

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2020] NZIACDT 54

Reference No: IACDT 002/20

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

**BY** **THE REGISTRAR OF  
IMMIGRATION ADVISERS**  
Registrar

**BETWEEN** **DY**  
Complainant

**AND** **DAMON PARKER**  
Adviser

**SUBJECT TO SUPPRESSION ORDER**

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**DECISION**  
**Dated 21 December 2020**

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**REPRESENTATION:**

Registrar: Self-represented  
Complainant: Self-represented  
Adviser: P Moses, counsel

## **PRELIMINARY**

[1] Mr Damon Parker, the immigration adviser, acted for DY, the complainant, concerning an entrepreneur work visa application. It required the creation of a business plan. Mr Parker assigned this task to his accountant employee, Mr Anson Zhao, who was not then licensed as an immigration adviser. Mr Zhao also worked with the complainant to complete the relevant immigration application. Prior to the visa application being filed, the complainant terminated Mr Parker's instructions.

[2] The complainant made a complaint to the Immigration Advisers Authority (the Authority). It has been referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It is alleged that Mr Parker permitted Mr Zhao to perform work exclusively reserved under the law to a licensed adviser, thereby being negligent, a ground of complaint under the Immigration Advisers Licensing Act 2007 (the Act). Alternatively, it is alleged that Mr Parker has breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] The essential issues to consider are whether an immigration adviser can delegate the preparation of a business plan to an unlicensed person and, if so, what role should the adviser have in the creation of that plan.

## **BACKGROUND**

[4] Mr Parker is a licensed immigration adviser based in Auckland. He was at the relevant time a director of Swiftvisa Limited (Swiftvisa), but is now described as an employee.

[5] Mr Anson Zhao commenced work for Swiftvisa as an office administrator in 2016. As he has an accounting degree, he came to be involved in the preparation of business plans for clients seeking entrepreneur visas. Subsequent to the events giving rise to this complaint, Mr Zhao became a provisionally licensed immigration adviser (supervised by Mr Parker). He remains at Swiftvisa where he is a director.

[6] The complainant is a national of China, with a wife and son. He has many years of experience in the automotive industry.

[7] On about 20 February 2017, the complainant and his friend visited Swiftvisa's office for an informal discussion with Mr Parker about the complainant's prospects of obtaining an entrepreneur visa. Mr Zhao was present to interpret. The complainant planned to set up a business in the automotive repair and "rescue" (breakdown) industry. Mr Parker told him that Mr Zhao could assist with the preparation of a business proposal.

It was agreed that Mr Zhao would contact the complainant a few weeks later to see if he was interested. The complainant was given a list of documents and information that had to be provided in order to prepare a business plan. This was the only occasion Mr Parker personally met or communicated with the complainant.

[8] From about 12 April 2017, the complainant and another unlicensed employee of Swiftvisa, Ms Jessie Cheng, the wife of Mr Parker, exchanged texts and used voicemail to discuss the complainant's business plan. On about 20 April, Ms Cheng invited Mr Zhao to join the chat group. She explained to the complainant that Mr Zhao was responsible for entrepreneurial immigration.

[9] At about this time, Mr Zhao sent Swiftvisa's terms of engagement to the complainant.

[10] The complainant paid \$10,000 to Swiftvisa on about 21 April 2017.

[11] On 23 April 2017, the complainant entered into terms of engagement with Swiftvisa. Mr Parker signed as a director. The contract authorised Mr Parker to prepare and file an entrepreneur visa application, including a business plan. The fee was \$40,000 (excl. GST).

[12] Mr Zhao sent an email to the complainant on 24 April 2017 setting out "a generic document list" for an entrepreneur application. It was a lengthy list of the documents and other information that had to be provided and listing certain criteria to be satisfied.

[13] The complainant and his friend then worked with Mr Zhao on the business plan until August 2017. There were, for example, communications in June 2017 about services and technology being used in China that were proposed for the New Zealand business, as well as suppliers in New Zealand. Ms Cheng was copied into many of these communications, but not Mr Parker.

[14] Mr Zhao had a meeting with the complainant on 29 June 2017 to learn more details of the proposed business.

[15] On 27 July 2017, Mr Zhao sent the draft business plan to the complainant (24 pages in length).

[16] Following comments from the friend of the complainant, Mr Zhao sent an amended draft to the complainant on 4 August 2017.

