

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2024] NZIACDT 06

Reference No: IACDT 010/23

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **ZR**
Complainant

AND **DAVID KIM**
Adviser

Decision on the papers

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 23 January 2024

REPRESENTATION:

Registrar: Self-represented

Complainant: No appearance

Adviser: Self-represented

PRELIMINARY

[1] The complainant instructed the adviser through an agent in China to seek a work visa. The application was successful. However, the adviser had minimal personal engagement with the complainant and charged a high fee.

[2] A complaint against the adviser was made to the Immigration Advisers Authority (the Authority). It has been referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It is alleged the adviser failed to engage directly with the client and his fee was not fair and reasonable. The adviser is said to have therefore breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code), a ground of complaint under the Immigration Advisers Licensing Act 2007 (the Act).

BACKGROUND

[3] David Kim, a licensed immigration adviser, is a director of Wealand International (NZ) Ltd (Wealand International), of Auckland.

[4] ZR, the complainant, is a national of China. He is a chef experienced in Chinese cuisine.

[5] The complainant desired to work in New Zealand. He contacted an agent in China, Ms Z. On 8 February 2023, Ms Z sent a text to Mr Kim saying she had people seeking work visas for New Zealand. She requested a checklist of documents. Mr Kim sent it to her that day. Then on 15 March, Ms Z sent a text to Mr Kim stating the complainant wanted to apply for a work visa. A job as a chef had already been arranged. Mr Kim was asked to advise whether he was qualified.

[6] On 16 March 2023, Mr Kim spoke to Ms Z presumably using WeChat. According to Mr Kim, Ms Z confirmed she had been authorised by the complainant to be his representative to pass on instructions, advice and documents between them.¹

[7] Mr Kim advised Ms Z by text on 17 March 2023 that the complainant was qualified to apply under the accredited employer work visa instruction. Ms Z immediately confirmed that the complainant had decided to apply. Mr Kim then asked Ms Z to tell the complainant to prepare the checklist documents.

[8] On the same day, 17 March, Mr Kim sent his client agreement and an Immigration New Zealand (Immigration NZ) form to Ms Z.² He asked her to request the complainant

¹ Mr Kim's statement of reply (15 December 2023) at [3].

² The Immigration NZ form is a declaration from the complainant and an authority for the adviser to act on his behalf.

to sign them. His covering text set out the fees. He added that attached to the client agreement were the professional standards (in both English and Chinese) and the complaints procedure, which he requested be forwarded to the complainant. Mr Kim sent Ms Z an “explanation of main information of the client agreement”, an “explanation of the summary of the licensed immigration adviser’s professional responsibilities” and his “internal complaint procedures”. He asked for the complainant’s email address. A later text from him on the same day explains the purpose of the standards and how to make a complaint to him and the Authority.

[9] Ms Z sent Mr Kim the complainant’s email address on 17 March 2023.

[10] On 20 March 2023, Mr Kim’s assistant sent an email directly to the complainant asking him to confirm whether he had received the client agreement, the explanation of the service fee, an Immigration NZ form, the checklist, the summary of the adviser’s professional standards, the internal complaints procedure and its explanation given to Ms Z. On the following day, he confirmed he had, adding that Ms Z was his authorised representative.

[11] On 22 March 2023, the complainant signed the client agreement of Wealand International. Mr Kim signed it on 23 March. Mr Kim would prepare and file a work visa (under the accredited employer scheme). The fee would be \$4,000, plus GST and the fee of Immigration NZ.

[12] On the same day, 22 March 2023, the complainant signed an employment agreement to work for a restaurant (the employer) as a Chinese cuisine cook (signed by the employer on 17 February 2023).

[13] On 23 March 2023, Ms Z sent to Mr Kim the complainant’s documents required to support the visa application. She asked him whether they were acceptable. He replied stating they were fine.

Visa application filed

[14] The work visa application was lodged with Immigration NZ by Mr Kim on 23 March 2023.

[15] Mr Kim sent an email direct to the complainant on 24 March 2023 to advise that the visa application had been lodged the day before. He attached an invoice in the name of Wealand International for \$750 (Immigration NZ’s fee).

