

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2021] NZIACDT 3

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

**DECISION
(Sanctions)
Dated 25 February 2021**

REPRESENTATION:

Registrar: Self-represented

Complainant: H Gu, representative

Adviser: P Moses, counsel

INTRODUCTION

[1] Mr Damon Parker, the adviser, acted for Mr DY, the complainant, concerning an entrepreneur work visa application. Mr Parker largely assigned the matter to his employee, Mr Anson Zhao, who was not then licensed as an immigration adviser. Mr Parker did not engage with the complainant.

[2] A complaint to the Immigration Advisers Authority (the Authority) was referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It was upheld in a decision issued on 21 December 2020 in *DY v Parker*.¹ Mr Parker was found to have breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] It is now for the Tribunal to determine the appropriate sanctions.

BACKGROUND

[4] The narrative leading to the complaint is set out in the earlier decision of the Tribunal and will only be briefly summarised here.

[5] Mr Parker, a licensed immigration adviser, was a director of Swiftvisa Limited (Swiftvisa) at the relevant time. He remains at Swiftvisa as an employee.

[6] Mr Anson Zhao was an office administrator at Swiftvisa with an accounting degree. Since the events giving rise to this complaint, he has become a provisionally licensed immigration adviser and remains at Swiftvisa where he is a director.

[7] The complainant is a national of China. He approached Swiftvisa in February 2017 concerning the prospects of obtaining an entrepreneur visa. He met Mr Parker in the presence of Mr Zhao as interpreter. This was the only occasion Mr Parker personally met or communicated with the complainant. He was left to work with Mr Zhao and Ms Jessie Cheng, the wife of Mr Parker, who was also an unlicensed employee of Swiftvisa. Mr Zhao and Ms Cheng put together a draft business plan for the complainant. There were meetings between the complainant and Mr Zhao, one of which was attended by Ms Cheng.

[8] A draft proposal was sent by Mr Zhao to Mr Parker to check on 16 August 2017.

[9] At about the same time, the complainant instructed a new licensed immigration adviser, Mr Harris Gu. On 22 August 2017, Mr Gu terminated the complainant's contract with Swiftvisa, before the application could be filed with Immigration New Zealand.

¹ *DY v Parker* [2020] NZIACDT 54.

[10] On 16 September 2019, Mr Gu, on behalf of the complainant, made a complaint to the Authority against Mr Parker.

Decision of the Tribunal

[11] Giving Mr Parker the benefit of the doubt, it was found that he had sufficiently engaged with the preparation of the business plan and had exercised overall control of its preparation. Hence there was insufficient evidence of Mr Zhao performing substantive immigration work. There was no breach of cl 3(c) of the Code.

[12] Mr Parker was, however, required to maintain a relationship of trust and confidence with the complainant, to give him advice, to take his instructions and to carry out those instructions. Those obligations were personal to him and could not be delegated to unlicensed persons. While Mr Parker was found to have sufficiently engaged with the substantive immigration work, he had excused himself wholly from the client relationship. He had not unlawfully abandoned the task of producing the business plan and application (in terms of his obligation under cl 3(c)), but he had abandoned his client (his obligation under cl 2(a) and (e)).

[13] The complaint was upheld to the extent that Mr Parker was found to have breached cl 2(a) and (e) of the Code.

SUBMISSIONS

Submissions from the Registrar

[14] The Registrar, Mr Connor, in his submissions of 29 January 2021, observes that this is the third complaint upheld against Mr Parker for similar serious breaches. The conduct in each complaint had occurred over a similar period of time, commencing in early 2017, before the initial 2019 disciplinary proceeding. The conduct now to be sanctioned cannot be characterised as a failure to reform in defiance of previous orders of the Tribunal.

[15] It is noted by the Registrar that there is a common character to Mr Parker's breaches. The systemic deficiencies in his practice may indicate a need for further training. His continued practice in the profession could appropriately be supplemented by further training to support his understanding and address deficiencies in his professional conduct.

