

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2021] NZIACDT 12

Reference No: IACDT 05/20

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **EM**
Complainant

AND **CHEE SENG MICHAEL YONG**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 3 June 2021

REPRESENTATION:

Registrar: Self-represented
Complainant: Self-represented
Adviser: M Logan, counsel

PRELIMINARY

[1] The complainant is EM, who is resident in New Zealand. His wife, TU, who will be referred to as the client, is a national of Malaysia and is resident there. She approached the immigration consultancy of Mr Yong, the adviser, whose business is based in Malaysia. Mr Yong's consultancy and the client entered into an agreement concerning an essential skills work visa application for her. However, he had no contact with the client and left all communications to his unqualified staff.

[2] A complaint by the complainant against Mr Yong to the Immigration Advisers Authority (the Authority) has been referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It is alleged that he has breached the Immigration Advisers Licensing Act 2007 (the Act) and the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] Mr Yong admits his wrongdoing.

BACKGROUND

[4] EM, the complainant, is the husband of TU, the client. She is an academic at a Malaysian university. She wished to migrate to New Zealand to join her husband.

[5] Mr Chee Seng Michael Yong is a licensed immigration adviser based in Kuala Lumpur, though throughout the relevant period he was living in Australia. He is the owner of Kitson Migration Advisory (Kitson).

[6] In early April 2019, the client approached Kitson. She was seeking a partnership work visa and needed an assessment by the New Zealand Qualifications Authority (NZQA) of her Malaysian qualifications.

[7] The client met with Mr P (Mr P) of Kitson on 4 April 2019. Mr P advised her about various skilled migrant and partnership options. She was told she needed 160 points.

[8] A client services agreement was entered into on 9 April 2019 between the client and Kitson. It is not clear who signed on behalf of Kitson. It provided for the lodgement of an essential skills visa application, including arranging for the assessment.

[9] An invoice for Malaysian Ringgit 8,100.42 (\$A 2,575, plus 6% tax) was issued by Kitson on 11 April 2019 and was paid on the same day.

[10] The assessment was arranged by Kitson's unqualified staff, Mr P and Ms U (Ms U). The client dealt only with them. There were over 30 emails and seven 'WhatsApp'

messages between the client and the staff, many of which were copied to Mr Yong. But there were no replies from him. Nor did he make any file notes recording any interaction between him and the client.

[11] Ms U advised the client by email on 15 April 2019 about the drafting of employer reference letters.

[12] The client met with Mr P on 22 April 2019 to obtain an update. She was informed Ms U had put the process on hold pending receipt of the work experience documents.

[13] NZQA issued a statement on 9 May 2019 recognising the client's Malaysian master and doctorate qualifications as the equivalent of the same in New Zealand.

[14] Ms U advised the client by email on 10 May 2019 of the NZQA assessment, noting that it met the credit and knowledge requirements for the occupation of university lecturer. Ms U set out an assessment of the points obtained for the client's work history and other factors. She calculated the client had 110 points, but she needed 160 points to be selected. The client was asked if her expression of interest should be lodged.

[15] On the same day, Ms U answered the client's queries about her work experience.

[16] On 13 May 2019, the New Zealand Teaching Council sent an email to the client stating that her NZQA assessment was for immigration purposes and not for registration as a secondary school teacher. She would have to ask NZQA for a teacher registration assessment.

[17] The client and Mr P met on 11 June 2019. She requested termination of the agreement. Mr P asked her to wait until he came back to her with advice about other suitable visas and notification of whether Kitson could refund 50 per cent of the fee.

[18] Mr Yong rang the client on the same day seeking the reasons for the termination of the engagement. He would look at what other visas could be explored. Mr P followed that up, again on 11 June, asking her to consider migration to Australia.

[19] On 14 June 2019, the client wrote to Mr Yong and Mr P thanking them for their professional services to date. She and her husband had been in a long-distance relationship, as they explored all the possibilities of living together sooner rather than later. She had been told by Kitson that the skilled migrant and partnership visas were the best options for ensuring a smooth journey. Since their services had been engaged, the only outcome had been the NZQA assessment. Her points total had remained unchanged at 110, well below the minimum requirement of 160.

