

# IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2023] NZIACDT 18

Reference No: IACDT 015/22

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

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

**BETWEEN** **XX**  
Complainant

**AND** **YAN XU**  
Adviser

**SUBJECT TO SUPPRESSION ORDER**

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**DECISION  
(Sanctions)  
Dated 1 June 2023**

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## **REPRESENTATION:**

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

## INTRODUCTION

[1] The complainant, XX (also known as XX), engaged Yan Xu (also known as Kitty Xu) to obtain visas for her parents. The visa application for her mother was unsuccessful, as Ms Xu either misread or missed letters from Immigration New Zealand (Immigration NZ).

[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 13 April 2023 in *XX v Xu*.<sup>1</sup> Ms Xu was found to have breached a number of provisions of 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 narrative leading to the complaint is set out in the earlier decision and will only be briefly summarised here.

[4] The complainant, a national of China, is a New Zealand permanent resident. Her parents are also nationals of China.

[5] Ms Xu, a licensed immigration adviser, is a director of C & N Immigration Consultants Ltd, of Auckland.

[6] The complainant and Ms Xu entered into a service agreement on 23 February 2022. She agreed to seek visas for the parents. The visa applications for the parents were duly lodged with Immigration NZ on 28 February 2022.

[7] On 24 March 2022, Immigration NZ sent a letter to Ms Xu requiring further information on two matters in relation to the mother's application. Ms Xu sought further information from the mother on one of the matters only, which was provided to Immigration NZ. The application was declined on 8 April 2022, due to the failure to respond to both matters. Ms Xu was unaware of the decline letter until 2 May 2022. She received a copy that day and advised the complainant of the rejection of the mother's visa, but she did not provide the letter to the complainant until 25 May 2022.

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<sup>1</sup> *XX v Xu* [2023] NZIACDT 12.

[8] Ms Xu lodged a s 61 request with Immigration NZ on 9 May 2022, acknowledging her role in failing to send the information. The request was refused by Immigration NZ on 24 May 2022.

*Decision of the Tribunal*

[9] The following breaches of the Code by Ms Xu were found by the Tribunal:

- (1) Failed to fully read the letter of 24 March 2022 and as a result provided the mother with erroneous immigration advice, in breach of cl 1.
- (2)(a) Failed to monitor the correspondence from Immigration NZ and as a result failed to read the 8 April 2022 letter in a timely manner, in breach of cl 1.
- (b) Failed to provide the mother with adequate immigration advice, in breach of cl 1.
- (c) Failed to provide the decline letter to the complainant in a timely manner, in breach of cl 1.
- (3) Failed to provide and explain the Code and internal complaints process when entering into the written agreement, in breach of cl 17(a), (b) and (c).
- (4) Failed to amend the written agreement or provide a new written agreement for the s 61 work, in breach of cl 18(a).
- (5) Failed to record and confirm material discussions with the complainant and her mother, in breach of cl 26(c).

**SUBMISSIONS**

*From the Registrar*

[10] In her submissions (3 May 2023), Ms Issar of the Registrar's office describes Ms Xu's misconduct as service failures in delivering the fundamental duties of an adviser. She showed a lack of diligence and due care, was tardy and failed to provide relevant information. The number of breaches illustrates repeated failure to adhere to the professional standards and is relatively serious. It was not without consequence for the clients. It contributed to their emotional distress and to the mother's visa being declined.

[11] It is the first complaint against Ms Xu in nearly 20 years of practice. Significantly, Ms Xu has expressed a clear and strong desire to atone for her conduct through accepting wrongdoing, taking steps to restore losses and apologising to her clients.

[12] It is submitted that the misconduct can be categorised as towards the higher end of low or the lower end of moderate in terms of seriousness.

[13] Ms Issar contends that the appropriate sanctions would be:

- (1) Caution.
- (2) If applicable, an order that Ms Xu complete the LAWS 7015 professional practice paper at Toi Ohomai Institute of Technology.
- (3) Payment of a penalty in the region of \$1,500 to \$2,000.

*From the complainant*

[14] In her submissions (4 May 2023), Ms Chen, counsel for the complainant, states that the whole family suffered serious consequences and significant losses – financial, emotional and physical – caused by Ms Xu’s misconduct, whether by dishonesty or negligence. The major stress and cost were in relation to the mother being unlawfully in New Zealand unknowingly.

[15] The complainant seeks compensation of \$42,328.96, as follows:

- (1) Expenses seeking professional advice and services to recover the mother’s legal status.
- (2) The complainant’s wages lost for the time spent recovering her mother’s legal status.
- (3) The mother’s medical costs to treat her anxiety disorders caused by being unlawfully in New Zealand.
- (4) Travelling costs after knowing the visa was declined.
- (5) Refund of Ms Xu’s professional service fee.