[17] There were meetings between the complainant and Mr Zhao on 7 and 8 August 2017 to discuss the financial forecasts, how much needed to be invested and how that would be allocated across the business assets. Ms Cheng was present on 8 August. They advised the complainant that in order to fast-track the application, a minimum of \$500,000 had to be invested and three people employed. They also informed him that Immigration New Zealand took about 10 months to process an entrepreneur application.

[18] The draft proposal was sent by Mr Zhao to Mr Parker to check on 16 August 2017.<sup>1</sup>

[19] At about this time, Mr Zhao also completed an entrepreneur visa application form or forms.

[20] The complainant then instructed a new licensed immigration adviser, Mr Harris Gu.

[21] On 22 August 2017, Mr Gu terminated the complainant's contract with Swiftvisa. The application and associated business plan were not therefore filed with Immigration New Zealand.

## **COMPLAINT**

[22] On 16 September 2019, Mr Gu, on behalf of the complainant, made a complaint to the Authority against Mr Parker. It was alleged, amongst other things, that Mr Parker had charged \$10,000, yet the complainant had never met him, only his wife, Ms Cheng.

[23] The Authority formally notified Mr Parker of the details of the complaint on 19 February 2020 and requested his explanation.

### *Explanation from Mr Parker*

[24] On 3 March 2020, Mr Moses, counsel for Mr Parker, replied to the Authority.

[25] According to counsel, the key question was whether the preparation of a draft business plan for an entrepreneur visa application amounted to immigration advice, which could only be carried out by a licensed adviser. Mr Moses submitted that it was not immigration advice. It was only the briefing of the accountant who would prepare the plan, as well as the advice as to its suitability from an immigration perspective, that amounted to immigration advice. It was conceded that it would have been preferable if Mr Parker had informed Mr Zhao in writing of his directions and had also recorded the

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<sup>1</sup> Registrar's documents at 40.

division of responsibilities during the preparatory stages. This would have avoided any misunderstanding.

[26] Mr Parker briefed Mr Zhao in general about the criteria for business plans. Mr Zhao then prepared the plan for the complainant. It was accepted that during preparation of the plan from April to August 2017, Mr Parker had no direct contact with the complainant. Until the plan was written, there was little for him to do. Mr Parker was entitled to await the completion of the draft business plan before conferring with the complainant again. This did not occur as the complainant instructed Mr Gu.

[27] It was Mr Moses' experience that the preparation of the plan was usually contracted out to an accountant or business adviser, with the immigration adviser setting out the immigration criteria in the written brief. This does not mean that the accountant or business adviser provided unlicensed advice. That it was done in this instance in-house did not *per se* make it immigration advice. The key question was to ask whether it was the accountant or the immigration adviser who was responsible for ensuring that the plan met Immigration New Zealand's criteria. The touchstone for legality was whether the immigration adviser controlled the immigration process.

[28] For the purpose of preparing the business plan, Mr Zhao did not need to have any expertise in immigration criteria, as he could rely on the instructions of Mr Parker. A business plan concerned the financial viability of the business, requiring a different skill set from immigration advice.

#### *Statement from Mr Parker*

[29] A statement (3 March 2020) from Mr Parker was provided to the Authority. He said he explained to the complainant that the first stage of the process was to prepare a business plan, which would be done by Mr Zhao who had an accountancy qualification. Once it was drafted, he (Mr Parker) would meet the complainant to discuss filing the application. Any issue as to whether the plan satisfied Immigration New Zealand's criteria would be resolved then. It was intended that he would be responsible for the immigration work and Mr Zhao would be responsible for the business advisory work.

[30] Mr Parker said that at the time he was contemplating setting up the entrepreneur service, he was aware of other advisers who prepared business plans using external accountants. He then researched relevant decisions of this Tribunal and came to the conclusion that it was permissible to delegate the preparation of the plan to a suitably qualified in-house employee. Mr Parker subsequently discussed with Mr Zhao Immigration New Zealand's documentation for the business migration categories.

Mr Zhao was therefore aware of what Mr Parker needed to see in a business plan. He also explained to Mr Zhao that the latter was permitted to discuss only the business with the client. Mr Zhao was told he could not comment on immigration matters.

[31] In his statement, Mr Parker said that the complainant first visited Swiftvisa's office in February 2017 for an informal consultation. Mr Zhao was present. The scope of their work and fees were discussed. Mr Parker said he would have explored in general terms the complainant's eligibility under the business migration categories. He did not record these details at the time because he thought the complainant did not genuinely intend to go ahead. It was not a formal consultation and he did not offer any immigration advice. It ended with him (Mr Parker) asking Mr Zhao to follow up with the complainant later. As a result of the follow-up, Mr Zhao prepared a client agreement setting out the scope of work and fees as discussed at the first meeting.

