

## IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2023] NZIACDT 20

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**

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**DECISION  
(Sanctions)  
Dated 21 June 2023**

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### **REPRESENTATION:**

Registrar: Self-represented  
Complainant: Self-represented  
Adviser: Self-represented

## INTRODUCTION

[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. Visa applications for the family were filed by Mr Sun and later withdrawn.

[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 26 April 2023 in *II v Sun*.<sup>1</sup> Mr Sun was found to have breached various 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).

[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 and will only be briefly summarised here.

[5] The complainant and his family are Chinese nationals. At the relevant time, his wife lived here, along with their son.

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

[7] On 17 October 2018, the complainant's wife entered into a written contract with Heytour for an entrepreneur resident visa. It was signed by Ms H for Heytour. The service fee was \$50,000.

[8] On 14 October 2019, Mr Sun filed an application for an interim work visa (entrepreneur category) for the complainant and associated visas for his wife and their child. Immigration New Zealand (Immigration NZ) wrote to the complainant on 18 November setting out numerous concerns. Ms M, also an employee of Heytour, advised the complainant on 28 November to withdraw the application. She sent him a withdrawal form, which he duly signed. Mr Sun then sent that form to Immigration NZ.

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<sup>1</sup> *II v Sun* [2023] NZIACDT 14.

[9] The complainant made a complaint to the Authority on 27 May 2022, which was referred to the Tribunal.

#### *Decision of the Tribunal*

[10] The following breaches of the Code were found by the Tribunal:

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

### **SUBMISSIONS**

#### *From the Registrar*

[11] In her submissions (18 May 2023), Ms Issar of the Registrar's office, notes that Mr Sun has held a full licence since February 2015. It is his first appearance before the Tribunal.

[12] It is contended that Mr Sun has committed a fundamental and serious failure in his duties to his client. It is the duty of an adviser to personally engage with a client. This is crucial to ensuring that immigration services are performed professionally. A failure of this nature undermines the purpose of a licensed immigration practitioners' regime and the protections it affords. Mr Sun's serious conduct is exacerbated by failing to engage with the Tribunal.

[13] Mr Sun does not admit he allowed unlicensed individuals to give immigration advice. He states that the complainant chose to communicate with the staff. He has produced no evidence of any communications he had with the complainant and his wife.

[14] Mr Sun completed the Graduate Certificate in New Zealand Immigration Advice in 2014. This has been superseded by the Graduate Diploma in New Zealand Immigration Advice at Toi Ohomai Institute of Technology (Toi Ohomai). As Mr Sun is either unaware of his obligation or unwilling to engage directly with his clients and also to ensure his details are recorded in the agreement, he should undertake the LAWS 7015 Professional Practice Paper at Toi Ohomai.

[15] The appropriate sanctions would be:

- (1) Censure.
- (2) Payment of a penalty in the vicinity of \$4,000.
- (3) Order to complete the LAWS 7015 paper.

*From the complainant*

[16] The complainant seeks compensation of \$343,208.68, made up as follows (the Tribunal has not checked any of the arithmetic).

Immigration advice fee	<b>\$50,000.00</b>
Investment property	
– lawyer’s fee	4,715.81
– lawyer’s fee	1,732.50
– rates	3,703.93
– rates	1,862.75
– rates	676.73
– agency fees	17,446.00
– management fees	3,449.05
– management fees	3,366.44
– water	500.00
	<b>\$37,453.21</b>
Immigration process expenses	
– translator	1,600.00
– translator	1,560.00
– IELTS	180.00
– travelling	3,586.00
– lawyer for complaint	3,330.25
	<b>\$10,256.25</b>
Loss from sale of property	<b>\$50,000.00</b>
Psychological and emotional damage	<b>\$189,000.00</b>
	<b>\$336,709.46</b>
Interest	6,499.22
	<b>\$343,208.68</b>

[17] At the Tribunal's request, the complainant sent evidence corroborating some of the expenses on 14 June 2023.

*From the adviser*

[18] Mr Sun, who declined to engage with the Tribunal until it issued the decision upholding the complaint, filed a statement of reply (16 May 2023) and submissions (17 May 2023).

[19] Mr Sun repeats the explanation given originally to the Authority. He says he talked to the complainant by telephone, but the latter preferred to talk to someone in China for his own convenience.

[20] Mr Sun says he was not aware of the property transaction between Heytour and the complainant. This is a separate issue from his work. He contacted Heytour and found out that the property was sold by the complainant's wife with a profit of \$21,000 and she did not repay the vendor finance of \$195,000 which was waived.

[21] It is submitted that any immigration application has the risk of being declined. As an immigration adviser, he was not responsible for the client's depression.

[22] Mr Sun admits that his name and licence number were omitted from the client agreement, but he disagrees with the allegations of incapacity and of dishonest or misleading conduct. The facts provided by the complainant are half-truths or incorrect.

[23] Mr Sun advises he does not require an oral hearing.

[24] At the Tribunal's request, Mr Sun sent further submissions on 15 June 2023. It remains his case that it was the complainant who made the decisions to apply for the entrepreneur visa and later to withdraw the application. It would be unfair and unreasonable for compensation to be awarded against him personally.

