds of complaint and breached the specified obligations in the Code as follows:

1. Negligence, or alternatively –
 - 1.1 Failing to exercise due care, in breach of cl 1;
 - 1.2 Failing to personally engage with the complainant and obtain her instructions, in breach of cl 2(e);
 - 1.3 Failing to make on-going timely updates, in breach of cl 26(b).
2. Dishonest or misleading behaviour, or alternatively failing to be honest and professional in the services provided to the complainant, in breach of cl 1.

JURISDICTION AND PROCEDURE

[44] 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.

[45] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.²

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

[46] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.³ It has been established to deal relatively summarily with complaints referred to it.⁴

[47] 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.⁵

[48] The sanctions that may be imposed by the Tribunal are set out in the Act.⁶ The focus of professional disciplinary proceedings is not punishment but the protection of the public.⁷

[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.⁸

[50] The Tribunal has received from the Registrar the statement of complaint (9 December 2019), with paginated supporting documents.

[51] There is no statement of reply or submissions from the complainant.

[52] Nor did Mr Ji file a statement of reply or submissions. The statement of complaint and supporting materials had been sent to him by email on 11 December 2019 at the address under which he is currently licensed. He was invited to file a statement of reply if he did not agree with the complaint. As Mr Ji did not do so, he was reminded by email on 2 March 2020 that he had not filed a statement of reply and was advised that the matter would be referred to the Tribunal for a decision. There was no response.

ASSESSMENT

[53] 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.

Client Care

2. A licensed immigration adviser must:

³ Section 49(3) & (4).

⁴ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁵ Section 50.

⁶ Section 51(1).

⁷ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

⁸ *Z v Dental Complaints Assessment Committee*, above n 7, at [97], [101]–[102] & [112].

...

- e. obtain and carry out the informed lawful instructions of the client, and

...

File management

- 26. A licensed immigration adviser must:

...

- b. confirm in writing to the client when applications have been lodged, and make on-going timely updates

...

[54] I will assess the second head of complaint first, as it will be apparent that I find Mr Ji's misconduct to be dishonest, rather than negligent. In the face of dishonesty allegations notified to him by both the Authority and the Tribunal, Mr Ji has been silent. He has chosen not to provide an explanation to either body. The Tribunal is entitled to draw an adverse inference from his refusal to give an explanation for his conduct.⁹

- 2. *Dishonest or misleading behaviour, or alternatively failing to be honest and professional in the services provided to the complainant, in breach of cl 1.*

[55] The complainant's work visa was declined on 7 December 2017 and two s 61 requests were then made, which were declined on 5 January and 5 February 2018. The Registrar alleges that Mr Ji was dishonest or misleading in omitting to tell the complainant any of this. Furthermore, his responses to the complainant's numerous requests to be updated were dishonest or misleading:

- 1. Advising the complainant on 19 January 2018 that Immigration New Zealand had not replied;
- 2. Advising her on 23 January 2018 that the agency had not done it well and she needed to wait;
- 3. Advising her on 5 February 2018 that the officers were "all" on holiday and it should be completed that week;

⁹ *Gill v Singh* [2016] NZIACDT 36 at [33]–[36], relying on *Bowen-James v Walton* [1991] NSWCA 29 at 14. There is some qualification of this principle as the privilege against self-incrimination is available in this Tribunal – see Immigration Advisers Licensing Act 2007, cl 9 of the Schedule.

4. Advising her on 21 March 2018 that he would hand over the materials that day or the next day, and the agency had not replied as it was still reviewing the matter;
5. Advising her on 18 July 2018 that the agency had not replied;
6. Advising her on 26 July 2018 that the agency had effectively said nothing, that she should wait and he thought the agency was investigating her partner; and
7. Advising her on 30 July 2018 that the agency was investigating whether her partner had a criminal record and that the officer handling her case said there would be a reply that week.

[56] I find that none of Mr Ji's responses are honest, as the complainant's application had been declined in December 2017 which he knew. He does not assert that he did not know immediately of the decline. Mr Ji concealed not just the decline but also the later filing and decline of both s 61 requests. He did not inform the complainant of what had happened until May 2019, about 17 months after the visa application was declined.

