IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2023] NZIACDT 25

Reference No: IACDT 05/22

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**ED** Complainant
AND	**YUXIANG HENDRY DAI** Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
(Sanctions)
Dated 25 September 2023

REPRESENTATION:

Registrar:	T M Thompson, counsel
Complainant:	Self-represented
Adviser:	Self-represented

INTRODUCTION

[1] The adviser, Yuxiang Hendry Dai, was engaged by ED, the complainant, to obtain a student visa for herself and a visitor visa for her husband. The complainant says she dealt only with the unlicensed FN and EL. The visa applications were duly filed but ultimately withdrawn, as Immigration New Zealand (Immigration NZ) raised an issue about forged documents filed by the couple on earlier applications.

[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 11 August 2023 in *ED v Dai*.[1] Mr Dai was found to have breached 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 more detail in the Tribunal's earlier decision.

[5] Mr Dai was a director of JC Migration Service Ltd (JC Migration) and is now a director of TD Consultancy Ltd, of Auckland.

[6] At the relevant time, FN was an unlicensed contractor to JC Migration and found clients for the company. EL was a shareholder in JC Migration who advised clients on finance and mortgages. She was not licensed as an immigration adviser.

[7] On 23 May 2019, the complainant and her husband, YE, nationals of China, applied for visitor visas. The complainant says that unknown to them, a Chinese travel agent assisting them used false employment and banking documents. Immigration NZ granted visitor visas to the complainant and her husband and they arrived in the country on about 18 June 2019.

[8] On about 30 June 2019, the complainant met FN by chance. She described herself as an immigration agent. They exchanged texts and voice messages, then met at FN's home to complete a customer information form. FN advised the complainant to seek a student visa on the basis of an English language course. They met again at FN's house on 8 July 2019 to sign a service agreement with JC Migration. During the meeting, FN rang EL. The latter outlined to the complainant an immigration strategy leading to

[1] *ED v Dai* [2023] NZIACDT 23.

residence. The complainant and FN continued to exchange text messages and the former provided documents required for the visa applications.

[9] On 22 July 2019, Mr Dai made a request to Immigration NZ seeking the complainant's immigration file.

[10] Mr Dai replied on 30 July 2019 to a query from FN in a chat group about minimum living allowances. FN repeated that information to the complainant, though the complainant would have been able to see Mr Dai's reply herself. The same occurred on 14 August 2019 in relation to travel photos (except that the complainant would not have directly seen Mr Dai's reply).

[11] On 20 and 21 August 2019, Mr Dai filed visa applications for the complainant and her husband respectively. Interim visas were issued by Immigration NZ on 11 September 2019.

[12] On the following day, the government agency sent letters to Mr Dai stating that false information had been provided by the complainant and her husband in support of earlier visa applications. FN then asked the complainant to withdraw the applications. She went to the complainant's home on 17 September 2019 and produced a visa application withdrawal letter to be signed. FN telephoned EL who advised the complainant that if the applications were not withdrawn, there was a very high chance of their decline which would leave a negative record. The complainant and her husband duly signed the letters. Immigration NZ confirmed the withdrawals on 19 September 2019.

[13] The complainant and Mr Dai met for the first time on 1 October 2019 to discuss a refund. No agreement was reached.

[14] On 11 October 2019, the complainant made a complaint against Mr Dai to the Authority.

Decision of the Tribunal

[15] In its decision on 11 August 2023, the Tribunal found that Mr Dai had engaged in the practice known as 'rubber stamping', permitting unlicensed people to advise the complainant. There was no evidence of any substantive advice from him, except in relation to maintenance funds. His evidence as to speaking to the complainant three or four times was disbelieved. Mr Dai had neglected to give the complainant any advice about withdrawing the applications. It was found he would have been aware of FN and EL providing substantive immigration advice to the complainant.

[16] Turning to the obligations in the Code, the Tribunal found that Mr Dai had:

(1) Allowed two unlicensed persons to give immigration advice to the complainant and obtain her instructions, in breach of cls 2(e) and 3(c).

(2) Failed to confirm in writing to the complainant details of material discussions (of FN and EL), in breach of cl 26(c).

SUBMISSIONS

From the Registrar

[17] In her submissions (31 August 2023), Ms Thompson, counsel for the Registrar, submits that Mr Dai's conduct could be considered moderate in terms of seriousness. He had failed to engage directly with his client, a fundamental duty of an adviser. There were various aggravating factors on the part of Mr Dai:

(1) He had not admitted the breaches.

(2) He had shown no remorse.

(3) He appeared not to have put in place any systems to mitigate similar breaches in the future.

(4) He appeared to lack knowledge of what constituted the statutory definition of "immigration advice", a core concept for an adviser.

(5) He had questioned the credibility of the complainant, instead of focusing on his own conduct.

(6) His evidence had not been consistent and plausible.

