

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2021] NZIACDT 10

Reference No: IACDT 01/21

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **YC**
Complainant

AND **JIALE WILLIAM WAN**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 19 May 2021

REPRESENTATION:

Registrar: Self-represented
Complainant: H Gu, immigration adviser
Adviser: Self-represented

PRELIMINARY

[1] Mr Jiale William Wan, the adviser, entered into an agreement with YC, the complainant, to seek a work visa. However, he delegated the work to Ms Yujuan Janelle Han, a provisionally licensed adviser employed by his consultancy. She was not identified in the agreement as an adviser. Due to the failure of Mr Wan and/or Ms Han to reply to a letter from Immigration New Zealand, the complainant's visa application was unsuccessful.

[2] A complaint to the Immigration Advisers Authority (the Authority) against Mr Wan and Ms Han has been referred to the Tribunal by the Registrar of Immigration Advisers (the Registrar). It alleges multiple breaches of the Licensed Immigration Advisers Code of Conduct 2014 (the Code). Separate decisions will be issued by the Tribunal for Mr Wan and Ms Han.

[3] Both Mr Wan and Ms Han admit breaching their professional obligations.

BACKGROUND

[4] Mr Wan, a licensed immigration adviser, is a director of PJ Education & Immigration Services Ltd (the consultancy), of Auckland. His consultancy employs Ms Han, then a provisionally licensed adviser, whom he supervised. Ms Han has since obtained a full licence.

[5] The complainant is a national of China. She has been in New Zealand since 2014, initially on student visas and later work visas.

[6] In early June 2019, the complainant contacted Ms Han as she wished to apply for an essential skills work visa, since her then current visa was due to expire on 29 June 2019.

[7] Ms Han wrote to the complainant on 10 June 2019 sending her various documents, including the consultancy's immigration services agreement to be signed by her.

[8] On the same day, the agreement was entered into between Mr Wan and the complainant. Mr Wan, as the named adviser, agreed to assist the complainant to apply for an essential skills work visa to remain in New Zealand. The professional fee was \$3,000, including \$1,500 only if the visa was successful. In addition, Immigration New Zealand's application fee of \$495 had to be paid.

[9] An invoice was also sent by the consultancy to the complainant on 10 June 2019 for \$1,995 (\$1,500 + \$495). The complainant paid on 11 June 2019.

[10] It was Ms Han who worked exclusively with the complainant to prepare the visa application, which was filed by Ms Han with Immigration New Zealand on 28 June 2019. Ms Han provided further information to the agency on 11 July 2019.

[11] On 31 July 2019, Immigration New Zealand wrote to Ms Han and the complainant advising that a number of issues had been identified which could have a negative impact on the outcome of the application. Their comments by 7 August 2019 were invited.

[12] Ms Han wrote to the relevant branch of Immigration New Zealand on 6 August 2019 seeking an extension of two weeks until 21 August 2019, to reply to Immigration New Zealand's letter. The letter was presumably emailed to the branch.

[13] A note was made on the consultancy's internal "Client Communication Tracker" on 6 August 2019 stating that the case had been assigned to Mr Wan "due to maternity leave".

[14] While on leave, Ms Han sent an email directly to an immigration officer on 7 August 2019 repeating the request for an extension of two weeks until 21 August 2019. Ms Han used her own email address at "pjgroup". The email was copied to "PJ Education & Immigration", a shared email address within the consultancy.

[15] On the same day, the immigration officer replied to Ms Han by email granting an extension until 15 August 2019. The officer presumably clicked "Reply" and not "Reply All", as the email was not copied to the shared email address. Mr Wan says he was not therefore aware of the extension.

Immigration New Zealand decline visa

[16] On 21 August 2019, the application for a work visa was declined by Immigration New Zealand because it did not meet the requirements of the immigration instructions. No reply had been received to the letter of 31 July 2019.