[16] Ms Chen produces a detailed schedule of costs, for a total of \$42,328.96, though it is not broken down into the five categories listed above. It includes \$1,603 for “Student visa declined loss”. Numerous support documents (invoices, receipts) are also produced.

[17] The complainant seeks recognition of the family's significant loss and serious suffering caused by Ms Xu's professional misconduct. A fair and reasonable outcome is important for the family to maintain their confidence in the system and protect the public interest.

[18] Ms Chen made further submissions (18 May 2023) in reply to Mr Moses' response to the compensation sought by the complainant.

[19] It is contended that the whole family suffered serious consequences and significant losses financially, emotionally and physically, caused by Ms Xu's misconduct. From the complainant's point of view, the claim made is the minimum. The greater amount of costs were for the purpose of restoring the mother's legal status in New Zealand. They were not optional. It would be unfair for the complainant to have to pay those costs.

*From the adviser*

[20] In his submissions (4 May 2023), Mr Moses, counsel for Ms Xu, states that she acknowledges the Tribunal's decision. She has fully and frankly accepted her key errors from the time they became apparent to her. This was before the filing of the complaint. Ms Xu advised the complainant and her mother, apologised to them, offered to rectify the matter without charge and filed a s 61 request, taking full responsibility for her role. Ms Xu has offered to refund her professional fees, compensate for Immigration NZ's fees, the excess taken by the school and the insurance costs for the tuition fee, a total of \$1,603. She has been co-operative throughout the process, showing a mature and responsible approach.

[21] The gravamen of the complaint is not adequately monitoring or reading Immigration NZ's correspondence, which led to erroneous immigration advice to the complainant's mother. These errors directly prejudiced the mother's immigration position.

[22] It is relevant that this is the first complaint against Ms Xu who has been in practice for almost two decades.

[23] A very significant sanction is the publication of Ms Xu's name in a public forum in the Tribunal's decisions. It is something to be taken into account when determining the magnitude of any fine or other sanction.

[24] Ms Xu acknowledges that a formal caution is appropriate. The Registrar has also sought a fine of \$1,500 to \$2,000. This is greater than appropriate. In broadly similar cases for an oversight or repeated oversights, the Tribunal has fined the adviser \$500 or \$1,000. It is submitted that a fine in the vicinity of \$1,000 would be commensurate with the gravity of Ms Xu's conduct. In setting the fine, the Tribunal is also asked to consider the likely financial burden on Ms Xu who has offered \$1,603 to the complainant.

[25] Mr Moses submits that further training is not required, though Ms Xu will abide any such direction of the Tribunal. The misconduct was in the nature of an oversight. Ms Xu instructs that she is familiar with her obligations and has taken steps to ensure that in future her workload is manageable, avoiding the risk of any repeat of the professional failures identified here. The complaint has been a very potent reminder to Ms Xu of her professional obligations.

[26] In his additional submissions (18 May 2023), Mr Moses responded to the claim for compensation.

[27] The complainant seeks \$16,207.50 for legal fees, including representation before the Authority and the Tribunal. While she may be entitled to compensation for her immediately connected legal costs, she has sought reimbursement for legal advice by four different firms for an amount vastly in excess of what would be required for advice and to regularise her immigration position.

[28] It is acknowledged that Ms Xu clearly made significant mistakes, but there was never any certainty that the mother's visa application would be approved. There is a real question as to whether the claimed legal expenses are directly attributable to Ms Xu's errors. Furthermore, Ms Xu also contests liability for compensation for any legal fees not commensurate with the complexity of the matter. It is submitted that \$1,200 (plus GST), being four hours of Ms Chen's time, would be a reasonable amount for advising the complainant and filing a s 61 request. The matter was not complex.

[29] It is also conceded that Ms Xu should compensate the complainant for Immigration NZ's fee of \$410 for the s 61 request.

[30] Mr Moses observes that it has not been the practice of the Tribunal to direct payment of legal fees to complainants legally represented in proceedings before the Authority and the Tribunal. The Tribunal is not a jurisdiction where costs follow the event.

[31] As for the complainant's claim to be reimbursed for lost work, there is no evidence to show the amount of lost work caused by Ms Xu's breaches. This is not "reasonable" compensation.

[32] The Tribunal does not routinely award compensation for stress or disappointment.<sup>2</sup> There is no evidence to show that the mother suffered adverse mental health caused by Ms Xu's errors.

[33] Nor can Ms Xu be liable to reimburse cancellation fees for a flight by the mother when she decided to remain in New Zealand.

[34] The translation fees sought are a litigation expense which cannot be recovered as compensation.