[16] It is submitted that the appropriate sanctions would be:

- (1) censure;
- (2) an order that Mr Parker completes the Post Graduate Professional Practice module (LAWS7015) offered by Toi-Ohomai Institute of Technology within 12 months of the sanctions decision (the next intake being in July 2021); and
- (3) an order for payment of a penalty in the vicinity of \$2,000.

Submissions from the complainant

[17] In an email from Mr Gu on 21 December 2020, it is submitted that although Mr Zhao did some work on the business plan, the complainant would not have entered into the agreement with Mr Parker and paid him professional fees had he known that Mr Parker was unable to fulfil his obligations. A full refund was therefore reasonable.

[18] In addition, Mr Parker should pay compensation of \$2,000 for distress. Mr Parker had been asked on 22 August 2017 to provide the complainant's full file. Had he cooperated and admitted sooner that he did not hold the relevant information, the complaint could have been raised and resolved sooner. The complainant was distressed knowing that Mr Parker was unwilling to provide the information the complainant was entitled to. This caused unnecessary and unjustified delay by Mr Parker and intensified the feeling of distress.

[19] It is submitted by Mr Gu that the appropriate sanctions would be:

- (1) Mr Parker is to be immediately suspended until he has completed Toi-Ohomai's Graduate Diploma in New Zealand Immigration Advice, coupled with an order preventing him from reapplying for any licence during that time;
- (2) refund to the complainant \$10,000 plus GST; and
- (3) pay the complainant \$2,000 for distress.

Submissions from Mr Parker

[20] There are submissions from Mr Moses, counsel for Mr Parker, dated 29 January 2021. The Tribunal's decision is accepted. It is also acknowledged that this is the third complaint upheld against Mr Parker, but it is noted that the material events had occurred

in 2017, before Mr Parker had been advised of the deficiencies identified in the earlier complaints.

[21] Mr Parker has addressed the lessons learned from all three complaints in his statement to the Tribunal, as well as in his earlier evidence given to the Authority or the Tribunal. He has further strengthened his internal processes and office manual. Importantly, he has ensured that his administrative staff who are interested in becoming licensed have a pathway to do so.

[22] It is noted that publication of Mr Parker's name on a readily searchable database has a strong punitive effect and is liable to adversely affect Mr Parker's practice and potentially its profitability. This is a very significant sanction in its own right and can be taken into account when deciding the magnitude of any fine.

[23] It is accepted that censure is clearly a likely consequence of the complaint being upheld. Furthermore, it is accepted that the imposition of a moderate fine would be appropriate. In the circumstances, that could be towards the lower end of the possible range. One of the key objectives of upholding professional discipline has been met as Mr Parker acknowledged his central error of judgement and consequentially amended the management of his practice following receipt of the first complaint against him in 2019.

[24] Mr Moses points out that while the total fees agreed were \$40,000, only \$10,000 was paid. The work of preparing a business plan was done by a suitably qualified member of the staff. The Tribunal found that the preparation of the plan by a staff member had not itself been a breach of Mr Parker's obligations. The complainant withdrew his instructions, but it is not clear why he did so. In any event, he received the benefit of the work which Mr Parker contracted to perform, namely the creation of a business plan. The breach found by the Tribunal did not relate to the provision of or the manner of preparation of the business plan. There is no causal link between Mr Parker's breach of his obligations and the compensation claimed by the complainant.

[25] In relation to the claim for payment of \$2,000 for distress, it is contended that there is equally no nexus between the breach and the claim for compensation. There is no evidence of distress suffered by the complainant as a result of delays in providing a copy of the information held on Mr Parker's file.

[26] There is a statement in support from Mr Parker (29 January 2021). He understands and accepts the Tribunal's findings. He did not realise in 2017 that he was in breach of his professional obligations.

[27] In response to Mr Gu's submission that he should undertake the graduate diploma for one year fulltime, Mr Parker states that this would be grossly disproportionate. Not only has he accepted all three of the complaints, but the unprofessional conduct is not ongoing.

[28] As for the Registrar's contention that he should complete the LAWS7015 paper, Mr Parker notes that he is familiar with this paper, as he has reviewed and discussed it with two employees who are undertaking the graduate diploma. Those employees are provisionally licensed under his supervision. It would serve no useful purpose for him to take the paper as he is entirely familiar with the materials. It is not significantly different to the graduate certificate which he completed in 2013. While it includes more recent IACDT decisions, he has already reviewed these decisions.