[17] Mr Wan advised the complainant of the decline of the application at a meeting in his office on 22 August 2019. This was the first time she had met him. It was also the first time she was made aware of Immigration New Zealand's original letter and that there had been no response to it. Mr Wan took full responsibility for the decline. He reminded her that the interim visa expired on 11 September 2019 and offered to lodge a reconsideration for no charge. If that was not successful, he could lodge a s 61 request

(for a discretionary visa for a person unlawfully in New Zealand), also for no charge. A full refund was additionally offered.

[18] The complainant did not give Mr Wan any instructions at the meeting.

Complainant instructs another licensed adviser

[19] On 25 September 2019, Mr Harris Gu, a licensed immigration adviser, wrote to Ms Han (copied to Mr Wan) advising that he was acting for the complainant. He sought a copy of the complainant's complete file. According to the letter, a lawyer for the complainant had previously requested the full file but it had not been provided. Ms Han was asked to provide the file by 27 September 2019.

[20] Mr Wan advised Mr Gu on 27 September 2019 that Ms Han was on maternity leave, so he was looking after the uplift of files. They had been provided to the complainant's lawyer. The files were attached electronically to his email to Mr Gu.

[21] Mr Gu sent a further comprehensive itemised request for documents to Mr Wan on 11 October 2019.

[22] On 18 October 2019, Mr Wan wrote to the complainant recording that he had taken full responsibility for the decline of the work visa. It had occurred because Ms Han, who had been on maternity leave, had notified Immigration New Zealand of her email address. The application had therefore been declined following the failure to reply to Immigration New Zealand's letter. He would be happy to refund the service fee and Immigration New Zealand's application fee, amounting to \$1,995. The complainant was asked to provide her bank account details.

[23] On the same day, Mr Wan wrote to Mr Gu stating that he had provided him with the files on 27 September 2019. They no longer acted for the complainant so were not obliged to provide further information.

[24] Mr Gu replied to Mr Wan on 21 October 2019 declining the refund offered. The complainant requested reasonable compensation. Mr Gu listed a number of factors to be taken into account in assessing compensation.

COMPLAINT

[25] Mr Gu, on behalf of the complainant, made a complaint against Mr Wan and Ms Han to the Authority on 7 November 2019. It was alleged that Mr Wan did not provide the contracted services, instead Ms Han did so but her name was not on the contract.

Ms Han failed to respond to Immigration New Zealand's letter, leading to the visa being declined. The complainant subsequently became unlawful in New Zealand. Numerous breaches of the Code were alleged against both of them. The complainant sought a refund of the professional fees paid and reasonable compensation.

[26] Mr Wan provided the complainant's full file to the Authority on 26 November 2019, at the latter's request. He noted that the extension granted by Immigration New Zealand was not forwarded to him and was therefore missed. As for the client files, he said they had been forwarded to the complainant's lawyer, at the lawyer's request. A further request had been received from Mr Gu on 25 September 2019 and the files were sent to him two days later.

[27] On 12 November 2020, the Authority wrote to Mr Wan formally informing him of the details of the complaint and requesting his explanation.

[28] Mr Gu advised the Authority on 15 December 2020 that the complainant had been granted a s 61 visa on 7 January 2020. She had spent \$5,010 to regularise her status under the s 61 process and \$1,850 for an appeal to the Immigration and Protection Tribunal. The total cost of \$6,860 would not have occurred but for Ms Han's misconduct. There was also the loss of wages for the period from 22 August 2019 to 6 January 2020 when she was an overstayer. The complainant had not received any refund or compensation from Mr Wan.

Explanation from Mr Wan and Ms Han

[29] Mr Turner of Laurent Law wrote to the Authority on 18 December 2020, on behalf of both Mr Wan and Ms Han, replying to its letter of 12 November 2020. Statements from the two advisers were sent with his letter.

[30] According to Mr Turner, both Mr Wan and Ms Han admitted most (but not all) of the breaches of the Code alleged. He set out their various explanations for the breaches. They had acknowledged them early in the process. Mr Wan and Ms Han apologised for their breaches.

[31] They had both learned as a result of the complaint, changing some of their business processes. In particular, there was now a service agreement to be used by Ms Han as a provisional licence holder. They had also adopted a task management system. These matters might not influence the Tribunal in relation to liability, but they would be relevant in determining sanctions.