[35] The complainant also seeks a direction that Ms Xu apologise, but she has already done so twice, as noted by the Tribunal in its earlier decision.<sup>3</sup>

[36] In summary, it is conceded that Ms Xu should pay \$1,603 and another \$410 in compensation. If compensation for legal fees is considered, then \$1,380 (incl. GST) would be appropriate. If Ms Xu is directed to pay compensation of about \$3,000, then a financial penalty may not be required.

## JURISDICTION

[37] The Tribunal's jurisdiction to impose sanctions is set out in the Act. Having heard a complaint, the Tribunal may take the following actions:<sup>4</sup>

### 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.

[38] 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:

<sup>2</sup> *DD v Pabellon* [2023] NZIACDT 2 at [37].

<sup>3</sup> *XX v Xu*, above n 1, at [21] and [25].

<sup>4</sup> Immigration Advisers Licensing Act 2007.

- (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.

[39] 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.

[40] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:<sup>5</sup>

...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.

...

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.

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<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] and [151].



Lord Diplock pointed out in *Zideman 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.

[41] 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 collective reputation and public confidence in the profession itself.<sup>6</sup>

[42] 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.<sup>7</sup>

[43] The most appropriate penalty is that which:<sup>8</sup>

- (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.

## DISCUSSION

### *Compensation*

[44] Ms Xu's most serious professional failure was misreading Immigration NZ's letter of 24 March 2022 which specified two problems with the mother's visa application, only

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<sup>6</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Bolton v Law Society* [1994] 2 All ER 486 (EWCA) at 492; and *Z*, above n 5, at [151].

<sup>7</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

<sup>8</sup> *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].

one of which was identified by Ms Xu. As a result, Immigration NZ declined the visa. The complainant alleges her mother then, unknown to them all, became an overstayer. This caused significant stress and financial loss.

[45] It is correct that 21 days after the decline, the mother's interim visa expired. Ms Xu did not inform the complainant of this, because she did not know of the decline until 2 May 2022. Ms Xu then immediately informed her of the decline. Two days later, she informed the complainant of her mistake which had caused the decline. At the same time, according to Ms Xu, she told the complainant that her mother had become an overstayer. The complainant denies being told then of her mother's unlawful status and says she did not know until 20 May in a discussion with Ms Xu concerning her father's visa. However, the Tribunal found that Ms Xu probably did inform the complainant of her mother's unlawful status on 4 May. Furthermore, it was found that the complainant should have realised on 2 May, when aware of the decline, that her mother would become an overstayer 21 days after the decline.

[46] Irrespective of when the complainant and her mother knew of the latter's unlawful status, that will have come as a shock to them. That status was a direct result of Ms Xu's mistake in overlooking the second problem identified by Immigration NZ and then failing to discover the decline letter until after the expiry of the visa and the commencement of the unlawful status. Even if the complainant was aware of her mother's unlawful status as early as 2 May, that was already after she had become unlawful.

[47] There is some supporting evidence of the mother being anxious and depressed in a medical certificate from China dated 13 December 2022. While Mr Moses says there is no evidence this was caused by Ms Xu's errors, it would be likely that finding out she was unlawfully in New Zealand and could not remain in the country would cause or contribute to anxiety and/or depression.

[48] The Tribunal can award modest damages for emotional stress.<sup>9</sup> As Mr Moses submits, it does not do so routinely but this is an appropriate case. The claim here is for a total of \$20,000, being \$15,000 for the mother and \$5,000 for the complainant. The Tribunal does not award significant sums for such harm. Nor has it been shown that the mother's mental ill-health was caused entirely by Ms Xu. While the Tribunal can accept that the complainant was also shocked to hear of the decline of her mother's visa and her unlawful status, there is no medical evidence from the complainant of any mental distress. An award of \$1,500 will be made. It is not intended as full compensation for distress and anxiety, but as recognition for the stress to the mother and the complainant

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<sup>9</sup> *Ikbarieh v Hammadih* [2014] NZIACDT 111 at [41]–[42]; *Unnikrishnan v Goldsmith* [2017] NZIACDT 22 at [30]–[31]; and *DD v Pabellon*, above n 2, at [37].

from Ms Xu's failings. In determining what is "reasonable" compensation, the Tribunal is mindful of the total compensation awarded and other financial penalties (see below).

[49] The Tribunal can also award reasonable compensation for the specific losses and expenses caused by or relating to or arising from an adviser's wrongdoing upheld by the Tribunal.<sup>10</sup>

[50] Accordingly, in addition to the damages for emotional stress, the Tribunal will award \$1,603 for the expenses wasted and other losses directly caused by Ms Xu's mistakes. This is an item claimed by the complainant and accepted by Ms Xu. To that may be added the \$410 Immigration NZ fee for the s 61 request made on about 8 August 2022 by Ms Chen, an item also appropriately accepted by Ms Xu.

