

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 47

Reference No: IACDT 025/19

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **IK**
Complainant

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

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 3 November 2020**

REPRESENTATION:

Registrar: Self-represented

Complainant: No appearance

Adviser: Self-represented

INTRODUCTION

[1] Ms Ying Tian (aka Tina Qin), the adviser, acted for IK, the complainant, who sought a student visa. The application was unsuccessful. There were numerous failures by Ms Tian in her relationship with the complainant and her record keeping.

[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 23 September 2020 in *IK 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 is a licensed immigration adviser and director of Abstract Solution Ltd, of Auckland.

[6] The complainant, a national of China, engaged Ms Tian in about February 2017 to seek a student visa for him. He was then in New Zealand on a visitor visa.

[7] On 7 April 2017, Ms Tian lodged a student visa application for the complainant. Immigration New Zealand wrote to Ms Tian on 11 May 2017 declining the application. It was not satisfied the complainant had sufficient funds. The letter stated that his interim visa had expired, he was unlawfully in New Zealand and liable for deportation.

[8] As Ms Tian did not inform the complainant of the outcome of the application or its consequences in terms of his immigration status, on numerous occasions he texted or telephoned her asking if there was any news. She would give such replies as; she could not find any person, she would let him know shortly, she would make enquiries, her cellphone had trouble, she would tell him that afternoon, she would call him later, her family member was ill, or nobody answered her call. The dates of these communications are not clear.

[9] On 12 May 2017, Ms Tian lodged a request for a discretionary student visa for the complainant under s 61 of the Immigration Act 2009. It was declined by Immigration New Zealand on 6 June 2017 in a letter sent to Ms Tian. No reason was given, nor was

¹ *IK v Tian* [2020] NZIACDT 39.

one required to be given. The letter advised that the complainant was unlawfully in New Zealand and had to leave, otherwise he was liable for deportation.

[10] As Ms Tian did not inform the complainant of the outcome of the application or its immigration consequences, he continued to text or telephone her seeking news of the applications. She continued her practice of claiming not to know.

[11] The complainant engaged his former counsel, Ms Mitchell, in January 2019. She contacted Immigration New Zealand and was informed of the decline of the complainant's visa applications and his unlawful status. Counsel contacted Ms Tian on multiple occasions requesting evidence that the complainant had been informed of the decline of the various visa applications, but she did not provide any evidence.

Decision of the Tribunal

[12] The Tribunal found that Ms Tian had failed to:

- (1) provide the complainant with a written agreement covering the student or s 61 visa applications;
- (2) provide the complainant with invoices for fees and disbursements;
- (3) provide the complainant with receipts for cash payments;
- (4) confirm in writing to the complainant when applications were lodged and to make ongoing timely updates; and
- (5) maintain a well-managed filing system including copies of all written communications (including advice to the complainant) and records of material oral communications with the complainant (including advice to him).

[13] The Tribunal further found that Ms Tian gave vague and evasive answers to queries from the complainant as to the status of his visa application. It concluded that Ms Tian had breached cls 18(a), 22, 23, 26(a)(iii), (b) and (d) of the Code of Conduct 2014 (the Code).

[14] In the decision, Ms Tian was informed that the sanctions imposed would take into account two similar complaints against her upheld by the Tribunal. Furthermore, the Tribunal would consider removing her from the profession and/or preventing her from holding a full licence for a period.

SUBMISSIONS

Submissions from the Registrar

[15] In his submissions of 14 October 2020, the Registrar notes that Ms Tian has been subject to sanctions imposed in two previous cases for conduct similar to that arising in this case. While the Tribunal required her to undertake training through Toi-Ohomai Institute at the next available intake, she did not complete the required training. However, Ms Tian had enrolled recently in the Graduate Diploma in New Zealand Immigration Advice, to start on 22 February 2021 and end on 5 November 2021.

[16] The Registrar further noted that Ms Tian had not admitted any wrongdoing nor shown any remorse.

[17] It is submitted by the Registrar that, given this is the third case where Ms Tian had engaged in similar conduct to the detriment of her clients, it might not be appropriate for her to continue in the profession until she has undertaken the required training. This would assist her to address her recurring unprofessional conduct. While acknowledging that depriving a person of their livelihood was a sanction of last resort, the public should be protected from an adviser with a repetitive pattern of unprofessional conduct who did not admit any wrongdoing, provide an explanation or show remorse. Ms Tian should be required to undertake training and upskill in order to ensure that this type of conduct did not continue.

[18] The Registrar submits that Ms Tian should:

- (1) be ordered to complete the graduate diploma;
- (2) have her licence cancelled;
- (3) be prohibited from reapplying for a licence until completion of the graduate diploma; and
- (4) be ordered to pay a penalty in the vicinity of \$8,000.

Submissions from the complainant

[19] There are no submissions from the complainant.

