

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2023] NZIACDT 29

Reference No: IACDT 005/23

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **DT**
Complainant

AND **LI JOYCE LI**
Adviser

Decision on the papers

SUBJECT TO SUPPRESSION ORDER

DECISION
(Sanctions)
Dated 11 December 2023

REPRESENTATION:

Registrar: Self-represented
Complainant: Self-represented
Adviser: S Laurent, counsel

INTRODUCTION

[1] The adviser, Li Joyce Li, was engaged by the complainant, DT, the wife of the client, XC. The client was in New Zealand unlawfully. Ms Li made a futile request for a visa without advising the couple of its futility.

[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 1 November 2023 in *BT v Li*.¹ Ms Li 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] Ms Li is a licensed immigration adviser and is self-employed with Fayo Ltd (Fayo), of Auckland.

[6] The complainant is a New Zealand citizen and the client is a national of [Country]. He was in New Zealand unlawfully. A service agreement was signed with Fayo on 23 March 2021.

[7] On 10 May 2021, Ms Li filed with Immigration New Zealand (Immigration NZ) a request for a partnership work visa for the client under s 61 of the Immigration Act 2009. It was declined on 28 May 2021. A second request was made on 10 August 2021, which was declined on 13 October 2021.

[8] The complainant made a complaint against Ms Li to the Authority on about 30 May 2023.

Decision of the Tribunal

[9] In its decision on 1 November 2023, the Tribunal found that Ms Li had breached the specified clauses of the Code:

- (1) Failed to provide the client with an opportunity to review the s 61 requests before lodgement, in breach of cl 1 (obligation of diligence and due care).

¹ *BT v Li* [2023] NZIACDT 27.

- (2) Failed to indicate to the complainant and/or client whether the second s 61 request was likely to be futile and/or to notify them of such risks, in breach of cl 9(a) and (b) (obligation to notify futility and obtain acknowledgment in writing).
- (3) Failed to have a second written agreement in place for lodging the second s 61 request, in breach of cl 18(a) (obligation to have a written agreement for every service).

SUBMISSIONS

From the Registrar

[10] In her submissions (23 November 2023), Ms Issar of the Registrar's office describes Ms Li's conduct as towards the lower end of moderate in terms of seriousness. She failed to adhere to three distinct professional standards. All three clauses are significant. Clause 9 is of particular importance. It is designed to ensure a client's attention is squarely brought to the inherent risks associated with making a futile application.

[11] It is acknowledged that Ms Li accepted the breaches. Nor was she trying to gloss over the risk of refusal or hide it from her client. In respect of the absent second written agreement, there was no intention to take advantage of the client, but a misunderstanding by her. It is Ms Li's first appearance before the Tribunal and she has already demonstrated insight and identified areas of her practice which can be improved.

[12] The Registrar contends that the appropriate sanctions would be:

- (1) A caution.
- (2) An order for payment of a penalty in the vicinity of \$1,500.
- (3) Reasonable compensation to the client.

From the complainant

[13] In her email to the Tribunal (2 November 2023), the complainant seeks a refund for the money spent on the failed s 61 requests, as she was not given a realistic view of the likelihood of success.

[14] The complainant further requests compensation for the emotional distress and opportunity cost caused by the failed requests. She and her husband were short of money and discouraged. They took no further action for over a year. In that time, they

dealt with an enormous uncertainty about their future as a family. Her husband's inability to work was a great expense to them. His precarious immigration status prevented him from being with his mother in her last days or to attend her funeral. Additionally, she would like compensation to be given to their current immigration adviser who helped her put together the complaint at no additional cost, while working to correct her husband's visa situation. He successfully obtained a s 61 visa.

From the adviser

[15] In his submissions (23 November 2023) on behalf of the adviser, Mr Laurent notes that Ms Li had already taken legal advice and admitted the grounds of liability. This demonstrated a reasoned approach by a competent professional adviser. She has held a full licence since 2015.

[16] Mr Laurent contends that no fee was charged for the second s 61 request which was found to be futile. The fee was charged for the first request, which was not found to be futile. As for the second request, Ms Li did not conceal the low chance of success. It is also submitted that the lack of a written agreement for the second request did not materially disadvantage the client.

[17] Ms Li has taken steps to improve her practice in response to the complaint. She has changed her service agreement so that clients can review applications before lodgement and provide an acknowledgment of futility (where applicable). She is also committed to ensuring that additional work is addressed in a new service agreement.

[18] It is submitted that a fine, if any, towards the lower end of the scale, perhaps \$1,000, would be appropriate. Neither a refund nor compensation should be ordered, as they must be causally related to the breaches for which the adviser is liable. The fee was \$2,500 for the preparation of a single s 61 request. This is not an unreasonable sum for such work. Ms Li carried out substantive work, including collating supporting evidence, reflected in the detailed submission to Immigration NZ.