[29] Mr Parker states that he does not need to undertake further training to understand the errors of judgement made by him. The Tribunal's decisions and his counsel's advice have made that clear. Due to the significant reduction in his workload as a result of the pandemic, he has applied to re-enrol in the LLB degree course. If he uses his available time for such further study, that outcome would be more beneficial.

[30] The most significant change Mr Parker says he has made has been to financially support previously unlicensed staff to become provisionally licensed.

JURISDICTION

[31] The Tribunal's jurisdiction to impose sanctions is set out in the Immigration Advisers Licensing Act 2007 (the Act). Having heard a complaint, the Tribunal may take the following action:²

50 Determination of complaint by Tribunal

After hearing a complaint, the Tribunal may—

- (a) determine to dismiss the complaint:
- (b) uphold the complaint but determine to take no further action:
- (c) uphold the complaint and impose on the licensed immigration adviser or former licensed immigration adviser any 1 or more of the sanctions set out in section 51.

² Immigration Advisers Licensing Act 2007.

[32] The sanctions that may be imposed are set out at s 51(1) of the Act:

51 Disciplinary sanctions

- (1) The sanctions that the Tribunal may impose are—
- (a) caution or censure:
 - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
 - (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
 - (d) cancellation of licence:
 - (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:
 - (f) an order for the payment of a penalty not exceeding \$10,000:
 - (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
 - (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
 - (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

[33] In determining the appropriate sanction, it is relevant to note the purpose of the Act:

3 Purpose and scheme of Act

The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination, by providing for the regulation of persons who give immigration advice.

[34] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:³

...It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

³ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citations omitted).

...

The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.

...

Lord Diplock pointed out in *Ziderman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

[35] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the profession itself.⁴

[36] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.⁵

[37] The most appropriate penalty is that which:⁶

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee*, above n 3, at [151].

⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

⁶ *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], citing *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633, [2013] NZAR 320 at [49].

DISCUSSION

[38] The starting point is the seriousness of the breach of the duty to personally engage with clients. It is a fundamental obligation of licensed advisers to engage directly with both the substantive immigration work and the client. Clients are entitled to deal directly with licensed advisers who are knowledgeable and subject to a professional code.

[39] Moreover, this is not the first time Mr Parker has appeared before the Tribunal on similar breaches of his professional obligations. His conduct here is aggravated by the earlier complaints upheld against him.

[40] In *NT v Parker*,⁷ Mr Parker was found to have left it to the unlicensed staff, largely his wife, to communicate with the client about the information and documentation required to support the client's immigration applications, in breach of cl 2(e) of the Code. This conduct had occurred between about February and August 2017. Furthermore, Mr Parker was found to have been unprofessional in failing to promptly provide his client with a copy of a letter from Immigration New Zealand, in breach of cl 1. The sanctions were censure, payment of a penalty of \$2,500 and compensation to his client of \$3,000.

[41] Then in *ZG v Parker*,⁸ the Tribunal found that while there was evidence of Mr Parker meeting or communicating with the client on certain occasions, there was no evidence of any engagement by him directly with her in the period during which the expression of interest was prepared and filed, from April to November 2017. Mr Parker was found to be in breach of the obligation to be professional in cl 1 of the Code. He had also failed to personally obtain his client's instructions, in breach of cl 2(e).

[42] Furthermore, Mr Parker had a conflict of interest. While he had disclosed the conflict, it was found that he should have declined to act, since he was not able to provide objective advice. This was a breach of cls 2(a) and 7(a) of the Code.

[43] In the second complaint, Mr Parker was censured, directed to pay a penalty of \$4,500 and to pay compensation of \$2,500 to his client.

[44] While this is the third time Mr Parker has appeared before the Tribunal on similar professional misconduct, it is acknowledged that his misconduct is not characterised by wilful defiance of the Code or the disciplinary process. The conduct at issue here occurred from February until August 2017, at about the same time as the earlier

⁷ *NT v Parker* [2019] NZIACDT 62, 71.