[20] According to the client's email, Kitson had set an expectation of being "required" to secure a job offer from New Zealand. But from their own efforts they had discovered the complexities of obtaining an academic appointment in her occupation. She had been left with zero confidence in successfully pursuing Kitson's recommended options. They had expected the immigration process to be stressful, but they had never expected the stress of considering withdrawing the consultancy's services.

[21] In her email to Messrs Yong and P, the client said she was still waiting for NZQA's re-evaluation. She also wanted advice from them on the procedure for withdrawing from the visa application. There was a lack of expertise with New Zealand immigration, which had crippled all parties from proceeding with certainty and in a timely manner towards her objective of successfully migrating to New Zealand and being with her husband.

[22] No application had been lodged with Immigration New Zealand at this point.

[23] Following information the client received from the New Zealand Teaching Council, another application was made to NZQA (it is not clear by whom). NZQA issued a further recognition statement on 21 June 2019 stating that the master's degree did not meet New Zealand's teacher requirements, but the doctorate met the credit and knowledge requirements for the occupation of university lecturer.

[24] Kitson treated the communication of 14 June 2019 as a notice to terminate its services, following which it refunded RM 2,430.12 (being 30 per cent of the fee) on 11 July 2019.

COMPLAINT

[25] On 6 February 2020, the complainant made a formal complaint to the Authority against Mr Yong. It alleged negligence, incompetence, dishonest and misleading behaviour and breaches of the Code. A detailed chronology was set out. The complainant wanted a full refund of the fee paid.

[26] The Authority wrote to Mr Yong on 24 July 2020 formally advising him of the complaint and setting out the particulars. His explanation was invited.

[27] Mr Marty Logan, counsel for Mr Yong, replied on 28 August 2020. The various breaches of the Code alleged were accepted. Mr Yong was putting into place procedures to ensure that his business was fully compliant with New Zealand immigration law, particularly the requirement that unlicensed staff provide clerical assistance only and not give immigration advice.

[28] According to Mr Logan, Kitson operated out of Kuala Lumpur, but at the relevant time, Mr Yong was in Australia. Most of his clients were seeking to migrate to Australia, with New Zealand migration making up 20 per cent of his workload.

[29] Previously the general practice had been for the staff to deal directly with clients under the close supervision of Mr Yong. In respect of this client, Mr Yong was kept up to date by his staff as to the progress of the matter through daily meetings. He provided regular instruction to them and oversaw the advice given to the client. It predominantly involved the preparation and collection of information and documents. It was accepted that Mr Yong should have had greater contact with the client. In normal circumstances, he would have met her during the initial stage of the application, but he was in Australia at the time attending to other clients and was unable to arrange an electronic communication. He intended to meet her on his return to Malaysia, but the engagement was terminated before this could be arranged.

[30] It was accepted that Mr P and Ms U had direct contact with the client, rather than Mr Yong, so the various Code breaches were made out. This was not intentional. This mode of operating was permitted in Australia. Mr Yong had not turned his mind to the different and more stringent regime in New Zealand.

[31] Notwithstanding the lack of personal involvement, Mr Yong had personal knowledge of every file, including that of the client. If he believed the staff were not providing an appropriate level of service, he would have immediately intervened.

[32] Since receiving the complaint, Mr Yong had taken legal advice. He now understood in more detail the limitations on his unqualified staff and his obligation to deal directly with clients. He had made immediate changes to his practice, as listed in Mr Logan's letter. He intended completing the refresher course available at Toi Ohomai Institute of Technology. This involved approximately 100 learning hours.

Complaint filed in Tribunal

[33] The Registrar filed a complaint (dated 8 September 2020) in the Tribunal, with supporting documents. It alleges Mr Yong was negligent, a ground of complaint under the Act, or alternatively breached cls 1, 2(a), 2(e) and 3(c) of the Code by:

- (1) failing to conduct himself with due care in not personally engaging with the client; and

- (2) failing to conduct himself with due care by maintaining business practices whereby he relied on unlicensed individuals, Mr P and Ms U, to provide immigration advice.

JURISDICTION AND PROCEDURE

[34] 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.