[57] Mr Ji's explanation to the complainant on 5 February 2018 about all the officers being on holiday was fictitious. There is no evidence from him that he contacted Immigration New Zealand around this time, let alone was told that. He made up a story on 26 July and 30 July 2018 about a possible investigation of the complainant's partner. Again, he provides no evidence he was told that by any officer.

[58] Mr Ji falsely told the complainant that the agency had not responded or decided on 19 January, 21 and 29 March, 18 and 26 July 2018. He falsely told her on 30 July 2018 he did not know if the chance of refusal was great. Until May 2019, Mr Ji pretended that Immigration New Zealand had not made a decision on her visa application.

[59] On the balance of probabilities, noting the higher evidential standard for dishonesty allegations, I find that Mr Ji has been dishonest in his communications with the complainant concerning the status of her visa application. As part of this charade, he concealed two s 61 requests and their outcome. The statutory ground of complaint of dishonest or misleading behaviour is satisfied.

[60] Mr Ji's conduct also amounts to a breach of the obligation at cl 1 of the Code to be honest and professional. However, that alternative head of complaint duplicates the statutory ground and so will not add to the sanctions.

1. *Negligence, or alternatively –*

1.1 *Failing to exercise due care, in breach of cl 1;*

1.2 *Failing to personally engage with the complainant and obtain her instructions, in breach of cl 2(e);*

1.3 *Failing to make on-going timely updates, in breach of cl 26(b).*

[61] As found above, Mr Ji's conduct was deliberately deceptive. It was dishonest. I do not see it in terms of negligence or a lack of due care. I dismiss the complaint of negligence and the alternative lack of due care breach of cl 1 of the Code.

[62] As for the alleged breach of cl 2(e) of the Code, I accept that Mr Ji's conduct amounts to a failure to engage with the complainant and take her instructions. Once the visa was declined, he should have immediately told her, advised her as to the next step (which may well have been a s 61 request) so she could be "informed", then he should have taken her instructions and carried them out. The same process was required in respect of any s 61 request or other application and its outcome. He failed to do any of that.

[63] Mr Ji's conduct is therefore a breach of cl 2(e) of the Code. However, there will be no additional sanction, as this breach is based on the same misconduct which I have found to be dishonest. Mr Ji will be sanctioned for the dishonesty, not the concomitant breach of the Code.

[64] It is equally clear that Mr Ji's failure to update the complainant on the outcome of the visa application and the lodgement and outcome of the s 61 requests are breaches of cl 26(b) of the Code. I will uphold the breach, but there will be no additional sanction as the same conduct will be sanctioned under the dishonesty complaint.

OUTCOME

[65] Mr Ji's behaviour has been dishonest, a statutory ground of complaint. He concealed from the complainant the decline of her work visa application, the subsequent s 61 requests and their outcome, for up to 17 months. He also breached cls 1, 2(e) and 26(b) of the Code.

SUBMISSIONS ON SANCTIONS

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

[67] A timetable is set out below. Any request that Mr Ji undertake training should specify the precise course suggested. Any requests 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.

[68] In determining the sanctions, the Tribunal will take into account the previous two complaints upheld against Mr Ji.¹⁰ Given his poor disciplinary record and his dishonesty, the Tribunal will consider whether to remove him from the profession or to deprive him of a full licence. The parties are asked to address this. Mr Ji is urged to seek legal advice, or at least engage with the Tribunal even at this late stage of the disciplinary process.

Timetable

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

- (1) The Registrar, the complainant and Mr Ji are to make submissions by **27 October 2020**.
- (2) The Registrar, the complainant and Mr Ji may reply to submissions of any other party by **10 November 2020**.

ORDER FOR SUPPRESSION

[70] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.¹¹

[71] There is no public interest in knowing the name of Mr Ji's client.

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

D J Plunkett
Chair

¹⁰ *XN v Ji* [2019] NZIACDT 49 & 67, *INZ (Calder) v Ji* [2019] NZIACDT 50 & 68.

¹¹ Immigration Advisers Licensing Act 2007, s 50A.