[32] According to Mr Parker, the key to understanding what was going on here was that no visa application was filed. It was still at the preparatory stage. While he had not discussed with Mr Zhao what he needed to see in the complainant's draft plan, he had earlier identified the requirements in general. Mr Zhao did not rely on his own understanding of the immigration instructions to draft the plan, but on his (Mr Parker's) knowledge.

[33] Mr Zhao undertook a points assessment but it was never passed onto the complainant. That was Mr Parker's role. Mr Parker said he was not involved in the extensive discussions between the complainant and Mr Zhao concerning the business and that would have been artificial as he (Mr Parker) would not have added any value. He checked the draft in about July 2017 at the request of Mr Zhao and provided verbal feedback.<sup>2</sup>

[34] As for Mr Zhao's completion of the draft application form, Mr Parker said he (Mr Zhao) merely recorded the complainant's answers to the questions put to him.

[35] It had always been Mr Parker's intention to carefully review the plan and discuss the application with the complainant prior to filing it. They were close to finalising it at the time their engagement ended.

[36] Mr Parker advised that Swiftvisa no longer offered the service of preparing business plans, as they learned that such applications had a 95 per cent decline rate.

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<sup>2</sup> As corrected by Mr Moses in his email to the Tribunal on 2 July 2020.

[37] It had never been the business model of Swiftvisa to rely on unlicensed staff to do immigration work. This had happened though, as staff had crossed the line, despite his best efforts to avoid this. As a result of two earlier complaints against him, Mr Parker explained that he had tightened up on processes so that staff did not stray into the area of giving immigration advice.

[38] Mr Parker acknowledged that he could have avoided the Authority's concerns if he had informed Mr Zhao in writing at the beginning how to approach the preparation of an entrepreneur application, with Mr Zhao focused solely on the plan and Mr Parker himself being the only contact for all immigration advice.

#### *Complaint filed in Tribunal*

[39] The Registrar filed a statement of complaint in the Tribunal on 18 March 2020. It alleges Mr Parker was negligent, a ground of complaint under the Act, or alternatively breached the identified provisions of the Code, in the following respects:

- (1) allowed Mr Zhao to work exclusively with the complainant to complete the business plan and application forms for the entrepreneur visa, in breach of cls 1 and 3(c);
- (2) maintained business practices whereby he relied on Mr Zhao to provide immigration advice, in breach of cls 1 and 3(c); and
- (3) failed to personally engage with the complainant, in breach of cls 1 and 2(a) and (e).

#### **JURISDICTION AND PROCEDURE**

[40] 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.

[41] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.<sup>3</sup>

[42] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.<sup>4</sup> It has been established to deal relatively summarily with complaints referred to it.<sup>5</sup>

[43] 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.<sup>6</sup>

[44] The sanctions that may be imposed by the Tribunal are set out in the Act.<sup>7</sup> The focus of professional disciplinary proceedings is not punishment but the protection of the public.<sup>8</sup>

[45] 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.<sup>9</sup>

[46] The Tribunal has received a statement of complaint (18 March 2020) and supporting documents from the Registrar.

#### *Submissions from the complainant*

[47] Mr Gu, on behalf of the complainant, sent an email to the Tribunal on 27 May 2020. It is submitted that Mr Parker delegated the drafting to Mr Zhao and had minimal or no involvement with the complainant's immigration matters. While Mr Parker had said in his statement that he met the complainant in February 2017, the complainant told Mr Gu that he had never met him and at all times he communicated with Swiftvisa's unlicensed staff. Mr Gu points out that the file notes concerning the alleged meeting did not record details of the discussion. Repeated requests for these notes were initially refused or ignored by Mr Parker. Furthermore, cl 26(c) of the Code requires an adviser to confirm in writing with the client details of material discussions.

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<sup>3</sup> Immigration Advisers Licensing Act 2007, s 45(2) & (3).

<sup>4</sup> Section 49(3) & (4).

<sup>5</sup> *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

<sup>6</sup> Section 50.

<sup>7</sup> Section 51(1).

<sup>8</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).

<sup>9</sup> *Z v Dental Complaints Assessment Committee*, above n 8, at [97], [101]–[102] & [112].

*Submissions from Mr Parker*

[48] There is a statement of reply (20 April 2020) from Mr Moses.

[49] According to counsel, Mr Parker maintains that he did not breach his professional obligations by delegating the production of the draft business plan to the then unlicensed Mr Zhao. It is submitted that there was no disciplinary offence. The preparation of the business plan did not amount to the provision of immigration advice in breach of the Act.

