

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2023] NZIACDT 14

Reference No: IACDT 013/22

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **II**
Complainant

AND **YUE SUN**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 26 April 2023

REPRESENTATION:

Registrar: Self-represented
Complainant: No appearance
Adviser: No appearance

PRELIMINARY

[1] The complainant is II. His wife, who was present in New Zealand, engaged a New Zealand company for immigration services for the family. The complainant dealt with staff of the company in China and New Zealand. The company used the adviser, Yue Sun (also known as Curt Sun), to undertake the immigration work. He had no contact with the complainant or his wife. A residence application for the family was filed by Mr Sun and later withdrawn.

[2] A complaint by the complainant against Mr Sun 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 Licensed Immigration Advisers Code of Conduct 2014 (the Code), a ground of complaint under the Immigration Advisers Licensing Act 2007 (the Act).

BACKGROUND

[3] The complainant and his family are Chinese nationals. His wife, ZA, came to New Zealand in 2015 on a visitor visa and is understood to remain here on a guardian visitor visa to accompany their son who is studying in New Zealand.

[4] Mr Sun is a licensed immigration adviser. At the relevant time, he was engaged by Heytour Group Holding Ltd or one of its companies (Heytour) of Auckland.

[5] On 17 October 2018, the complainant's wife entered into a written contract with Heytour for an application for a New Zealand entrepreneur resident visa concerning a start-up project in the tourism industry. Ms H, based in Auckland, signed on behalf of Heytour. The fee was \$50,000.

[6] On 14 October 2019, Mr Sun filed an application for an interim visa (Work, Work to Residence, Entrepreneur Work Visa), for the complainant and associated visas for his wife and their child. The complainant was the principal applicant.

[7] Immigration New Zealand (Immigration NZ) completed an initial assessment of the application and wrote to the complainant, care of Mr Sun, on 18 November 2019, setting out numerous concerns with the application. He was invited to provide further information.

[8] On 28 November 2019, Ms M, an employee of Heytour in China, rang the complainant (who was in China) and told him that Immigration NZ was not satisfied with the predicted finance figure, so he would need to sign a withdrawal request. She sent a

template withdrawal form via WeChat to him and invited him to sign it. Later that evening, the complainant returned the signed form to Ms M. On the same day, Mr Sun sent it to Immigration NZ. On 19 December 2019, the government agency formally wrote to the complainant, care of Mr Sun, confirming the withdrawal of the application.

[9] On 4 December 2020, Ms H sent a text to the complainant's wife.¹ She acknowledged introducing the project to her. She said the real estate company was about to be bankrupted and the hotel was liquidating. According to Ms H, she had not refused to give the complainant the money. The company had only RMB100,000 and another RMB100,000 from Ms H's brother. If her father did not have cancer, she would pay the complainant.

COMPLAINT

[10] On 27 May 2022 (form dated 5 May 2022), the complainant made a complaint against Mr Sun to the Authority. He said his wife saw Ms H to discuss an entrepreneur application. Part of the scheme involved buying a property from a Heytour related company. His wife signed the service contract. As required by Heytour, they purchased a "unit" of a certain type of hotel. In accordance with the service contract, they paid Heytour in two instalments the full fee of \$50,000.

[11] The complainant said Ms H informed them of problems with the application. There were no written communications from Ms H or Mr Sun. Heytour and Mr Sun "never informed or discussed with us" before the application was withdrawn.² The application was withdrawn without their consent. They therefore had to sell the unit at a loss. Heytour refused a refund or compensation.

[12] The complainant provided further information to the Authority on 21 September 2022. At the time of withdrawal of the application, Ms M said he needed to sign the withdrawal request because Immigration NZ was not satisfied with the projected income. She sent the withdrawal form to sign. He was told by Ms M and Ms H it was highly likely the application would be declined, which would affect the chance of the next application.

[13] The complainant said that Ms H orally agreed to a full refund of \$50,000, but she then claimed financial hardship. Later, she said Heytour did not allow a full refund, only a partial refund of \$35,000. They found that Ms H's real purpose was to sell a property at a price higher than the market, irrespective of the success of the immigration project. They had bought a property for \$571,000, which they sold for \$396,000.

¹ Registrar's bundle at 28.

² Complaint (5 May 2022), Registrar's bundle at 14.

[14] On 2 October 2022, the complainant provided further information to the Authority. He said Ms H “strongly recommended” the entrepreneur visa.³ It was Ms H and Ms M who communicated with him. He never met the adviser (Mr Sun) and had no communication with him. Neither Ms H nor Ms M mentioned him.

Explanation from Mr Sun

[15] The Authority advised Mr Sun of the complaint and sought certain information from him.