[18] In mitigation, counsel notes this is Mr Dai's first appearance before the Tribunal.

[19] In the circumstances, the Registrar contends that the appropriate sanctions would be:

(1) Censure.

(2) A requirement to undertake the LAWS 7015 Professional Practice paper at the Toi Ohomai Institute of Technology.

(3) A penalty in the vicinity of $2,500.

(4) An order directing Mr Dai to refund such part of the fees as the Tribunal sees fit.

From the complainant

[20] In her submissions (1 and 15 September 2023), the complainant states that Mr Dai shows absolutely zero remorse and is completely dismissive of any wrongdoing. He conveniently dismisses FN as someone out of control. This is extremely implausible. Mr Dai's continuing excuses and shifting of blame to everyone except himself must lead to the maximum allowed penalties.

[21] Mr Dai's unlawful and unlicensed advice resulted in significant financial losses for them, as well as the human toll of enormous stress and anxiety. The complainant and her husband seek $21,633 in compensation:

Service fee	$6,900
Application fees	$600
Tour fee	$798
Tuition fees	$4,760
Student insurance	$175
Medical fees for immigration	$400
Emotional stress and anxiety	$8,000
	$21,633

[22] The complainant says that had they dealt with a qualified and reputable adviser, they would not have been subject to such poor and unlawful advice. Nor would they have gone down the futile pathway they were advised to take, which led them to spend all that time and money.

[23] It is submitted that the Tribunal should apply its own penalties to deter such conduct going forward. Mr Dai does not seem to understand that he was wrong. He has not acknowledged any wrongdoing or shown any remorse. Instead, he gathered his staff as witnesses to promulgate more lies and attempt to discredit her. He has been dishonest to the Authority and the Tribunal. They have had to deal with two dodgy advisers, one in China and then Mr Dai. These supposed professionals are just out to prey on and squeeze as much as possible out of vulnerable immigrants.

[24] In support, the complainant produces receipts, invoices, a certificate and an undated letter from a traditional Chinese medical practitioner confirming the complainant had a condition "often linked to emotional stress".

[25] At the request of the Tribunal, the complainant provided further evidence on 5 and 8 September 2023.

From the adviser

[26] In his submissions (1 and 15 September 2023), Mr Dai states that he has been licensed since 2015 and has built an excellent reputation with a number of migrant communities. He has assisted over 1,000 clients. His behaviour is professional, except there was neglect in this case for which he apologises. He feels very sorry for not fully engaging in the visa applications from the beginning to the end. He has sympathy for the complainant and her husband.

[27] Mr Dai agrees he did not have much direct communication with the client. His oral immigration advice was very limited. His conduct though was totally different from rubber stamping. He did "heaps of work", spending "more than 10, 20 or even 30 hours" on their very straight-forward visa applications. He obtained sufficient information and documents to present their applications to Immigration NZ. Mr Dai says he provided detailed immigration assistance starting with the initial assessment. He then filled in the forms, filed the applications and translated letters from Immigration NZ. He feels it is extremely unjust, given all his immigration work, that his conduct is regarded as rubber stamping.

[28] According to Mr Dai, FN transferred the messages in person in this special case. She was totally out of control. He was not aware of the discussions between the unlicensed staff and the clients. He questions whether the Tribunal has seen the actual materials related to her immigration advice. In his view, it is "weird" that there is no evidence supporting the finding that immigration advice was given by the staff. He questions what advice FN provided to the client. Mr Dai acknowledges EL may have picked up the phone and talked to the client on one or two unexpected occasions. He questions why such phone calls have led to the conclusion that he permitted unlicensed people to give immigration advice.

[29] Mr Dai says that once he received the complaint, he actively cooperated with the complainant, the Registrar and the Tribunal. He dealt immediately with the refund request, although agreement was not reached by the parties. FN was the only contractor he dealt with and now he has no contractors or employees. Additionally, he has installed software enabling him to keep client files and provide written confirmation after each discussion with a client.

[30] As for training, Mr Dai believes this is not required for a complaint involving a single case. It was the only case where the client could not provide an email address and preferred that documents be handled in person. He has attended many training programmes and webinars conducted by the Authority, Immigration NZ and others, as listed in his submissions. The proposed LAWS 7015 paper would not bring much benefit, as he has strong professional skills and is always ethical. Mr Dai says he is aware of his obligation to engage directly with clients and not to let unlicensed people communicate directly with them.

[31] The financial penalty should not be more than $1,000.

[32] Mr Dai contends no compensation is applicable. There are two reasons. First, a very significant sanction is the publication of his name in a public forum which will depress his reputation. Second, he did not make the clients' stay in New Zealand illegal. They chose to ignore the immigration laws and regulations, and also chose not to follow Immigration NZ's decision to leave New Zealand. They lost Immigration NZ's fee because of their forged documents and dishonesty in their previous applications. There is no evidence their applications would have succeeded but for his misconduct.