[50] Mr Moses submits that the key legal question is not whether an unlicensed person is entitled to prepare a draft business plan, as the legality of doing that has already been accepted by the Tribunal.<sup>10</sup> Indeed, there is no decision of the Tribunal which has held that a business plan cannot be prepared by an unlicensed person. The pertinent question is the extent of control of the adviser over the preparation of the business plan and the immigration process.

[51] It is contended that it is practically inevitable that such plans will be prepared by chartered accountants or other business professionals. Immigration advisers do not have the skills to prepare such plans. An adviser who attempted to do so without having a relevant business background would likely be in breach of the Code.

[52] An immigration adviser needs to have full control over the immigration application. He or she also has to have overall control of the business plan. That does not mean the adviser writes it. The adviser is instead responsible for ensuring it meets the immigration criteria.

[53] Prior to the complainant's instructions, Messrs Parker and Zhao had met to carefully consider the immigration requirements for business plans in the entrepreneur category. Mr Zhao was briefed as to the immigration requirements.

[54] Mr Moses notes that, in the case of the complainant, Mr Parker explained to him at the meeting in February 2017 the immigration process and fees. He was told Mr Parker would be responsible for the immigration work and Mr Zhao would prepare the business plan. That plan would then be reviewed by Mr Parker and discussed with the complainant before the application was filed.

[55] Once the complainant had confirmed his instructions, Mr Parker referred Mr Zhao to the relevant Immigration New Zealand guide and instructed him to refer any immigration related question to him (Mr Parker).

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<sup>10</sup> *MZ v Sun* [2019] NZIACDT 12 at [82].

[56] While the plan was being prepared, there was no direct contact between Mr Parker and the complainant. The numerous exchanges between Mr Zhao and the complainant show only the discussion of matters relating to the business. The only exception was Mr Zhao, on the telephone, obtaining information from the complainant for the preparation of the application form(s) to be subsequently reviewed by Mr Parker.

[57] It is contended by Mr Moses that there is no evidence that Mr Zhao provided immigration advice.

[58] Mr Moses observes that the Registrar relies on the Tribunal's decisions in relation to Mr Sun.<sup>11</sup> It is submitted that what happened there was very different to the complainant's situation. While Mr Sun provided rudimentary information to the agent and reviewed the applications before filing them, he had no contact with the clients at all. He had no agreement with them, their agreements being with the agent. They were not aware of his existence. Mr Sun had delegated all aspects of the immigration application to the unlicensed agent.

[59] In the *MZ* case, there was evidence of the client's queries not being referred to Mr Sun. In *LL*, Mr Sun had no opportunity to ensure that the material provided by the agent reflected the client's intention.

[60] Mr Moses argues that, in the present case, the complainant had met Mr Parker and knew his role. He also could have contacted Mr Parker (through Mr Zhao as an interpreter). Furthermore, there was a clear intention that the draft business plan and application would be reviewed and discussed by Mr Parker and the complainant. This did not happen because the complainant instructed another adviser. The early termination of the engagement prevented Mr Parker from completing his legal obligations.

[61] Mr Parker acknowledges that it would have been preferable for him to have communicated with the complainant in writing, confirming the oral advice given at the meeting, particularly as to the different roles of himself and Mr Zhao. Counsel submits that this lack of written confirmation can be characterised merely as a failure to adhere to best practice. Even if it is a breach of some requirement of the Code, it is not every lapse which requires a disciplinary consequence.

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<sup>11</sup> *LL v Sun* [2019] NZIACDT 3, *MZ v Sun*, above n 10.

*Statement from Mr Parker*

[62] In support, there is a statement from Mr Parker (17 April 2020). He confirms the factual narrative outlined by Mr Moses. In particular, he instructed Mr Zhao on the immigration aspects of business plans in general, prior to accepting instructions from the complainant. Once the instructions were received, he reminded Mr Zhao of the earlier discussion and referred him again to the Immigration New Zealand guide. Mr Zhao was told to refer immigration questions to him. Mr Parker said he had limited input into the plan when Mr Zhao showed it to him in July. Mr Zhao had prepared the immigration application forms by recording information given to him (Mr Zhao) over the phone by the complainant. The application would not have been filed without Mr Parker's careful review and discussion with the complainant.

[63] It is accepted by Mr Parker that it would have been preferable if he had given written instructions to Mr Zhao, as he would have done if engaging an external contractor. It would also have been best to have confirmed in writing to the complainant the discussion at the initial meeting in February 2017. In early 2017, he had just started offering this type of immigration work and his processes, which are generally well documented, had not been worked out. In the end, due to the low chance of success of such applications, he stopped representing such clients.