[32] Mr Turner also stated that the complainant may have damaged her own position, as she did not provide Mr Wan with any instructions when he met her on 22 August 2019. At that time, her interim visa had not expired. He had offered to seek a reconsideration and later a s 61 request, without charge. This amounted to a failure to mitigate some of the losses she might otherwise claim.

[33] Mr Turner pointed out that Mr Wan had made an offer of reasonable compensation, but it needed to be quantified by Mr Gu for consideration by the Tribunal.

[34] In his "affidavit" (actually a witnessed statement) of 17 December 2020, Mr Wan said that on 6 August 2019, when Ms Han went on leave, he instructed the consultancy's IT person to arrange for her emails to be forwarded to him. However, this was only implemented one week later. He was therefore unaware of the new deadline granted by Immigration New Zealand. Mr Wan also stated that when the complainant's lawyers were sent the files on 29 August 2019, she still had until 4 September 2019 to file a reconsideration request.

[35] In his statement, Mr Wan provided his comments on each of the professional breaches alleged by the Registrar, admitting most of them. To the extent relevant to this decision, his explanations will be reviewed later.

[36] The statement of Ms Han (17 December 2020) also largely admits similar professional breaches alleged against her and provides explanations consistent with those of Mr Wan. She added that she did not check her emails after 7 August 2019, as she had understood that they were being redirected to Mr Wan.

Complaint referred to Tribunal

[37] The Registrar referred the complaint to the Tribunal on 29 January 2021. It alleges the following against Mr Wan:

- (1) failure to ensure Ms Han had a written agreement with the complainant and failure to ensure there was a response to Immigration New Zealand's letter, in breach of cl 1;
- (2) failure to maintain a relationship of confidence and trust with the complainant or to provide her with advice until the very end of the engagement, in breach of cl 2(a);
- (3) failure to obtain and carry out the instructions of the complainant, in breach of cl 2(e);

- (4) failure to ensure that the written agreement contained the name and licence number of Ms Han, in breach of cl 19(a);
- (5) failure to insert into the written agreement the required details of Ms Han as a provisional adviser advising the complainant, in breach of cl 19(c);
- (6) failure to update the complainant in writing, in breach of cl 26(b); and
- (7) failure to provide to Mr Gu on request a copy of the full file, in breach of cl 26(f).

JURISDICTION AND PROCEDURE

[38] 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 Immigration Advisers Licensing Act 2007 (the Act):

- (a) negligence;
- (b) incompetence;
- (c) incapacity;
- (d) dishonest or misleading behaviour; and
- (e) a breach of the code of conduct.

[39] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.¹

[40] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.² It has been established to deal relatively summarily with complaints referred to it.³

[41] 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.⁴

¹ Immigration Advisers Licensing Act 2007, s 45(2) & (3).

² Section 49(3) & (4).

³ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁴ Section 50.

[42] The sanctions that may be imposed by the Tribunal are set out in the Act.⁵ The focus of professional disciplinary proceedings is not punishment but the protection of the public.⁶

[43] 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.⁷

[44] The Registrar has filed the statement of complaint (29 January 2021) with supporting documents.

[45] The Tribunal has received a letter of explanation (2 March 2021) jointly from Mr Wan and Ms Han. Mr Wan admits breaching cls 1, 2(a) & (e), 19(a) & (c) and 26(f) of the Code. As for cl 26(b), he states that he may be in breach of this provision. He relies on the explanations for the breaches set out in his earlier statement. The advisers identify what they see as two issues:

- (1) The service agreement was not proper. It should have been signed by both of them.
- (2) When Ms Han went on leave, Immigration New Zealand was not clearly informed that further correspondence should be directed to Mr Wan. The arrangement would have been better if Ms Han had done so, or the IT person redirected Ms Han's emails on time or Mr Wan had followed up with Immigration New Zealand. There was no prompt for Mr Wan to act on, so the communication was lost.