## **JURISDICTION**

[25] 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>2</sup>

### **50 Determination of complaint by Tribunal**

After hearing a complaint, the Tribunal may—

- (a) determine to dismiss the complaint:

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<sup>2</sup> Immigration Advisers Licensing Act 2007.

- (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.

[26] 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.

[27] 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.

[28] The focus of professional disciplinary proceedings is not punishment, but the protection of the public.<sup>3</sup>

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<sup>3</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] and [151].

...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.

...

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.

[29] 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>4</sup>

[30] 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>5</sup>

[31] The most appropriate penalty is that which:<sup>6</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;

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<sup>4</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 3 at [151].

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

<sup>6</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].

- (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

[32] Mr Sun repeats his explanation given to the Authority that the complainant preferred to communicate with the staff in China. He sent the Tribunal certain WeChat text transcripts between the complainant and an unknown person (dated August and November 2019). Mr Sun does not say who the other party is. It cannot be him as he says he can no longer access his alleged communications with the complainant and nor does he contend it is him.

[33] The Tribunal found Mr Sun permitted unlicensed individuals to engage with the complainant and his wife and provide them with immigration advice. This is a practice known as 'rubber stamping' (whereby the adviser rubber stamps the advice and assistance to clients given by unlicensed persons). The adviser rarely, and in this case never, saw or communicated with the client. This is a breach of the Code (cls 2(e) and 3(c)) and of the Act (s 6).

[34] The obligations in the Code are personal to the adviser and cannot be delegated.<sup>7</sup> An adviser must from the beginning of the instructions to the end take charge of the client engagement process and deal directly with his or her client.<sup>8</sup> The unlicensed staff are confined to clerical work only.<sup>9</sup> It is no justification that it was more convenient for the complainant to deal with the staff in China in his time zone, nor that Mr Sun's contact details were made available to him (if indeed they were).<sup>10</sup>

[35] Mr Sun's misconduct is serious. The Registrar is correct in describing Mr Sun's failure to engage directly with the complainant or his wife as a fundamental failure of his duties to his client.

[36] Mr Sun also failed to ensure that he was identified in the client agreement. This is consistent with his lack of engagement with the complainant or his wife.

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<sup>7</sup> *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [22], [26], [29], [34] and [47].

<sup>8</sup> *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 18 at [89]; and *Immigration New Zealand (Calder) v Cleland* [2019] NZIACDT 25 at [68].

<sup>9</sup> Immigration Advisers Licensing Act, s 7(1)(b)(iii).

<sup>10</sup> *Cleland*, above n 8, at [92].



[37] While Mr Sun accepts his omission in relation to the client agreement, he does not acknowledge the more serious failure to engage with his clients. He continues to wrongly blame the complainant whom he says preferred to talk to someone in China for his own convenience. Had Mr Sun proactively communicated with the complainant, the Tribunal has little doubt the latter would have preferred to deal directly with Mr Sun, the expert, rather than the clerical staff.

[38] It is acknowledged that this is Mr Sun's first appearance before the Tribunal.

#### *Caution or censure*

[39] It is appropriate to mark the Tribunal's disapproval of Mr Sun's serious misconduct by censuring him.

#### *Training*

[40] As Mr Sun has not acknowledged his obligation to engage personally with his clients and undertake all the immigration work (as defined in s 7 of the Act), the Tribunal agrees with the Registrar that he should complete the LAWS 7015 paper.

#### *Penalty*

[41] The primary head of complaint upheld is Mr Sun's wholesale abrogation of his duty to communicate directly with the complainant and/or his wife. This is regarded as serious wrongdoing. Mr Sun refuses to acknowledge this misconduct. To that is added his failure to ensure he was identified in the written agreement, though he has acknowledged that wrongdoing. He expresses no remorse nor offers any apology. He has not said that he learned anything from the complaint.

[42] The Registrar seeks a penalty in the vicinity of \$4,000. Given that this is the first complaint against Mr Sun upheld and the 'rubber stamping' involved only one client, the penalty will be \$2,500. While no earlier decision of the Tribunal involves the same mix of wrongdoing, mitigation and other circumstances, the decisions in *Hill* (penalty \$2,500) and *Ji* (penalty \$3,000) have a degree of comparability.<sup>11</sup> The Tribunal has also taken into account that it is awarding substantial compensation to the complainant. It is appropriate to have regard to the totality of the financial sanctions in setting the penalty.

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<sup>11</sup> *XN v Ji* [2019] NZIACDT 67; and *XA v Hill* [2020] NZIACDT 28.

### *Refund and Compensation*

[43] The complainant seeks compensation of \$343,208.68, which could only be described as a very large figure.

[44] The Tribunal can 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>12</sup> It can also award modest damages for emotional stress, though it does not do so routinely.<sup>13</sup>

[45] The claim for compensation includes \$50,000 for Heytour's service fee. This would be considered a refund if sought against Heytour. However, it has been sought from Mr Sun so it is appropriately considered under the compensation sanction. The Tribunal is not aware how much Heytour paid Mr Sun.