Submissions from Ms Tian

[20] In her email to the Tribunal on 19 October 2020, Ms Tian accepts that she did not do the job in a professional way. She points out that she was a migrant in this country and had spent 20 years operating a business to support migration to New Zealand. She had helped in excess of 10,000 applicants secure visas which had been beneficial for the people she had worked with and also her employees. She had worked hard to support the growth of migration in areas where there was a shortage. This had supported growth to the economy, particularly exports. Her own employees and their families had benefited by having stable employment which had created viable benefits.

[21] Ms Tian says she has invested much into upskilling, but this had been difficult when combining fulltime work and study. She was dedicated to further opportunities through education and would shortly complete the graduate diploma. Her intention was to complete upskilling in 2021. The delay was due to her current study in art history.

[22] According to Ms Tian, the COVID-19 restrictions had been difficult for everyone so moving forward she would be grateful to hold her licence until completing the immigration advice diploma to enable her to continue operations while she upskilled. Ms Tian begged to be able to keep her licence for another six months so she could prove her capability.

JURISDICTION

[23] 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.

² Immigration Advisers Licensing Act 2007.

[24] 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.

[25] 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.

[26] 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.

³ *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.

[27] 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

[28] 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

[29] 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.

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].

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].

DISCUSSION

[30] This is the third time that the Tribunal has upheld a complaint against Ms Tian for similar unprofessional conduct.

[31] In *Xu v Tian*,⁷ decisions issued by the Tribunal on 26 October and 10 December 2018, Ms Tian was found to have been negligent and/or to have breached the Code in the following respects:

- (1) twice failing to inform the client of the decline of a work visa;
- (2) failing to inform the client of the grant of a visitor's visa;
- (3) failing to inform the client of Immigration New Zealand's notification that she was unlawfully in New Zealand;
- (4) failing to obtain the client's express instructions to lodge an application pursuant to a statutory discretion; and
- (5) failing to have a written record of telephone conversations with the client on 9 July and 7 August 2015 and of meetings on 28 April and 12 August 2015.

[32] Ms Tian was found to have been negligent and to have breached cl 26(a)(iii) of the Code. The conduct, the subject of that complaint, was between about 10 April and 12 August 2015. Ms Tian was censured and ordered to enrol and complete the New Zealand Immigration Advice Refresher Course provided by Toi-Ohomai Institute of Technology at its next intake (which was then scheduled for February 2019).

[33] In *Y(O)R v Tian*,⁸ decisions issued on 8 June and 7 August 2020, Ms Tian was found to have breached the Code in the following respects:

- (1) failed to disclose in writing a conflict of interest (commissions from schools) and failed to obtain the client's written consent to continue representing her and her family;
- (2) failed to provide the client with written client agreements;
- (3) failed to provide the client with invoices for fees and disbursements;
- (4) failed to confirm in writing to the complainant when applications were lodged and to make ongoing timely updates; and

⁷ *Xu v Tian* [2018] NZIACDT 42 & 49.

⁸ *Y(O)R v Tian* [2020] NZIACDT 23 & 36.

- (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 client in writing.

[34] Ms Tian was found to have breached cls 5, 6, 18(a), 22, 26(a)(iii), (b), (c) and (d) of the Code. The unprofessional conduct was between August 2015 and April 2017.

[35] The Tribunal noted in the sanctions decision in the *Y(O)R* complaint that Ms Tian appeared to have learned nothing from the previous complaint which had been made to the Authority on about 12 August 2015 and lodged with the Tribunal on 17 December 2015. The lodging of the complaint had not led to any change in her unprofessional practices. However, it was also noted that the Tribunal had not issued its decision upholding the first complaint until 26 October 2018, which was well after the events at issue in the second complaint.

[36] In setting sanctions in *Y(O)R*, the Tribunal censured Ms Tian, directed her to enrol and complete the LAWS7015 (Professional Practice) paper from Toi-Ohomai at its next available intake and ordered her to immediately pay to the Registrar a financial penalty of \$3,500.

[37] The unprofessional conduct at issue in this complaint, the third upheld against Ms Tian, occurred between about February or April 2017 and about January 2019. The same point made in the *Y(O)R* sanctions decision can be made in relation to this third complaint. Neither the first or second complaints made any impression on Ms Tian. It will be recalled that the first complaint was made to the Authority in August 2015 and the second complaint was made in May 2018. Yet her approach to communications with the complainant in the third complaint and her record-keeping remained the same.

[38] Ms Tian has a casual, if not cavalier, attitude to her clients. This is not just about a failure to keep clients informed. In respect of the complainant, she continually misled him about the status of his visa application. She made a s 61 application to Immigration New Zealand without his agreement or even knowledge. In the *Xu* complaint, Ms Tian had also filed a s 61 application without instructions. In addition, her approach to file management is generally poor.