*Statement from Mr Zhao*

[64] There is also a statement from Mr Zhao (16 April 2020). He says he has a degree in accounting and has previously worked as an accountant. He started work as an office administrator at Swiftvisa in September 2016. Then, in late 2016, he discussed with Mr Parker Immigration New Zealand's guide for entrepreneur visas. When drafting the complainant's proposal, Mr Parker referred him to the guide.

[65] At the initial meeting with the complainant in early 2017, Mr Parker made it clear that he and nobody else would provide the immigration advice. It was Mr Parker who explained the general requirements and the procedures. When Mr Zhao prepared the client contract, it was a template contract and set out the services and fees discussed with the complainant at the initial meeting.

[66] According to Mr Zhao, he drafted the business plan mainly by liaising with the complainant's friend in New Zealand who was helping to set up the business. Mr Zhao says he did not give any advice regarding the level of investment or the number of employees. He was aware that the complainant's intentions were broadly in line with

what was required for such a visa, otherwise he would have brought it to Mr Parker's attention.

[67] In July 2017, Mr Parker gave oral feedback on the draft proposal provided to him to review. It was also sent to the complainant and his friend.

[68] Mr Zhao says he filled in the work visa application form using information from the complainant obtained over the phone. This was a usual part of his daily job. The intention was that Mr Parker would review it when completed, which is their normal practice. While he recorded in his timesheet that he had assessed the points to be claimed by the complainant, he had done so out of interest as he thought it might be useful. It was not communicated to the complainant. He knew he was not allowed to give immigration advice.

[69] The final draft of the proposal and the form was passed onto Mr Parker to review. Mr Parker instructed him to arrange a phone conference with the complainant, but before that happened, the complainant terminated the engagement.

*Statement from Mr Howard*

[70] Mr Moses also produced to the Tribunal an expert's statement from Cyril Richard Howard (14 April 2020). Mr Howard is a licensed immigration adviser, with experience in the preparation of business plans for entrepreneur applications. Mr Howard had previously worked as a financial analyst. He has worked in the immigration advisory industry for almost 30 years and has been licensed since 2008.

[71] According to Mr Howard, business plans are invariably contracted out to unlicensed people, usually an accountant or business adviser. If an immigration adviser has such a person on the staff, it could be delegated to that person. He had personally instructed business consultants and chartered accountants. He had seen plans filed by other immigration advisers which had been prepared by accountants. The reason plans are prepared by unlicensed people is that the vast majority of immigration advisers do not have the skills or experience to prepare realistic and commercially viable plans.

[72] According to Mr Howard, it is inevitable that the plan writer will have direct contact with the client to discuss the client's relevant background, the nature of the business, the capital and staffing requirements and so forth.

[73] In Mr Howard's view, the key to compliance with an immigration adviser's professional obligations is for the adviser to be responsible for ensuring that the plan reflects the client's intended business and meets the immigration criteria. The

immigration adviser has to have control of the process. He or she must provide some initial general direction to the plan writer, but their most significant input comes after the plan is drafted and is being finalised to satisfy both the client's intention and the criteria. At that point, the plan may have to be changed, perhaps investing more capital and forecasting less employment.

[74] The plan writers need to be briefed on the key immigration requirements and need to be aware to direct immigration questions to the immigration adviser.

#### *Further submissions from Mr Parker*

[75] There were further submissions from Mr Moses (2 June 2020) in answer to Mr Gu's email of 27 May 2020. Mr Moses notes that Mr Gu had been informed by the complainant that he had never met Mr Parker. This amounted to a serious allegation that Messrs Parker and Zhao were misleading the Tribunal. If a material fact is in dispute, the complainant should make a formal statement to the Tribunal. There is only the bald allegation by way of submission that no meeting with Mr Parker took place, which has been rebutted by the two formal statements from Messrs Parker and Zhao. Mr Gu has not provided any evidence challenging Mr Parker's position.

#### *Hearing*

[76] No party has requested a hearing. There is no material credibility issue on which the Tribunal needs to hear from the parties. There is no need for an oral hearing.<sup>12</sup>

## **ASSESSMENT**

[77] 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:
  - a. maintain a relationship of confidence and trust with the client and provide objective advice

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<sup>12</sup> Immigration Advisers Licensing Act 2007, s 49(3) & (4)(b).

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

...