[16] There was a text exchange between Mr Kim and Ms Z on the same day about arranging the complainant's medical examination. A few days later, on 27 March 2023, he sent her Immigration NZ's letter (25 March) confirming receipt of the application and requiring a medical certificate. He asked her to arrange a medical examination for the complainant. Ms Z sent Mr Kim the medical report that day.

[17] Mr Kim sent an email direct to the complainant on 20 April 2023 forwarding to him an email from the medical company seeking further medical tests.

[18] On 28 April 2023, Immigration NZ approved the complainant's work visa under the accredited employer instruction.

[19] On 29 April 2023, the complainant sent an email to Mr Kim asking the adviser to seek visas for his wife and child. Mr Kim replied on 30 April to say they could apply.

[20] On 1 May 2023, Mr Kim sent an email to the complainant to inform him the visa was approved and briefly explaining certain conditions. As for a work visa for his wife, he said it would be better if she applied before 30 May. He set out the fees payable. He also gave the complainant his WeChat "ID". Immigration NZ's approval letter (28 April 2023) was attached to the email, as was an invoice from Wealand International (1 May 2023) for the service fee of \$4,000.

[21] The complainant arrived in New Zealand on 20 May 2023 and departed on 16 July 2023.

[22] On 2 August 2023, Immigration NZ sent a letter to the complainant (care of Mr Kim) advising that his visa might be cancelled as his employment had ended on 18 June and he had left New Zealand on 16 July. On the same day, Mr Kim sent the letter by email to the complainant.

[23] On 15 August 2023, Immigration NZ sent a letter to the complainant (care of Mr Kim) advising the cancellation of his visa. Mr Kim sent it by email to the complainant on 18 August.

COMPLAINT

[24] Earlier, on 29 July 2023, an employment advocate acting on behalf of the complainant made a complaint against Mr Kim to the Authority. It was alleged that the complainant had engaged a company in China to facilitate work arrangements in New Zealand. He did not have any direct communication with Mr Kim. Nor did he individually pay for any visa related service or receive any official receipt for such service.

[25] The complaint stated that the complainant began work on 22 May 2023, but he was dismissed on 17 June without any notice or explanation. He was paid below the minimum wage. It was suspected that Mr Kim may have been involved in charging an illegal premium for his service. The Tribunal notes that in a letter (8 August 2023) from the employer's solicitor to the employment advocate, it was alleged the complainant did not have the skills for the job. It was accepted he was underpaid and a further payment would be made.

[26] The Authority formally advised Mr Kim of the details of the complaint on 9 October 2023 and requested his explanation.

[27] On 3 November 2023, Mr Kim provided an explanation to the Authority:

- (1) The summary of professional responsibilities, in both English and Chinese, was provided. It was mentioned in the explanation made to Ms Z. An explanation of the summary was provided to Ms Z in WeChat communications on 17 March 2023. She was asked to forward it to the complainant. A copy of the internal complaints procedure was provided and was mentioned in the explanation made to Ms Z. Explanations were given in the WeChat communications with Ms Z on 17 March.
- (2) The explanation of significant matters in the client agreement was given in the WeChat communications with Ms Z on 17 March.
- (3) These documents and explanations were provided to the complainant before he signed the client agreement.
- (4) In answer to the allegation that there were no written records of material discussions being confirmed in writing with the complainant, he confirmed with Ms Z that the complainant's documents were fine via WeChat on 23 March 2023.
- (5) The communications concerning the medical examination were with Ms Z. She was asked to forward the medical company's email to the complainant so he could take it to the doctor.
- (6) The service fee was fully paid by Ms Z.
- (7) Clause 2(e) of the Code has not been breached simply because Ms Z forwarded the documents/information between him and the complainant. He provided step by step advice and documents in a lawful way. He provided the immigration advice and Ms Z forwarded it to the complainant.