[46] Mr Wan and Ms Han sincerely apologise for the breaches. It was not a deliberate failure, but they feel responsible for the decline of the complainant's application. They have made changes and improvements to their business processes as a result.

[47] Mr Gu has filed a notice of authority to act (12 March 2021) on behalf of the complainant.

[48] No party has requested an oral hearing.

⁵ Section 51(1).

⁶ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

⁷ *Z v Dental Complaints Assessment Committee*, above n 6, at [97], [101]–[102] & [112].

ASSESSMENT

[49] 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
 - ...
 - e. obtain and carry out the informed lawful instructions of the client, and
 - ...

Written agreements

19. A licensed immigration adviser must ensure that a written agreement contains:
 - a. the name and licence number of any adviser who may provide immigration advice to the client
 - ...
 - c. if the adviser holds a provisional licence:
 - i. a record that a provisional licence requires them to work under the direct supervision of a full licence holder, and that they must seek advice from the supervisor whenever necessary
 - ii. the name and licence number of their supervisor, and
 - iii. a record that they will disclose the client's personal information to their supervisor who is obliged to keep that information confidential
 - ...

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
 - ...

- f. when requested by the client or their new licensed or exempt immigration adviser, release a copy of all applications lodged on behalf of the client and all correspondence relating to the client.

(1) *Failure to ensure Ms Han had a written agreement with the complainant and failure to ensure there was a response to Immigration New Zealand's letter, in breach of cl 1*

[50] It is alleged by the Registrar that Mr Wan was not professional and diligent in failing to ensure that Ms Han, whom he supervised, had a written agreement with the complainant. Mr Wan admits such a breach.

[51] However, there is no requirement in the Code for each adviser in an immigration company working on a client's file to have a separate written agreement. What the Code requires is that the written agreement name all advisers who provide immigration advice.⁸ Mr Wan's breach of the obligation to name Ms Han is dealt with below. There is no breach of cl 1 of the Code in regard to the absence of an agreement between Ms Han and the complainant.

[52] Turning to the response to Immigration New Zealand's letter, I agree with the Registrar that Mr Wan was not professional and diligent in failing to follow up with the agency on the extension request, but more importantly in failing to ensure that by the deadline (whether 7 or 15 August) there was a response to the agency. He admits this breach of cl 1.

[53] Mr Wan was not entitled to assume that Immigration New Zealand would use an email address to which he had access (which the agency was not informed it had to use). Nor was he entitled to wait for a "prompt" from Immigration New Zealand. It was his responsibility to proactively chase the agency for a reply to the extension request (being unaware that the agency had already done so) and moreover, to ensure that there was a substantive response to the agency's letter of 31 July 2019. A timely response to Immigration New Zealand's letter was critical.

[54] As for the failure to get the 7 August extension email, Mr Wan should have instructed his IT person to attend urgently to redirecting Ms Han's emails. Waiting for one week to be aware of progress on all Ms Han's files was not being diligent.

[55] The first head of complaint is upheld in relation to Mr Wan's failure to respond to Immigration New Zealand's letter.

⁸ Code of Conduct 2014, cl 19(a); *Registrar of Immigration Advisers v Ho* [2019] NZIACDT 54 at [76].

(2) *Failure to maintain a relationship of confidence and trust with the complainant or to provide her with advice until the very end of the engagement, in breach of cl 2(a)*

(3) *Failure to obtain and carry out the instructions of the complainant, in breach of cl 2(e)*

[56] These heads of complaint will be reviewed together.

[57] Mr Wan signed the service agreement but did not name Ms Han in the agreement as the adviser who would be assisting the complainant. He should therefore have personally provided the immigration advice and undertaken the work from the commencement of the instructions. Had he named Ms Han in the agreement, he could have delegated the work to her, including engagement with the complainant (subject to his supervision).

[58] As Mr Wan did not name Ms Han, he was required to engage directly with the complainant from the start, personally taking her instructions and undertaking the work. Even if Ms Han had been named, he should have immediately engaged directly with the complainant and established a relationship as soon as he took over the file on 6 or 7 August 2019. Yet, he did not contact her until 22 August, after the application had been declined.