[51] According to Mr Moses, the claim for \$42,328.96 includes \$16,207.50 for the legal fees of four law firms. The Tribunal agrees with Mr Moses that the mother's immigration circumstances were not complex. He says \$1,380 (four hours of work) would be appropriate. The Tribunal agrees. It is not for the Tribunal to assess whether the lawyers were justified in charging more than \$16,000, but such high fees are not recoverable as reasonable compensation in the circumstances here. In particular, no part of the fees attributable to representation in the Tribunal is recoverable, as the Act does not provide for the Tribunal to award costs.

[52] The Tribunal also agrees with Mr Moses that the complainant cannot recover compensation for her time off work to regularise her mother's immigration status. She had instructed lawyers to attend to that. Even if she had to accompany her mother to the meetings with the lawyers and to read/prepare documents, the Tribunal must assess what is reasonable in the context of the mother's relatively straightforward immigration situation.

[53] There is another factor material to what is reasonable and that is Ms Xu's very modest professional fee of only \$345 (incl. GST). Compensation of \$42,328.96 would be grossly disproportionate to the fee.

[54] The Tribunal declines all other heads of loss claimed. The power to award "reasonable" compensation is intended as a contribution to losses, not full compensation. It will award \$4,893:

Emotional distress	\$1,500
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<sup>10</sup> *Zhang v Chen* [2019] NZIACDT 11 at [67]–[68]; and *NLT v Coetzee* [2020] NZIACDT 7 at [47].

Originally offered <sup>11</sup>	\$1,603
s 61 fee	\$ 410
Lawyer's fee	\$1,380
	<b>\$4,893</b>

[55] The Tribunal's award of total compensation of \$4,893 is a reasonable contribution for the stress, as well as the specific losses and expenses, of the complainant and her mother in the circumstances here.

[56] It is open to the complainant to pursue a civil claim in the general courts or Disputes Tribunal for the balance of the claimed losses. In the civil courts, the usual protections of pleadings, a cause of action, discovery, onus of proof, a trial, the laws of evidence and mitigation of loss apply. No such discipline exists in a claim for compensation in the Tribunal which is a sanction designed for modest losses and expenses which can readily be assessed in the disciplinary context.

#### *Caution or censure*

[57] It is appropriate to formally caution Ms Xu.

#### *Training*

[58] The Tribunal agrees with Mr Moses that it is unnecessary to order Ms Xu to undergo any training. She has acknowledged her failings, which are out of character.

#### *Financial penalty*

[59] The Registrar seeks a penalty in the vicinity of \$1,500 to \$2,000. Mr Moses contends a fine in the vicinity of \$1,000 would be commensurate with the gravity of Ms Xu's conduct.

[60] There were seven breaches of the Code by Ms Xu. Some might be regarded as technical in nature, but others are more substantive and contributed to the decline of the mother's visa and the family's distress.

[61] This is Ms Xu's first appearance before the Tribunal in about 14 years of licensed practice. She accepted her wrongdoing and apologised to the complainant at an early stage. Some account will be taken of the award of compensation of \$4,893. It is

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<sup>11</sup> See the breakdown at *XX v Xu*, above n 1, at [23].

acknowledged that the adverse publicity attendant on the publication of Ms Xu's name is a consequence, though it is not punitive in nature and has only limited relevance.

[62] The three decisions of the Tribunal cited by Mr Moses are respectfully of limited relevance.<sup>12</sup> There were fewer breaches of the Code in each case than here. In two of the cases, the advisers' failings had no immigration consequences for their clients.<sup>13</sup> Nonetheless the Tribunal agrees with Mr Moses that a penalty of \$1,000 would be appropriate in the circumstances.

[63] The penalty will be \$1,000, less than would otherwise be justified because of the award of compensation.

## **OUTCOME**

[64] Ms Xu is:

- (1) Cautioned.
- (2) Ordered to pay to the Registrar \$1,000 within one month.
- (3) Ordered to pay to the complainant \$4,893 within one month.

## **ORDER FOR SUPPRESSION**

[65] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.<sup>14</sup> The accountability and transparency of tribunals must be balanced against the privacy of parties.

[66] There is no public interest in knowing the name of Ms Xu's client, the complainant.

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

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D J Plunkett  
Chair

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<sup>12</sup> *TQ v Gibson* [2022] NZIACDT 23; *Pabellon*, above n 2; and *SM v Kim* [2023] NZIACDT 11.

<sup>13</sup> *Pabellon* and *Kim*.

<sup>14</sup> Immigration Advisers Licensing Act, s 50A.