- (8) Due to the agency relationship between Ms Z and the complainant, it was common practice for Wealand International to establish the relationship with the client via the agent. Ms Z was a bridge to forward advice and documents. He did though inform the complainant directly by email on 24 March that the visa application had been filed.
- (9) He did not facilitate the provision by Ms Z of immigration advice. She simply forwarded documents and information between them. He did not breach the Code.

Complaint referred to Tribunal

[28] On 17 November 2023, the Registrar referred the complaint against Mr Kim to the Tribunal alleging breaches of the specified provisions of the Code:

- (1) Failing to directly engage with the complainant before he signed the written agreement, by providing him with the summary of the professional responsibilities of advisers, explaining the summary and advising the complainant how to access the Code, and advising that the adviser has an internal complaints procedure and providing a copy, in breach of cl 17(a), (b) and (c).
- (2) Failing to directly provide the complainant with a written agreement and, before it was signed, explain all significant matters in the agreement, in breach of cl 18(a) and (b).
- (3) Failing to engage with the complainant by directly obtaining and carrying out his informed instructions, in breach of cl 2(e).
- (4) Failing to provide the complainant with the visa application to review before filing with Immigration NZ, in breach of cl 1.
- (5) Failing to ensure the service fee was fair and reasonable, in breach of cl 20(a).

JURISDICTION AND PROCEDURE

[29] The grounds for a complaint to the Registrar made against an immigration adviser or former immigration adviser are set out in s 44(2) of the Act:

- (a) negligence;

- (b) incompetence;
- (c) incapacity;
- (d) dishonest or misleading behaviour; and
- (e) a breach of the Code.

[30] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.³

[31] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.⁴ It has been established to deal relatively summarily with complaints referred to it.⁵

[32] After hearing a complaint, the Tribunal may dismiss it, uphold it but take no further action or uphold it and impose one or more sanctions.⁶

[33] The sanctions that may be imposed by the Tribunal are set out in the Act.⁷ The focus of professional disciplinary proceedings is not punishment but the protection of the public.⁸

[34] It is the civil standard of proof, the balance of probabilities, that is applicable in professional disciplinary proceedings. However, the quality of the evidence required to meet that standard may differ in cogency, depending on the gravity of the charges.⁹

From the Registrar

[35] The Tribunal has received from the Registrar the statement of complaint (17 November 2023), with supporting documents.

From the complainant

[36] There are no submissions from the complainant.

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

⁴ Section 49(3) and (4).

⁵ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁶ Immigration Advisers Licensing Act, s 50.

⁷ Section 51(1).

⁸ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] and [151].

⁹ At [97], [101]–[102] and [112].

From the adviser

[37] There is a statement of reply (15 December 2023) from Mr Kim, with supporting documents.

ASSESSMENT

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

General

1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.

Client Care

2. A licensed immigration adviser must:

...

- e. obtain and carry out the informed lawful instructions of the client, and

...

Code and complaint documents

17. Before entering into a written agreement with the client, a licensed immigration adviser must:
 - a. provide the client with the summary of licensed immigration advisers' professional responsibilities, as published by the Registrar of Immigration Advisers
 - b. explain the summary of licensed immigration advisers' professional responsibilities to the client and advise them how to access a full copy of this code of conduct, and
 - c. advise the client that they have an internal complaints procedure and provide them with a copy of it.

Written agreements

18. A licensed immigration adviser must ensure that:
 - a. when they and the client decide to proceed, they provide the client with a written agreement
 - b. before any written agreement is accepted, they explain all significant matters in the written agreement to the client

...

Fees

20. A licensed immigration adviser must:
- a. ensure that any fees charged are fair and reasonable in the circumstances
- ...

'Rubber stamping'

[39] Prior to assessing each head of complaint, it is helpful to understand the unlawful practice in the immigration advisory industry known as 'rubber stamping'.

[40] Typically, this occurs where a licensed immigration adviser uses unlicensed agents to recruit the clients, communicate with them, prepare the immigration applications and send them to the licensed adviser to sign off and file with Immigration NZ. There is little, if any, direct contact between the licensed adviser and the client and sometimes little engagement by the adviser with the substantive application.