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

[36] 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

[37] 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

[38] 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

[39] 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

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.

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].

[40] The Tribunal has received from the Registrar the statement of complaint (8 September 2020) and supporting documents.

Submissions from the complainant

[41] The complainant has filed a statement of reply (22 October 2020). He emphasises his wife's loss of trust and confidence in Mr Yong, as a result of repeated unnecessary financial costs. This was due to the amount of time that passed with no confident action. The "delegate" (presumably Mr P) disclosed that a 50 per cent refund might be offered on termination, but this was revised by Mr Yong to 30 per cent.

[42] According to the complainant, the difference between the skill and expertise expressed in the initial interaction and that demonstrated as the case progressed, was reflected in the outcome. Mr Yong's professional capabilities did not match the requirements. There was intentional deception by Mr Yong who expedited their prompt payment when his practice was not prepared to provide a level of service that would maintain their trust. His wife was able to achieve her key objective, of joining her New Zealand citizen husband, without legal representation as a result of her interactions directly with Immigration New Zealand.

Submissions from Mr Yong

[43] Mr Yong filed submissions with his statement of reply (1 October 2020). He accepts that the grounds of complaint are made out and apologises for the inadvertent breaches of the Code. He confirms obtaining legal advice since receiving the complaint and putting in place procedures going forward to ensure that Kitson is fully compliant with New Zealand immigration law.

[44] In his submissions to the Tribunal, Mr Yong sets out his involvement generally with each client. He also confirms that he was kept up to date in the progress of the matter for this specific client. He gave the staff regular instruction. Mr Yong says he had intended to meet the client on his return to Malaysia, prior to lodging the application, but his engagement was terminated before this time.

[45] Mr Yong adds that he did not deliberately breach the Code. The breaches were a result of confusion between the Australian and New Zealand practices, with Australia being his predominant area of practice.

[46] Additionally, Mr Yong lists the new systems put in place in his practice. In particular, there is now a strict requirement that staff do not meet personally with clients

seeking New Zealand immigration advice. He has provided clear training about how they should respond to enquiries from clients and he was in the process of developing further compulsory training. A training seminar was held with his staff to review the Tribunal's decision in *Ahmed*.⁸ Mr Yong undertakes that his staff will no longer be able to sign off advice in his name, but only send his written advice in a separate PDF letter.

[47] Mr Yong also undertakes to complete Toi Ohomai's refresher course. He notes that he has refunded 30 per cent of the client's fee as a goodwill gesture.

[48] Finally, Mr Yong expresses his regret at his inadvertent breaches and assures the Tribunal that he will in future be fully compliant with New Zealand immigration law.

[49] Mr Yong sent to the Tribunal letters (17 November 2020) from each of Mr P and Ms U. They confirm that, as a result of the complaint, Mr Yong has counselled them about not providing immigration advice concerning New Zealand. Ms U lists the tasks Mr Yong permits her to undertake. Mr P states that his sole focus is now Australian migration.

[50] No party has requested an oral hearing.

ASSESSMENT

[51] 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
 - ...

⁸ *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 18.

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.

[52] The obligations set out in the Code are personal to the licensed immigration adviser and cannot be delegated.⁹

[53] The allegation against Mr Yong is that he maintains a business practice which is known in the industry as ‘rubber stamping’. The Tribunal has adversely commented in previous decisions on this practice.¹⁰ It occurs where the licensed adviser becomes the ostensibly legitimate front for unlicensed individuals who provide the bulk of the immigration services.

[54] Typically, this occurs where a licensed immigration adviser uses agents, who are often offshore, to recruit the clients, prepare the immigration applications and send them to the adviser to sign off and file with Immigration New Zealand. There is little, if any, direct contact between the licensed adviser and the client.

[55] The practice is plainly unlawful. A person commits an offence under the Act if he or she provides “immigration advice” without being licensed or exempt from licensing.¹¹ A person employing as an immigration adviser another person who is neither licensed nor exempt also commits an offence.¹² A person may be charged with such an offence even where part or all of the conduct occurred outside New Zealand.¹³

[56] The statutory scope of “immigration advice” is very broad:¹⁴

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

⁹ *Sparks*, above n 3, at [29], [34] & [47].