[59] Mr Wan admits breaching cls 2(a) and (e) of the Code. While admitting the breaches, he explains that he oversaw Ms Han's management of the file. That is not, however, engaging directly and personally with the complainant in order to advise and take her instructions. These heads of complaint are upheld.

(4) *Failure to ensure that the written agreement contained the name and licence number of Ms Han, in breach of cl 19(a)*

(5) *Failure to insert into the written agreement the required details of Ms Han as a provisional adviser advising the complainant, in breach of cl 19(c)*

[60] There is a clear breach of cl 19(a) of the Code since the name and licence number of Ms Han were not specified in the written agreement with the complainant. This is admitted by Mr Wan. The fourth head of complaint is upheld.

[61] Since the service agreement made no mention of Ms Han, then a provisional licence holder, it did not set out the information about such an adviser required by the

Code to be disclosed to the client in the agreement. This is a breach of cl 19(c) of the Code. It is admitted by Mr Wan. The fifth head of complaint is upheld.

(6) *Failure to update the complainant in writing, in breach of cl 26(b)*

[62] It is alleged that Mr Wan failed to advise the complainant of Immigration New Zealand's letter of 31 July 2019 seeking further information, nor did he inform her of the extension granted on 7 August 2019. The complainant was not aware of these matters until 22 August, after the visa had been declined.

[63] According to Mr Wan's statement, he was not aware of the extension as Immigration New Zealand's email was not sent to him. There was no prompt for him to act on.⁹

[64] I have already found that Mr Wan was not entitled to wait for a prompt. He should have made sure Ms Han had sent Immigration New Zealand's letter of 31 July 2019 to the complainant and he should have followed up with the agency on the extension request as the original deadline of 7 August (which he knew about) loomed. Mr Wan has responsibility not only because he was Ms Han's supervisor but because he had taken over the file on 6 or 7 August as she went on leave. It was Mr Wan's fault that he did not know about the extension granted and did not therefore send it to the complainant, as he should have.

[65] Mr Wan acknowledges he may be in breach of cl 26(b) of the Code. I find there is a clear breach. This head of complaint is upheld.

(7) *Failure to provide to Mr Gu on request a copy of the full file, in breach of cl 26(f)*

[66] Mr Wan responded to the requests from the complainant's then lawyer and Mr Gu for the complainant's full file in a timely manner, but he overlooked certain documents of which he was not aware. He discovered these when the files were provided to the Authority on 26 November 2019, as it was then that he contacted Ms Han who was on leave. In his statement, Mr Wan identified the missing documents and provided some explanation:

- (1) Pre-application handwritten assessment notes of Ms Han kept by her in her notebook which had not been uploaded to the client file;

⁹ Letter to Tribunal (2 March 2021) at [5](2).

- (2) Client communication track record kept by Ms Han in her work station folder and not uploaded to the client file; and
- (3) Ms Han's email correspondence with the client. Mr Wan says he overlooked locating these.

[67] At the time of Mr Gu's request, Mr Wan should have taken the obvious step of contacting Ms Han as to whether there were any further documents, notwithstanding her leave. That is particularly so, given the missing emails which should have been noticed by him. That was a glaring omission from the file. Mr Wan accepts he should have contacted her, as he did later when the Authority requested the files. He breached cl 26(f) of the Code. This head of complaint is upheld.

OUTCOME

[68] I uphold the complaint. Mr Wan breached cls 1, 2(a) & (e), 19(a) & (c) and 26(b) & (f) of the Code.

SUBMISSIONS ON SANCTIONS

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

[70] A timetable is set out below. Any request that Mr Wan 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. Any claim for compensation must arise from the breaches of the Code upheld by the Tribunal.

Timetable

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

- (1) The Registrar, the complainant and Mr Wan are to make submissions by **10 June 2021**.
- (2) The Registrar, the complainant and Mr Wan may reply to submissions of any other party by **24 June 2021**.

ORDER FOR SUPPRESSION

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

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

[74] 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.