[41] It is contrary to the Act and indeed it is a statutory offence for an unlicensed person to undertake "immigration advice" work (as defined in the Act) or for any person (who would usually be licensed) to hold out that a person who is not licensed can undertake such work, or to employ or contract with such a person, or to receive a fee for such advice.¹⁰ The Act applies to offshore immigration advice.¹¹

[42] The term "immigration advice" is broadly defined in the Act:

7 What constitutes immigration advice

- (1) In this Act, **immigration advice**—
- (a) means using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward; but
 - (b) does not include—
 - (i) providing information that is publicly available, or that is prepared or made available by the Department; or
 - (ii) directing a person to the Minister or the Department, or to an immigration officer or a refugee and protection officer (within the meaning of the Immigration Act 2009), or to a list of licensed immigration advisers; or
 - (iii) carrying out clerical work, translation or interpreting services, or settlement services.

¹⁰ Immigration Advisers Licensing Act, ss 6, 63, 64, 65, 67 and 68.

¹¹ Section 8(1).

- (2) To avoid doubt, a person is not considered to be providing immigration advice within the meaning of this Act if the person provides the advice in the course of acting under or pursuant to—
- (a) the Ombudsmen Act 1975; or
 - (b) any other enactment by which functions are conferred on Ombudsmen holding office under that Act.

[43] The use of unlicensed persons to undertake immigration advice work is not just contrary to the Act, but it can also amount to a breach of cls 2(e) and 3(c) of the Code. The obligations in the Code are personal to the licensed adviser and cannot be delegated.¹²

[44] While Mr Kim did undertake the substantive immigration advice work (by guiding Ms Z, as well as preparing and filing the application), the issue for the Tribunal is the extent of Mr Kim's engagement with the complainant.

- (1) *Failing to directly engage with the complainant before he signed the written agreement, by providing him with the summary of the professional responsibilities of advisers, explaining the summary and advising the complainant how to access the Code, and advising that the adviser has an internal complaints procedure and providing a copy, in breach of cl 17(a), (b) and (c)*

[45] Mr Kim provided the required documents (the summary of his professional responsibilities and his internal complaints procedure), but he did not provide them direct to the complainant. They were given to Ms Z to pass onto the complainant. The complainant confirmed in an email to Mr Kim's assistant on 21 March 2023 that he had received them.

[46] There is no breach of cl 17(a) or (c) of the Code. What is important is that the client is provided with the required documents and the adviser has proof of this. While cl 17(c) on its face requires the adviser to advise the existence of the complaints procedure, which did not occur in this case, any breach would be trivial in circumstances where it was provided to the complainant who had confirmed receipt.

[47] Clause 17(b) requires an adviser, not just to provide a copy of the summary, but to explain it to the client as well as to explain how to access the full Code. Mr Kim says he did so in two emails to Ms Z on 17 March 2023. There are two reasons why sending a written explanation to an agent breached the obligation:

¹² *Sparks*, above n 5, at [22], [26] and [34].

- (1) Mr Kim cannot delegate to an unlicensed agent his professional obligations, beyond “clerical work”.¹³ It does not matter who provided the complainant with the summary, but Mr Kim was required to personally explain the summary directly to the complainant.
- (2) The explanation cannot be in writing. The Code requires a summary and an explanation. A written explanation of the summary is really nothing more than the summary. The purpose of an oral explanation in person is that the client can ask questions. That is particularly important for a client with a limited ability in written English. Mr Kim could have done this by Skype, WeChat or some other voice messaging service as he did in respect of Ms Z.

[48] Mr Kim has breached cl 17(b).

- (2) *Failing to directly provide the complainant with a written agreement and, before it was signed, explain all significant matters in the agreement, in breach of cl 18(a) and (b)*

[49] Mr Kim provided the written client agreement to Ms Z on 17 March 2023 and asked her to arrange for the complainant to sign it. The complainant confirmed to Mr Kim’s assistant on 21 March that he had received it. He signed it the next day. The client received the agreement from Mr Kim, albeit indirectly, before he decided to proceed (proven by his signature). There is no breach of cl 18(a) of the Code.