### **Legislative requirements**

- 3. A licensed immigration adviser must:

...

- c. whether in New Zealand or offshore, act in accordance with New Zealand immigration legislation, including the Immigration Act 2009, the Immigration Advisers Licensing Act 2007 and any applicable regulations.

(1) *Negligently or in breach of cls 1 and 3(c), Mr Parker allowed Mr Zhao to work exclusively with the complainant to complete the business plan and application forms for the entrepreneur visa*

(2) *Negligently or in breach of cls 1 and 3(c), Mr Parker maintained business practices whereby he relied on Mr Zhao to provide immigration advice*

[78] The essence of both heads of complaint 1 and 2 is the alleged provision of “immigration advice”, as defined in the Act, by the then unlicensed Mr Zhao.

[79] The focus here is Mr Zhao’s engagement with the substantive application and its supporting documentation, including the business plan. The Tribunal is being asked to draw the inference that the evidence shows, particularly Mr Zhao’s extensive communications with the complainant, that he provided “immigration advice” in breach of the Act. This is not about the extent of their communications, as that will be dealt with in the third head of complaint. It is about the content of the communications and the substantive work undertaken by Mr Zhao.

[80] The law and general principles applicable have been set out in numerous decisions of the Tribunal and will not be repeated here.<sup>13</sup> It is useful though to set out the statutory definition of “immigration advice”, work which is exclusively reserved to a licensed adviser:<sup>14</sup>

### **7 What constitutes immigration advice**

- (1) In this Act, immigration advice—

- (a) means using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in

<sup>13</sup> See, for example, *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 18 at [47]–[59].

<sup>14</sup> Immigration Advisers Licensing Act 2007.

regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward; but

- (b) does not include—
- (i) providing information that is publicly available, or that is prepared or made available by the Department; or
  - (ii) directing a person to the Minister or the Department, or to an immigration officer or a refugee and protection officer (within the meaning of the Immigration Act 2009), or to a list of licensed immigration advisers; or
  - (iii) carrying out clerical work, translation or interpreting services, or settlement services.

...

[81] The title “immigration advice” is a misnomer. The statutory definition covers all the substantive immigration work, not just advice to the client.

[82] To some extent, heads 1 and 3 of the complaint overlap. The issue of the extent of the respective engagement of Mr Parker and Mr Zhao with the complainant will be reviewed when the third head is assessed.

[83] Turning then to whether Mr Zhao’s drafting of the business plan amounted to what is regarded as immigration advice work, Mr Moses is correct in identifying the key question as being whether the preparation of a business plan amounts to immigration advice.<sup>15</sup>

[84] I note Mr Howard’s expert evidence as to the practice of accountants or business advisers to draft business plans. Immigration advisers would not have the skills and experience to do so. That is as much a matter of common sense as it is of expert evidence. Mr Moses also, correctly in my view, points out that an immigration adviser who personally drafts such a plan is at risk of a complaint of unprofessional conduct or negligence unless the adviser unusually has the expertise to do so. I had, in an earlier decision, observed that the drafting of the commercial and financial objectives of the plan by unlicensed experts is acceptable.<sup>16</sup> The business aspects of the plan (such as the capital, job creation, market, technology utilised, financial forecasts) comprise the bulk of the plan.

[85] Of course, the plan also has to meet Immigration New Zealand’s criteria for an entrepreneur’s visa (see the agency’s Entrepreneur Work Visa Guide attached to Mr Zhao’s statement). There are requirements, as well as a point system, concerning

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<sup>15</sup> Submissions to the Authority (3 March 2020) at [3].

<sup>16</sup> *MZ*, above n 10, at [82].

the level of capital, the source of capital, jobs created, business experience, the nature of the business and other factors.

[86] This is where the boundary between the business aspects and the overarching immigration criteria becomes blurred. In practice, the plan writer must know and will at all times keep in mind Immigration New Zealand's points allocation in composing a plan which reflects not only the client's intention (including commercial viability) but also the immigration criteria (which in reality also includes commercial viability).

[87] Strictly speaking, the writer's plan is arguably caught by the broad statutory definition of immigration advice, so does the unlicensed writer's creation of the plan breach the Act and therefore the immigration adviser's professional obligations under the Code?

[88] To answer this, I agree with Mr Moses in his refinement of the key question in his submissions to the Tribunal.<sup>17</sup> The issue is one of control. The question is answered by looking at the extent of the immigration adviser's overall control of the immigration process, including the drafting of the plan and the application form.