[16] Mr Sun sent an email to the Authority on 20 September 2022. He said he was a “contractor employee” of Heytour Migration Ltd from October 2018 until early 2021.⁴ Since the client was based in China and due to the large time difference, Heytour’s staff would contact the client with the instruction of the adviser.⁵ The staff collected information and then passed it onto an adviser by email or WeChat. The advisers assessed the situation. They provided feedback and immigration advice via email and WeChat, which the staff then communicated to the client. Because entrepreneur applications involved sensitive financial information, most clients preferred a phone call or face to face conversation, rather than a written exchange.

[17] In relation to the complainant, communication operated the same way. As it was more than four years ago, “we” do not have any record of a phone call or WeChat voice call.⁶ Furthermore, he had left Heytour and did not have access to the emails.

[18] Mr Sun said he had provided a withdrawal letter signed by the complainant.

[19] At the request of the Authority, Mr Sun provided further explanation by email on 21 September 2022. He said his name was not on the written contract as there were multiple advisers at Heytour. The staff in China were only responsible for collecting information from the client and passing instructions onto them from the advisers. During the initial consultation and for important communications, he would join the group voice chat or phone call. He could not find any record as it had been a few years since the last conversation. Mr Sun understood that he should keep all the records. He was merely a contractor employee and had left the company.

³ See translation at 33 of the Registrar’s bundle.

⁴ Email Mr Sun to Authority (20 September 2022), Registrar’s bundle at 61.

⁵ Mr Sun does not distinguish the two Heytour companies.

⁶ Email Mr Sun to Authority (20 September 2022), Registrar’s bundle at 61.

[20] In a further email that day, Mr Sun said the client files previously provided were all from Heytour as they were cooperative. But they could not find the communication record.

[21] The Authority formally wrote to Mr Sun on 28 September 2022 setting out details of the complaint and inviting his explanation.

[22] On 3 October 2022, Mr Sun replied to the Authority. According to him, the complainant was well aware of him as the immigration adviser. The staff at Heytour always emphasised when passing on immigration advice that it had come after communication with the adviser. His details were on all the forms signed by the complainant. The withdrawal letter also had his name on it. The complainant could have phoned or emailed him, but preferred to contact the staff by WeChat message. He said it was the complainant who decided to withdraw the application after receiving Immigration NZ's letter.

Complaint filed in the Tribunal

[23] On 14 October 2022, the Registrar filed a statement of complaint (10 October 2022) in the Tribunal. It alleges breaches of the identified provisions of the Code by Mr Sun:

- (1) Allowing unlicensed individuals, Ms H and Ms M, to give immigration advice to the complainant and obtain his instructions, in breach of cls 2(e) and 3(c).
- (2) Alternatively to (1) above, failing to record details of oral discussions, in breach of cl 26(a)(iii) and failing to record in writing details of material discussions in breach of cl 26(c).
- (3) Failing to ensure the written agreement contained his name and licence number, in breach of cl 19(a).

JURISDICTION AND PROCEDURE

[24] 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.

[25] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.⁷

[26] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.⁸ It has been established to deal relatively summarily with complaints referred to it.⁹

[27] 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.¹⁰

[28] The sanctions that may be imposed by the Tribunal are set out in the Act.¹¹ The focus of professional disciplinary proceedings is not punishment but the protection of the public.¹²

[29] 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.¹³

From the Registrar

[30] The Tribunal has received from the Registrar the statement of complaint (10 October 2022), together with supporting documents.

From the complainant

[31] The Tribunal has received no submissions or communications from the complainant.

⁷ Immigration Advisers Licensing Act 2007, s 45(2) & (3).

⁸ Section 49(3) & (4).

⁹ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

¹⁰ Section 50.

¹¹ Section 51(1).

¹² *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

¹³ At [97], [101]–[102] & [112].

From Mr Sun

[32] The Tribunal has received no submissions or communications from Mr Sun.

[33] The Tribunal records that the Registrar sent the statement of complaint to Mr Sun and the complainant on about 10 October 2022. A template statement of reply was sent to both of them by the Tribunal on 11 October 2022, with an invitation to complete the statement of reply by 8 November 2022. They were informed that if no reply was received, the file would be referred to the Chair and a decision made without further notice. As there was no response from them, the Tribunal sent the statement of complaint and template statement of reply again to Mr Sun and the complainant on 17 March 2023.¹⁴ Again, there was no response from either of them.

ASSESSMENT

[34] The Registrar relies on the following provisions of the Code:

Client Care

2. A licensed immigration adviser must:

...

- 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.

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

¹⁴ The Tribunal's emails of 11 October 2022 and 17 March 2023 were sent to the last email address Mr Sun notified to the Authority.

...

File management

26. A licensed immigration adviser must:

- a. maintain a hard copy and/or electronic file for each client, which must include:

...

- iii. copies of all written communications (including any file notes recording material oral communications and any electronic communications) between the adviser, the client and any other person or organisation

...