[39] These are not unimportant aspects of a professional service. Communications and record-keeping are not just bureaucratic paper-shuffling. Indeed, it is essential that there are written agreements with clients formally identifying and instructing each application to be made, together with a record of advice given and timely, accurate communications. The latter is particularly important where a client's immigration status risks becoming unlawful, as it was with the complainant. It is self-evident that the

complainant should have been promptly informed of his status and the consequences in terms of his liability for deportation. Ms Tian failed to inform him over a prolonged period of more than 18 months. He did not become aware of the decline of his visa and his unlawful status until his then lawyer contacted Immigration New Zealand directly. Ms Tian never told him. No explanation has been offered for this conduct.

Caution or censure

[40] Ms Tian is, again, censured. A caution would plainly be inadequate and of no utility, given the previous misconduct upheld.

Training

[41] There is a pattern of unprofessional conduct by Ms Tian. She says she has invested much in upskilling, but provides no details. It is clear that Ms Tian requires upskilling in a wide range of requirements for professional practice. She agrees. She will be directed to undertake the graduate diploma in which she has already enrolled.

Suspension, cancellation and/or prohibition

[42] The Registrar seeks the cancellation of Ms Tian's licence, together with an order prohibiting her from reapplying for a licence until she has completed the graduate diploma.

[43] Ms Tian has held a full licence since May 2009. Her current licence expired on 30 April 2019, but it formally remains "current" while a renewal application is being processed.

[44] Ms Tian, in what could be described as a very brief and superficial submission on sanctions, asks to retain her licence until she has completed the diploma. She points out that she is an immigrant herself who has helped a large number of migrants secure visas, which has been beneficial for them, her employees and the New Zealand economy. I have no doubt Ms Tian has helped thousands of migrants, though she has exhibited an unprofessional approach in recent years to a number of them. I acknowledge her commitment to her employees, though she does not say how many she currently has or how long they have been with her.

[45] Ms Tian's response to this complaint is a significant factor in assessing sanctions. She ignored invitations from the Authority and the Tribunal to participate in the disciplinary process, until sending an unduly brief submission to the Tribunal on

sanctions, unsupported by any affidavit, statement, financial or other documentary evidence.

[46] While Ms Tian accepts not doing her job in a professional way and hence her wrongdoing, she makes no apology or expresses any remorse. An apology to the complainant would have been appropriate. Her recognition of the need for further professional development is somewhat belated. She was directed in December 2018 to undertake further training, but ignored the direction. It was only after the Tribunal had upheld the third complaint that Ms Tian enrolled in a course, which the Tribunal acknowledges is actually more comprehensive than that directed on 7 August 2020. The priority of Ms Tian seems to be studying art history and not the needs of her migrant clients.

[47] The cancellation, or even suspension, of a licence is a serious step of last resort because it deprives the adviser of his or her income. A cancellation is even more serious because it potentially makes it difficult for the adviser to resume practice at a later date. This is because the Registrar has a discretion as to whether a cancelled licence can be reissued following any period of prohibition.⁹

[48] I find that the appropriate sanction here is to suspend Ms Tian from practice pending the retraining she critically needs. Ms Tian's pattern of misconduct requires the public to be protected by removing her from practice while she is retraining. But it is not such that there would be any reason to prevent her from holding a full licence, should she complete the training.

[49] Ms Tian has not sought a provisional licence as an alternative to cancellation or suspension of her full licence pending training, but I would not consider this a sufficient protection for the public. Ms Tian's attitude to her clients and to the disciplinary process is concerning. It would be difficult for a supervisor to police her compliance with the Code on every file. She also needs time to reflect on these matters, which the year-long diploma course will provide.

Financial penalty

[50] The Registrar seeks a penalty of \$8,000. It is observed that on 7 August 2020 in *Y(O)R*, a penalty of \$3,500 was imposed.

[51] Ms Tian provides no evidence as to her financial circumstances. In assessing a financial penalty, I will take into account the totality of the sanctions. The suspension of

⁹ Immigration Advisers Licensing Act 2007, ss 17(b), 19(1)(b).

Ms Tian's licence for about 13 months will presumably have a serious effect on her income. She provides no justification for waiving the penalty, but I find that a penalty in the order of \$8,000 would be harsh when combined with the suspension of her licence for what is a lengthy period. The penalty will therefore be set at the low level of \$3,000.

OUTCOME

[52] The sanctions are:

- (1) Ms Tian is censured;
- (2) Ms Tian is directed to complete the Graduate Diploma in New Zealand Immigration Advice from Toi-Ohomai Institute of Technology for which she has already enrolled;
- (3) The licence of Ms Tian is to be immediately suspended until she has successfully completed the graduate diploma. This is to be coupled with an order preventing her from reapplying for any licence until she has successfully completed the graduate diploma; and
- (4) Ms Tian is also directed to immediately pay to the Registrar a penalty of \$3,000.

ORDER FOR SUPPRESSION

[53] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.¹⁰

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

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

D J Plunkett
Chair

¹⁰ Immigration Advisers Licensing Act 2007, s 50A.