[89] The immigration adviser controls the process in the way outlined by Mr Howard, whose evidence I have found helpful. He or she will meet the client at the start of the process to understand what the client proposes and talk about how that could be structured to meet the immigration criteria. The client will formulate a general proposal as to the size and nature of the business, the sources of capital, the targeted market and the like. These factors reflect the client's commercial imperatives.

[90] These commercial elements will be passed onto the immigration adviser who will instruct the plan writer. The latter will be given the immigration criteria and direction as to how the client's business proposition could meet that criteria. No doubt, the business proposition will be refined in considerable dialogue between the writer and the client. To some extent those discussions will be informed by the immigration criteria. That is inevitable and acceptable if kept to a minimal level. However, in order to retain control, the immigration adviser must be available to the client and the writer during the drafting process to answer any specific queries on the immigration criteria that arise. And critically, the immigration adviser must review the plan with the client and the writer at the completion of the drafting in order to finalise it for filing.

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<sup>17</sup> Statement of reply (20 April 2020) at [17] & [19].

[91] Focussing on the role of Mr Zhao in the preparation of the business plan for the complainant, the unopposed evidence of Messrs Parker and Zhao is that this is broadly what occurred. As for the end process, it was intended that Mr Parker would finalise the plan, but this did not happen as the complainant terminated his instructions.

[92] I dismiss Mr Gu's allegation that Mr Parker did not meet the complainant in February 2017, as he presents no evidence from the complainant, despite Mr Moses pointing out the absence of evidence.

[93] As for Mr Zhao's completion of the entrepreneur visa form(s) by recording information given by telephone by the complainant, this is permitted.<sup>18</sup> Again, there is no evidence from the complainant to the contrary.

[94] I have reviewed the exchange of messages between Mr Zhao, Ms Cheng, the complainant and his friend set out in the statement of complaint, along with Mr Zhao's timesheets and diary entries. They are largely uncontroversial. To the extent that Mr Zhao strays into giving advice or performing work which amounts to immigration advice under the Act, which he does, the disciplinary threshold is not met. It is, in my view, inevitable in the practical realities of professional practice in this field that the writer will trespass into impermissible territory. The business objectives of a plan overlap with the immigration criteria. They cannot be cleanly separated. It is the degree of straying that is critical and whether the immigration adviser can show overall control of the immigration process, including preparation of the plan, in the way outlined above.

[95] There is some evidence as to Mr Parker's control over the process, albeit that the evidence is not compelling. His early briefing of Mr Zhao as to the immigration criteria was more generic than focussed on the complainant's application. He did not provide to Mr Zhao any written instructions on the immigration criteria, their applicability to the complainant and Mr Parker's exclusive responsibility to advise the complainant on them. He should have.

[96] Mr Parker had no direct contact with the complainant on the plan, an issue to which I will return when assessing the third head of complaint. The sole written communication involving him shows he received the draft plan from Mr Zhao on 16 August 2017,<sup>19</sup> but Mr Parker and Mr Zhao both say in their statements that he received it in July 2017. Mr Parker says this was in addition to its receipt in August.<sup>20</sup> His feedback was apparently only oral and only to Mr Zhao.

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<sup>18</sup> Immigration Advisers Licensing Act 2007, s 7(1)(b)(iii) and s 5, definition of "clerical work" at (c).

<sup>19</sup> Email from Mr Zhao to Mr Parker (16 August 2017), Registrar's documents at 40.

<sup>20</sup> Mr Moses' email to the Tribunal on 2 July 2020.

[97] Notwithstanding the somewhat inconclusive evidence and giving Mr Parker the benefit of the doubt, I find that he sufficiently engaged with the preparation of the plan and exercised overall control.

[98] In conclusion, it is found that there is insufficient evidence of Mr Zhao performing substantive immigration work and therefore of a breach of cl 3(c) of the Code. Absent such a breach, the complaint of negligence and/or a lack of due care (cl 1) must also fail. If Mr Zhao did not perform work amounting to immigration advice, as defined in the Act, then Mr Parker cannot have negligently or carelessly allowed him to do so. The first two heads of complaint are dismissed.

(3) *Negligently or in breach of cls 1, 2(a) and (e), Mr Parker failed to personally engage with the complainant*

[99] Mr Parker is required to maintain a relationship of trust and confidence with his clients, give advice, take instructions and carry out those instructions. The obligation to do so is *personal* to him.<sup>21</sup> He cannot delegate that duty to unlicensed persons. While the first two heads of complaint focussed on Mr Zhao's engagement with the substantive immigration work (the plan and immigration form(s)), this head of complaint concerns who was responsible for engagement with the complainant. Was it Mr Parker, as the Code requires, or the unlicensed Mr Zhao?