JURISDICTION

[19] 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

After hearing a complaint, the Tribunal may—

- (a) determine to dismiss the complaint:

² 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.

[20] 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.

[21] 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.

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

³ *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 *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.

[23] 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

[24] 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

[25] 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;

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].

- (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

[26] The Tribunal agrees with Ms Issar that the gravity of the offending can be classified at the lower end of moderate. It is important that clients can check the accuracy and sufficiency of applications to Immigration NZ, that they be properly advised of applications with little chance of success and acknowledge they nonetheless wish to go ahead (in writing) and that the written service agreement covers all the services.

[27] Ms Li accepted all her wrongdoing early in the process and has made changes to her practice, so a repeat of her conduct is unlikely. This is her first appearance before the Tribunal.

Caution or censure

[28] It is accepted that Ms Li should be cautioned. The level of wrongdoing does not justify censure.

Training

[29] As Ms Li has insight into her failures and has shown a commitment to ongoing CPD (46.5 hours over the last two years), the Tribunal agrees with Mr Laurent that refresher training would not be warranted. It is not sought by the Registrar.

Penalty

[30] The Registrar contends a financial penalty in the vicinity of \$1,500 is appropriate and Mr Laurent submits it should be at the lower end of the scale, perhaps \$1,000, if at all.

[31] The breach of three professional obligations calls for a penalty. They are important safeguards for a client (particularly the obligation to warn the couple of the futility of the second request), though in this case their breach had no implications for them. Ms Li's mistakes did not cause the client's unlawful immigration status and did not cause any financial loss. It is to Ms Li's credit that her approach to the disciplinary process has been mature and professional. The penalty will be \$1,500.

Refund and compensation

[32] The complainant paid \$2,500 for the first s 61 request. Mr Laurent says there was no fee for the second request, but this is not correct. Ms Li charged \$920 (incl. GST) which was paid on 16 August 2021.⁷ Ms Li expressly declined to refund her fees on 25 May 2023 on the basis she had worked 12.3 hours on the applications (at \$300 per hour).

[33] As the first s 61 request was not found to be futile, no refund of the initial fee is appropriate. The complainant has not identified any mistake or omission in relation to the first request which she might have picked up had the request been sent to them to check before being lodged. The Tribunal accepts \$2,500 is a reasonable fee for such a service.

[34] However, the \$920 spent on the second futile request was of no value to the client. Ms Li should have specifically drawn the complainant's attention to the futility of the request and obtained a written acknowledgement of such advice. The wasted fee should be refunded.

[35] 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).⁸ It can also award modest damages for emotional stress, though it does not do so routinely.⁹ The sanction of compensation is intended as a modest contribution towards losses incurred or expenses wasted and is not an indemnity.¹⁰

[36] The complainant has sought compensation for the "opportunity cost" of the failed s 61 requests. She says they were short of money, there was uncertainty about their future, her husband could not work and they took no action for over a year. The losses and expenses have not been identified or quantified. There is no evidence of any financial losses arising from Ms Li's breaches.

[37] The only breach in relation to the first s 61 request was the failure to send the draft request to them, but no loss or expense arose from this. The same can be said for failing to send a draft for the second request. No loss or expense (beyond the wasted fee) is identified from failing to advise in writing that it had little chance of success or failing to obtain their written acknowledgment. There will not be any loss or expense from the failure to have a written agreement for the second request.

⁷ Invoice (11 August 2021) and letter from Ms Li to the Authority (19 August 2023) showing payment on 16 August 2021, at 66 and 84 respectively of the Registrar's bundle.

⁸ *Zhang v Chen* [2019] NZIACDT 11 at [67]–[68]; and *NLT v Coetzee* [2020] NZIACDT 7 at [47].

⁹ *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].

¹⁰ *Il v Sun* [2023] NZIACDT 20 at [53(4)].

[38] The family's uncertainty about their future and their financial difficulties as a result of the client being unable to work, are a consequence of his unlawful status in New Zealand and not Ms Li's failures. She is not to be blamed for the decline of the requests and was not responsible for the client's immigration plight.

[39] There is no basis to require Ms Li to pay any part of the services of the complainant's new adviser.

[40] As for an award of damages for emotional distress, the Tribunal does not do so routinely. It is accepted that the couple's distress would have been real, but it will have predominantly arisen from the client's unlawful status and not Ms Li's wrongdoing.

OUTCOME

[41] Ms Li is:

- (1) Cautioned.
- (2) Ordered to pay the Registrar a penalty of \$1,500 within one month.
- (3) Ordered to pay the complainant \$920 within one month.

ORDER FOR SUPPRESSION

[42] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.¹¹

[43] There is no public interest in knowing the name of Ms Li's client, or the complainant.

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

D J Plunkett
Chair

¹¹ Immigration Advisers Licensing Act, s 50A.