¹⁰ *Stanimirovic v Levarko* [2018] NZIACDT 3 at [4], [36]–[38]; *Immigration New Zealand (Calder) v Soni* [2018] NZIACDT 6 at [4], [50]–[61].

¹¹ Immigration Advisers Licensing Act 2007, ss 6 & 63.

¹² Section 68(1).

¹³ Sections 8 & 73.

¹⁴ Section 7.

- (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.
- (2) To avoid doubt, a person is not considered to be providing immigration advice within the meaning of this Act if the person provides the advice in the course of acting under or pursuant to—
 - (a) the Ombudsmen Act 1975; or
 - (b) any other enactment by which functions are conferred on Ombudsmen holding office under that Act.

[57] The exclusion from the scope of “immigration advice” potentially relevant here to the work of Mr P and Ms U is subs (1)(b)(iii) concerning clerical work, translation or interpretation services.

[58] “Clerical work”, however, is narrowly defined in the Act:¹⁵

clerical work means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:

- (a) the recording, organising, storing, or retrieving of information:
- (b) computing or data entry:
- (c) recording information on any form, application, request, or claim on behalf and under the direction of another person

[59] This brings me to the heads of complaint alleged against Mr Yong.

Negligence, or alternatively breaching cls 1, 2(a), 2(e) and 3(c) of the Code by:

- (1) *Failing to conduct himself with due care in not personally engaging with the client*
- (2) *Failing to conduct himself with due care by maintaining business practices whereby he relied on unlicensed individuals, Mr P and Ms U, to provide immigration advice*

[60] The Registrar alleges negligence, a statutory ground of complaint. Alternatively, various breaches of the Code are alleged. This includes a lack of due care by Mr Yong (cl 1). There is no real difference between negligence and a lack of due care. The

¹⁵ Section 5, “clerical work”.

particulars of Mr Yong's alleged negligence or lack of due care are his failure to personally engage with the client and his maintenance of business practices whereby he relied on his unqualified staff to undertake the substantive immigration work (being the statutory "immigration advice").

[61] The allegations of negligence and a lack of due care are unnecessary. I do not see Mr Yong's conduct in terms of any lack of reasonable or due care.

[62] It is not disputed that Mr Yong failed to personally engage with either the client or her husband, the complainant. He did not directly deal with them. His business practice was to permit his unlicensed staff to do that. The practice was deliberate. He knew what his staff were doing. While his business practice was intentional, I accept that he did not adopt it knowing it to be a breach of the Code. Mr Yong wrongly thought it was permitted, as such a practice is lawful for Australian migration practice.

[63] I do not accept the complainant's contention that Mr Yong was deceptive. There is no evidence Mr Yong received the fee knowing or suspecting that the client could not successfully achieve the visa sought.

[64] I find that, in terms of the Code, Mr Yong did not (personally) maintain a relationship of confidence and trust or provide advice to the client (cl 2(a)), obtain and carry out her instructions (cl 2(e)), or conduct himself in accordance with the Act by undertaking the immigration advice work (cl 3(a)). It is not enough that he is copied into communications and from time to time instructs the staff. He must personally undertake the client engagement and the substantive immigration work.

[65] Mr Yong admits these breaches of his professional obligations. It is to his credit that he has always acknowledged his failings.

OUTCOME

[66] I uphold the complaint. Mr Yong has breached cls 2(a), 2(e) and 3(c) of the Code.

SUBMISSIONS ON SANCTIONS

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

[68] A timetable is set out below. Any request that Mr Yong undertake training should specify the precise course suggested. Mr Yong is requested to provide proof of completing Toi-Ohomai's refresher course. 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

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

- (1) The Registrar, the complainant and Mr Yong are to make submissions by **25 June 2021**.
- (2) The Registrar, the complainant and Mr Yong may reply to submissions of any other party by **9 July 2021**.

ORDER FOR SUPPRESSION

[70] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.¹⁶

[71] There is no public interest in knowing the name of Mr Yong's client, or of his unlicensed staff who have not been the subject of any complaint or criminal process.

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

D J Plunkett
Chair

¹⁶ Immigration Advisers Licensing Act 2007, s 50A.