JURISDICTION

[33] The Tribunal's jurisdiction to impose sanctions is set out in the Act. Having heard a complaint, the Tribunal may take the following actions:[2]

> **50 Determination of complaint by Tribunal**
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> After hearing a complaint, the Tribunal may—
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> (a) determine to dismiss the complaint:
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> (b) uphold the complaint but determine to take no further action:
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> (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.

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

> **51 Disciplinary sanctions**
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> (1) The sanctions that the Tribunal may impose are—
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> (a) caution or censure:

[2] Immigration Advisers Licensing Act 2007.

(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.

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

> **3 Purpose and scheme of Act**
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> 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.

[36] 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.
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> …
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> 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.

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

…

> 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.

[37] 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.[4]

[38] 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]

[39] 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.

DISCUSSION

[40] The Tribunal agrees with Ms Thompson that the gravity of the offending can be classified as moderate. It is a fundamental duty of an adviser to engage fully with their

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[4] *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 and 727; *Bolton v Law Society* [1994] 2 All ER 486 (EWCA) at 492; and *Z*, 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].

client. Mr Dai's conduct, though, is not amongst the worst type of rubber stamping, as he did not completely abandon his client to the unlicensed FN and EL. While he permitted them to deal exclusively with the complainant, he did personally undertake much of the substantive work in completing the applications and dealing with Immigration NZ. In addition to the breaches of the Code directly associated with rubber stamping, he also failed to advise the complainant in writing of material advice given by FN and EL.

[41] Mr Dai's admission of wrongdoing is not fulsome. He acknowledges what he describes as "very limited oral immigration advice" to the clients. In truth, he provided no oral advice whatsoever and his only written advice was the minor topic of living allowances. Furthermore, he does not accept that FN and EL undertook work amounting to "immigration advice" (as defined in the Act) and questions the Tribunal's finding in this regard.[7] For the reasons given in the earlier decision, the Tribunal found that FN and EL did undertake such work.

[42] An aggravating factor, as Ms Thompson contends, is that Mr Dai gave untruthful evidence to the Authority and then to the Tribunal as to his claimed oral discussions with the complainant.

[43] Ms Thompson points to Mr Dai's attack on the complainant's credibility as an aggravating factor. However, that attack may not be misplaced. Her evidence was credible in relation to her lack of communication with Mr Dai, but the Tribunal makes no finding as to the truth of her story about being duped by an agent in China concerning the forged documents produced in support of their previous visa applications.

[44] It is noted that this is Mr Dai's first appearance in the Tribunal. It is also to his credit that he has offered a written apology, but it would have appeared more sincere if he had already issued that apology rather than apparently wait for the Tribunal to direct it. The Tribunal notes also that he no longer engages contractors or staff, so the likelihood of a repeat of wrongdoing is for the moment diminished. He has also taken other steps to prevent a repeat by installing new practice management software.

Caution or censure

[45] Mr Dai will be censured, reflecting the gravity of his wrongdoing.

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[7] Immigration Advisers Licensing Act, s 7.

Training

[46] While Mr Dai has diligently undertaken continuing professional development, the Tribunal accepts Ms Thompson's submission that his evidence to the Tribunal shows he has limited understanding of the scope of all work fitting the broad statutory definition of immigration advice.

[47] In his submissions on sanctions, Mr Dai says he realises that he should not let unlicensed people communicate with his clients directly, but then excuses himself where the unlicensed person becomes uncontrollable (as he says FN was) leading to immigration advice being given "out of scope". He does not appreciate that he is responsible for what unlicensed persons do in his name. If he engages them, he must control them. Mr Dai also blames the complainant for the lack of direct communication, since she did not provide an email address and insisted on documents being handled in person. This does not excuse his conduct. He could easily have communicated with her some other way.

[48] Mr Dai will be directed to undertake Toi Ohomai's professional practice paper in order that he may better understand cls 2(e) and 3(c) of the Code.

Suspension/cancellation/preventing reapplication

[49] This has not been sought by the Registrar and the Tribunal agrees the public do not need protecting to the extent of removing Mr Dai from the profession, even for a short period.

Financial penalty

[50] The Registrar has sought a penalty of $2,500. Mr Dai submits the penalty should be no more than $1,000.

[51] The Tribunal agrees with Ms Thompson that the present case is akin to *II v Sun*.[8] That was also a case where the adviser had failed to personally engage with his client. Like Mr Dai, the wrongdoing involved only one client. It was the adviser's first appearance before the Tribunal. The Tribunal ordered a penalty of $2,500, in addition to completion of the LAWS 7015 paper and substantial compensation of $35,000.

[52] No two cases are identical in terms of the wrongdoing or the mitigating/aggravating factors. A notable difference is that Mr Dai engaged with the

[8] *II v Sun* [2023] NZIACDT 20.