[100] It has already been found that it was acceptable for Mr Parker to delegate to Mr Zhao the writing task requiring a specialist, but he could not delegate the overall client relationship. However, that is precisely what Mr Parker did. He did not engage with the complainant at the time he was instructed, leaving it to Mr Zhao to arrange for the complainant to sign the client agreement. Nor did Mr Parker communicate with him at any time thereafter.

[101] The only direct contact between the two of them was at the initial meeting prior to being instructed, a meeting Mr Parker describes as informal and at which no advice was actually given.<sup>22</sup> Mr Parker had no contact or communication with the complainant whatsoever in the four months after he was instructed, from about 12 or 21 April until 22 August 2017. He was not copied into the email or text exchanges between Mr Zhao, the complainant, his friend and occasionally Ms Cheng, during the preparation of the plan. Mr Parker abandoned the complainant to Mr Zhao and, to a lesser extent, his wife.

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<sup>21</sup> *Sparks*, above n 5, at [29], [34] & [47].

<sup>22</sup> Statement of Mr Parker (3 March 2020) at [16].

[102] On being instructed, Mr Parker should have taken specific instructions on the business proposal and explored with the complainant in broad terms how it could be structured to meet the immigration criteria. That meeting and the advice given should have then been confirmed in writing to the client.<sup>23</sup> This should have been followed by the written instruction to Mr Zhao referred to above.<sup>24</sup>

[103] I appreciate that once instructed, it was largely for Mr Zhao, the expert, to prepare the detailed business plan. Mr Parker could not prepare that document himself. But the business and financial matters set out had to match both the client's intention and the immigration criteria. This is where the immigration adviser *must* be involved directly with the client from time to time. There is nothing artificial about that engagement as Mr Parker states, since it is the immigration adviser's responsibility to see that the client's business proposal matches the criteria. I would have thought that it was better practice to review the draft plan against immigration criteria occasionally during its preparation, rather than to wait until the final draft before placing it before the immigration adviser by which time considerable effort may have been put into a non-compliant proposal.

[104] There was also a need for the immigration forms to be prepared. In theory, Mr Zhao or a clerical worker could do that in the way he did (dictation from the complainant). In this case, that was acceptable so far as it concerned Mr Parker's obligation to ensure that no unlicensed immigration advice was given (cl 3(c)). But it was not acceptable in respect of Mr Parker's personal obligation to maintain a relationship and take instructions (cl 2(a) & (e)). That is because he had been entirely absent from the relationship since being instructed.

[105] Had Mr Parker been maintaining a relationship with the complainant in respect of the plan, it may well be acceptable to leave it to the staff to complete the forms for review by the adviser, but in this case Mr Parker's absence from the process of completing the forms is yet another illustration of his entire absence from the client relationship.

[106] It is not a sufficient reason to excuse direct contact that the client has poor or non-existent English language ability. Ms Cheng or Mr Zhao could be used as an interpreter, as the latter was at the early meeting and was to be used again for the intended telephone conference at the end.

[107] In conclusion, Mr Parker properly engaged an expert to prepare the business plan and, giving him the benefit of the doubt, controlled the preparation of the plan within his overall control of the immigration process. But he excused himself wholly from the client

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<sup>23</sup> Clause 26(c) of the Code.

<sup>24</sup> At [95] herein.

relationship. He did not unlawfully abandon the task of producing that document and the forms (in terms of his obligation under cl 3(c)), but he did abandon his client. Indeed, he never established a relationship with the complainant from the moment he was instructed. It is not enough that he had a preliminary meeting at the beginning and then intended to speak to the complainant at the end.

[108] Mr Parker has therefore breached cl 2(a) and (e) of the Code. Given this breach, I do not see any merit in assessing whether the same circumstances amount to negligence or a lack of due care (cl 1).

## **OUTCOME**

[109] I uphold the third head of complaint. Mr Parker is in breach of cl 2(a) and (e) of the Code.

## **SUBMISSIONS ON SANCTIONS**

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

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

### *Timetable*

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

- (1) The Registrar, the complainant and Mr Parker are to make submissions by **29 January 2021**.
- (2) The Registrar, the complainant and Mr Parker may reply to submissions of any other party by **12 February 2021**.

## **ORDER FOR SUPPRESSION**

[113] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.<sup>25</sup>

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<sup>25</sup> Immigration Advisers Licensing Act 2007, s 50A.

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

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

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D J Plunkett  
Chair