- c. confirm in writing to the client the details of all material discussions with the client

...

(1) *Allowing unlicensed individuals, Ms H and Ms M, to give immigration advice to the complainant and obtain his instructions, in breach of cls 2(e) and 3(c)*

[35] The evidence of the complainant given to the Authority is that he and his wife were advised throughout by Ms H and Ms M. He said he had never met Mr Sun and nor did they have any form of communication with him.¹⁵ The staff never spoke about him. Mr Sun provided them with no letters or written communications.¹⁶ He “never informed or discussed” with them the withdrawal of the application.

[36] Mr Sun told the Authority that the complainant chose to communicate with the staff. The staff would pass onto him the information, which he would assess and then provide feedback and immigration advice via email and WeChat. He would join the group voice chat or phone call.

[37] The complainant produced to the Tribunal transcripts of communications he or his wife had with Ms H or Ms M. However, Mr Sun has produced no evidence of any communications (written or transcripts of oral discussions) he had with the complainant and his wife. He claims not to be able to access them anymore due to their age and his departure from Heytour. Yet, he was able to provide the client files (minus the communications) to the Authority. He says Heytour were cooperative, but they could not find the communication record.

¹⁵ Email (2 October 2022) from the complainant to the Authority; Registrar’s bundle at 33.

¹⁶ Complaint (5 May 2022), items “End of 10/2019” and “6/12/2019”; Registrar’s bundle at 14.

[38] It is implausible that Mr Sun cannot provide one example of a communication between him and the complainant and his wife. Furthermore, he has chosen not to engage with the Tribunal. Unlike the complainant, Mr Sun has an obligation to provide his explanation to the Tribunal. If he does not, an adverse inference can be drawn.¹⁷ His explanation to the Authority in the absence of documentary corroboration or any engagement with the Tribunal is not accepted.

[39] The Tribunal finds that Mr Sun permitted the unlicensed individuals, Ms H and Ms M, to give immigration advice to the complainant and his wife. Someone was advising them on immigration matters and as it was not Mr Sun, it must have been Ms H and Ms M, as the complainant alleges.

[40] For example, the complainant says he was advised by Ms M and Ms H to withdraw the application and that Mr Sun never discussed the withdrawal with him. There is some corroboration of the complainant's allegation in the form of texts exchanged between him and Ms M on 28 November 2019.¹⁸

[41] As the Registrar contends, Mr Sun has delegated all the engagement with the complainant to unlicensed staff. The Tribunal confirmed in *Cleland* that it is the duty of an adviser to deal directly with clients and they must be active and not merely passive in performing that duty.¹⁹ It was Mr Sun's duty to seek out the client, not the client's duty to contact him. He failed to personally advise the complainant and obtain his instructions. Mr Sun knew what the staff were doing and permitted them to work directly with the complainant beyond merely clerical work, contrary to s 6 of the Act.

[42] The Tribunal finds that Mr Sun has breached cls 2(e) and 3(c) of the Code. The first head of complaint is upheld.

(2) *Alternatively to (1) above, failing to record details of oral discussions, in breach of cl 26(a)(iii) and failing to record in writing details of material discussions in breach of cl 26(c)*

[43] There is no need to deal with the alternative second head of complaint, in light of the upholding of the first head.

¹⁷ *KX v Ji* [2020] NZIACDT 43 at [54] and the authorities cited at fn 9.

¹⁸ Registrar's bundle at 69–72.

¹⁹ *Immigration New Zealand (Calder) v Cleland* [2019] NZIACDT 25 at [68] & [92].

(3) *Failing to ensure the written agreement contained his name and licence number, in breach of cl 19(a)*

[44] A service agreement must identify the immigration adviser engaged to undertake the client's work. It is important that the client knows and agrees who is responsible for the immigration advice work. Mr Sun acknowledged to the Authority on 21 September 2022 that his name was not in the agreement. It is no justification that this was because there were multiple advisers at Heytour. Indeed, that is a good reason why he should have been named, otherwise the complainant will not know who is responsible for his work.

[45] Mr Sun's name and licence number are not specified in the client agreement. The third head of complaint is upheld. Mr Sun breached cl 19(a) of the Code.

OUTCOME

[46] The complaint is upheld. Mr Sun has breached cls 2(e), 3(c) and 19(a) of the Code.

SUBMISSIONS ON SANCTIONS

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

[48] A timetable is set out below. Any request that Mr Sun 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

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

- (1) The Registrar, the complainant and Mr Sun are to make submissions by **18 May 2023**.
- (2) The Registrar, the complainant and Mr Sun may reply to submissions of any other party by **1 June 2023**.

ORDER FOR SUPPRESSION

[50] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.²⁰

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

[52] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration NZ.

D J Plunkett
Chair

²⁰ Immigration Advisers Licensing Act 2007, s 50A.