Tribunal throughout the process, unlike Mr Sun. Furthermore, Mr Dai has to some extent acknowledged his wrongdoing, unlike Mr Sun. On the other hand, Mr Dai perpetuated his untruthful narrative about speaking to the complainant directly on a number of occasions.

[53] The penalty of $2,500 adopted in *Sun* is appropriate here. In setting the penalty, the Tribunal has taken into account the reasonably substantial amount of compensation ordered.

Refund and compensation

[54] In addition to directing a refund of any fee or expense, the Tribunal may order reasonable compensation for the specific losses and expenses caused by or relating to or arising from an adviser's wrongdoing (as upheld by the Tribunal).[9] It can also award modest damages for emotional stress, though it does not do so routinely.[10] The sanction of compensation is intended as a modest contribution towards losses incurred or expenses wasted and is not an indemnity.[11]

[55] The complainant characterises the immigration pathway she was advised by FN and EL to follow as futile. In the absence of a good explanation for the forged documents previously presented by them, that is correct. Mr Dai is not responsible for the earlier presentation of the forged documents, but he is responsible for the failure to explain it when he filed the student and partnership visa applications.

[56] The Tribunal believes the complainant when she says she told FN and EL of their immigration problem, being the forged documents. While the unlicensed agents may not have told Mr Dai, he would have known of the couple's immigration history if he had dealt directly with the complainant. He could then have explained to Immigration NZ the forged documents (if a credible explanation was available) or advised them not to proceed as the applications would inevitably be rejected (in the absence of an explanation).

[57] It follows that the pathway mapped out for the couple was futile and Mr Dai's service fee was wasted. He has offered to refund 50 per cent, pointing to the substantial work he undertook, but that work was of no benefit to them. He should refund the full fee of $6,900.

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[9] *Zhang v Chen* [2019] NZIACDT 11 at [67]–[68]; and *NLT v Coetzee* [2020] NZIACDT 7 at [47].
[10] *Ikbarieh v Hammadieh* [2014] NZIACDT 111 at [41]–[42]; *Unnikrishnan v Goldsmith* [2017] NZIACDT 22 at [30]–[31]; and *DD v Pabellon* [2023] NZIACDT 2 at [37].
[11] *II v Sun*, above n 8, at [53(4)].

[58] The complainant has also sought $600 in "application fees". She has presented to the Tribunal a Chinese language document showing a payment to FN of $600. There is evidence from Mr Dai's file of Immigration NZ's fees for the visa applications made by him being $521 in total.[12] This is confirmed by a bank statement produced by the complainant showing total payments of $521 on 21 and 22 August 2019. An order will be made for the wasted Immigration NZ fees to be reimbursed.

[59] The wasted immigration medical fees must also be reimbursed. Mr Dai says he is not responsible because the couple made their own decision to complete the required medical tests and it was an expense charged by a third party which was of no financial benefit to him. Mr Dai is, however, liable to reimburse them as it was a necessary expense for futile visa applications which should not have been made (unless the fraud could be credibly explained). While $400 has been claimed, the receipts produced to the Tribunal amount only to $295.

[60] As for the balance of the compensation of $21,633 claimed, the Tribunal agrees with Mr Dai that the uncertain immigration status of the complainant and her husband resulted from the earlier production of forged documents. That will be the cause of their stress, not Mr Dai's failure to engage with them. Whether or not the complainant and her husband are responsible for their predicament, it is clear Mr Dai is not.

[61] While the tour and tuition fees are linked to the futile immigration strategy given to the complainant by FN and EL, it would not be reasonable to require such remote expenses to be reimbursed. The refund of the direct expenses wasted is an adequate contribution to the couple's losses. It would not be reasonable to require Mr Dai to indemnify the complainant for all her expenses connected more remotely to his failure to engage with her.

[62] The Tribunal declines to award any compensation beyond the refund of the direct application expenses wasted. The total awarded will be $7,716 ($6,900 + $521 + $295).

OUTCOME

[63] Mr Dai is:

(1) Censured.

[12] JC Migration's file notes 'Memory records tidy up' (entry for 19 August 2019) at 73 of the bundle.

(2) Directed to undertake LAWS 7015 Professional Practice at Toi Ohomai at its next intake.

(3) Ordered to pay the Registrar a penalty of $2,500 within one month.

(4) Ordered to pay the complainant $7,716 within one month.

ORDER FOR SUPPRESSION

[64] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[13] It must balance the public's right to know of wrongdoing by advisers and to understand the Tribunal's jurisprudence, with the privacy of the individuals involved.

[65] There is no public interest in knowing the name of Mr Dai's client, the complainant or her husband.

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

D J Plunkett
Chair

[13] Immigration Advisers Licensing Act, s 50A.