[46] It is clear from Immigration NZ's letter of 18 November 2019 to the complainant that the family's visa applications made by Mr Sun lacked merit. Immigration NZ was not satisfied the complainant, the primary applicant, met the requirements of the entrepreneur work visa. It raised numerous concerns. This lack of merit is confirmed by the alacrity with which Ms M and Ms H advised the complainant to withdraw the application. On Mr Sun's case, he would have been behind the advice to file the application and then to withdraw it. No attempt was made by Mr Sun, or the staff, to work with the complainant to satisfy Immigration NZ's concerns. Their immediate reaction was to urge the complainant to withdraw. That shows there was little, if any, merit to the family's primary application.

[47] Mr Sun was invited by the Tribunal to comment on what appeared to be the lack of merit in the entrepreneur visa application. His answer is that the complainant made the decision to apply and then the decision to withdraw. That may be so, but it begs the question as to what advice Mr Sun gave the complainant at the time the application was filed and then again when it was withdrawn. He does not say. There is no evidence he gave any advice. He cannot blame the complainant for the decision to apply if he did not advise him of the risks. Nor can he blame the complainant for the decision to withdraw if he did not advise him how to meet Immigration NZ's concerns.

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<sup>12</sup> *Zhang v Chen* [2019] NZIACDT 11 at [67]–[68]; and *NLT v Coetzee* [2020] NZIACDT 7 at [47].

<sup>13</sup> *Ikbarieh v Hammadih* [2014] NZIACDT 111 at [41]–[42]; *Unnikrishnan v Goldsmith* [2017] NZIACDT 22 at [30]–[31]; and *DD v Pabellon* [2023] NZIACDT 2 at [37].

[48] Mr Sun is responsible for what the Tribunal finds to be an unmeritorious application. It should not have been filed. If Mr Sun had dealt directly with the complainant and not unlawfully abrogated engagement to the unlicensed staff, he would have known this and should have advised the complainant not to proceed with the application or at least informed him of the merits (or otherwise). Mr Sun says any visa application has a risk of decline. This is correct. But there was a high risk of decline here. Indeed, there appears to have been little chance of success.

[49] It follows that the service for which the service fee was paid was of no value to the complainant. That fee was paid to Heytour and it was Heytour with which the complainant contracted. Mr Sun says he received no money directly from the complainant and it is unfair and unreasonable for the complainant to seek any money from him personally. Mr Sun also says he spent a lot of time and effort in preparing and filing the visa application, but that work was of no value to the complainant. While it is Heytour and not Mr Sun potentially liable in breach of contract for the return of the fee, it is Mr Sun and not Heytour with the professional obligations under the Code in relation to the advice to proceed and the fee.

[50] The statutory power to order compensation arises from the licensed adviser's breach of his or her professional obligations, irrespective of whoever received the money pursuant to the service contract. The professional and contractual obligations may rest with different persons. The Tribunal will direct Mr Sun to pay compensation to the complainant for the fee that should never have been charged.

[51] The fee set in the contract was \$50,000 and this is the amount the complainant says he paid. However, he has produced proof of payment to Heytour (in the form of bank statements) for only \$35,000. A further payment highlighted on one bank statement is for \$15,000, but the statement does not record it as a payment to Heytour. There is also an invoice from Heytour but it is for only \$25,000, not the full \$50,000.

[52] As for the translator's fees (\$1,600 and \$1,560) and the IELTS examination fee of the complainant (\$180), he has presented no corroborative evidence linking them to this immigration matter.

[53] The balance of the compensation claim is dismissed for the following reasons:

- (1) The losses substantially arise from the failed investment. The Tribunal does not accept Mr Sun's contention that he was not aware of the property transaction (plainly, he was aware as he was responsible for the entrepreneur visa application based on that investment), but there is no evidence he gave the complainant any investment advice. The Tribunal

accepts Mr Sun's submission that the complainant made his own financial decisions.

- (2) There is no evidence supporting the extravagant emotional damage claim.
- (3) The Tribunal has no statutory power to award legal costs in favour of any party.
- (4) The sanction of compensation is intended as a modest contribution towards losses and expenses incurred or wasted due to the adviser's wrongdoing and not an indemnity, particularly for such a large sum. It is more appropriate for the complainant to seek recovery in the courts through an orthodox civil claim against Heytour and/or Mr Sun, if he believes he has any entitlement to substantial damages. In the civil courts, the defendants will have the usual protections against such a large claim (such as pleadings, a cause of action, discovery, trial, rules of evidence and mitigation), none of which apply to a claim for compensation as an adjunct to a disciplinary complaint.

[54] The total compensation awarded will be \$35,000.

## **OUTCOME**

[55] Mr Sun is:

- (1) Censured.
- (2) Ordered to complete the LAWS 7015 paper at Toi Ohomai at its next intake.
- (3) Ordered to pay the Registrar \$2,500 within one month.
- (4) Ordered to pay the complainant \$35,000 within one month.

## **ORDER FOR SUPPRESSION**

[56] 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>

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

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

[58] 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