⁸ *ZG v Parker* [2020] NZIACDT 46, 53.

complaints and prior to the first complaint (IACDT 027/18) being referred to him by the Authority in May 2018.

[45] Mr Parker has also shown considerable insight into his wrongdoing as noted in the earlier sanctions decisions of the Tribunal.⁹ Not only has he acknowledged the misconduct, but he has set out to change practices in his firm to ensure it is not repeated. In particular, two previously unlicensed employees are now provisionally licensed and presumably working their way towards full licences. They are able to lawfully engage directly with clients, under his supervision.

[46] I acknowledge Mr Moses' point that disciplinary decisions themselves potentially have a strongly adverse effect on a practitioner since they are available on a public database. This is an inevitable consequence of professional misconduct since the public are entitled to make informed choices as to whom to instruct. As real as the effect is, it is not punitive in nature. It is not a punishment.

Censure

[47] I agree with the Registrar that Mr Parker should be censured. Mr Parker acknowledges this is appropriate.

Training

[48] The Registrar submits that Mr Parker should be directed to undertake the professional practice module at Toi-Ohomai while the complainant contends that he should undertake the full post graduate diploma. This is the third time Mr Parker has left a client to deal directly with unlicensed staff, but the misconduct involving all these clients occurred in 2017, before he was alerted to the practice being in breach of the Code. Given the insight shown by him since the first disciplinary proceedings commenced, the protection of the public does not require any training to be directed. Mr Parker has also had the benefit of advice on his specific failings from a number of lawyers experienced in this field.

Suspension or cancellation

[49] The complainant submits that Mr Parker should be suspended from practice pending retraining. I have already found retraining to be unnecessary. However, irrespective of any need for further training, I would not have contemplated suspending Mr Parker. From the time of the first complaint, Mr Parker has shown insight into his

⁹ *NT v Parker* [2019] NZIACDT 71 at [43]–[44], *ZG v Parker* [2020] NZIACDT 53 at [43].

professional failures, particularly the common complaint of a lack of engagement with his clients. I have already observed that there is no suggestion of defiance of the Code. I do not consider that the public need protecting from Mr Parker.

Financial penalty

[50] As noted above, an aggravating factor is that this is the third time Mr Parker has been disciplined by the Tribunal, the common misconduct being a failure to engage with his client. In the earlier complaints, other professional breaches were also upheld. The penalties imposed were \$2,500 and \$4,500, with the latter complaint including a conflict of interest.

[51] Mr Parker has acknowledged his wrongdoing and made changes to the practices in the firm. It is also relevant that I cannot identify any real prejudice to the complainant arising out of Mr Parker's absence from client engagement.

[52] Mr Parker will be directed to pay a penalty of \$4,500.

Refund and compensation

[53] The complainant paid \$10,000 (plus GST) in fees, out of an agreed fee for the full service, if successful, of \$40,000 (plus GST). He seeks a full refund. While Mr Parker's service was unsuccessful, since no application was actually filed, that was because the complainant withdrew his instructions. The reason he did so is not known.

[54] The complainant does not point to any substantive problem or mistake with the business plan. There is no reason to believe Mr Zhao did not competently put it together. Mr Parker did not engage with the complainant, but it has not been shown this had any effect on the quality or timing of the business plan. The complainant could presumably have relied on the plan to make an application, if necessary using another licensed adviser. Whether or not that is the case, he has not shown that Mr Parker's misconduct (his absence from direct communications with him) has led to any fault in the draft business plan or the application compiled. A refund of the fee paid is not therefore justified.

[55] The complainant seeks \$2,000 for distress, said to arise from delays in providing to the complainant his file when requested. There is no evidence from the complainant as to any distress, but in any event, it would not arise from the wrongdoing upheld by the Tribunal. I decline to award compensation for any such distress.

OUTCOME

[56] Mr Parker is:

- (1) censured; and
- (2) ordered to immediately pay to the Registrar the sum of \$4,500.

ORDER FOR SUPPRESSION

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

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

[59] 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.