[50] Clause 18(b) requires an adviser to explain to the client all significant matters in the agreement before it is accepted (proven by the client’s signature). Mr Kim says he did so in the emails to Ms Z on 17 March 2023. For the same two reasons given above in relation to the explanation of the summary, such an explanation breaches the Code. It must be given personally by Mr Kim as the licensed adviser and must be verbal. Mr Kim has breached cl 18(b).

- (3) *Failing to engage with the complainant by directly obtaining and carrying out his informed instructions, in breach of cl 2(e)*

[51] It is self-evident from the paucity of direct communications between Mr Kim and the complainant that Mr Kim failed to engage with him. This means he failed to obtain his instructions. Mr Kim cannot delegate this critical obligation to the unlicensed Ms Z. It does not matter how convenient that is for him or the complainant or how competent

¹³ Immigration Advisers Licensing Act, ss 5 (“clerical work”) and 7(1)(b)(iii); and *Sparks*, above n 5, at [22], [26] and [34].

she is in fulfilling the role of go-between. He must personally undertake and control client engagement from the commencement until its end.¹⁴ Ms Z can pass on messages and collect documents under Mr Kim's direction, being clerical work, but she cannot be responsible for client engagement.

[52] Mr Kim has failed to (personally and directly) "obtain" the complainant's instructions. However, he did personally undertake the substantive immigration work, so he complied with his obligation to "carry out" the complainant's instructions. The failure to obtain the complainant's instructions is a limited form of rubber stamping and a breach of cl 2(e).

(4) *Failing to provide the complainant with the visa application to review before filing with Immigration NZ, in breach of cl 1.*

[53] Mr Kim did not provide a draft of the visa application to the complainant prior to it being lodged with Immigration NZ. Mr Kim says in his statement of reply that the information required by the online visa application form was unchangeable information from the complainant, including from his passport, ID card, notarial certificates, employment agreement, job check and a completed form (which appears to the Tribunal to be an internal Wealand International form). He then carefully completed the application based strictly on that information and double checked it to ensure accuracy and completeness. Immigration NZ did not have any concerns about the application and the visa was issued.

[54] It would be best practice to send a draft to the client beforehand.¹⁵ It is so easy for mistakes to be made in transferring a great deal of information, even simple biodata, from one form to another. However, it would appear no errors were made by Mr Kim in completing the application. Any breach of cl 1 of the Code is technical and minor in this case. This head of complaint is dismissed.

(5) *Failing to ensure the service fee was fair and reasonable, in breach of cl 20(a)*

[55] Mr Kim's service fee for the complainant's work visa application (accredited employer) was \$4,000. The Registrar contends this fee was excessive and a breach of the obligation to charge a fair and reasonable fee. The Registrar compares the fee with one charged by Mr Kim in 2018 on another work visa application (under a different scheme). In his statement of reply, Mr Kim submits the fee was fair. He points to the

¹⁴ *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 18 at [89]; and *DY v Parker* [2020] NZIACDT 54 at [99]–[100].

¹⁵ *NG v Murthy* [2023] NZIACDT 10 at [35]–[36]; and *BT v Li* [2023] NZIACDT 27 at [32].

movement in the minimum wage since 2018. His fees had increased by about 33 per cent since 2018, due to inflation.

[56] This head of complaint is without merit. A comparison with the fee charged about five years earlier for an application by a different client under different criteria could not possibly establish an unfair or unreasonable fee. There can be many legitimate reasons why a fee for one client is more or less than that for another, even if the application criteria and time period are the same, which they are not in this case. Such a complaint requires evidence of the market rate or spectrum charged for such applications at the same time by advisers generally. The fee of \$4,000 for what was a straightforward application strikes the Tribunal as high, but not outrageously so. There is no breach of cl 20(a).

OUTCOME

[57] The first, second and third heads of complaint are partially upheld. Mr Kim has breached cls 2(e), 17(b) and 18(b) of the Code. The balance of the complaint is dismissed.

SUBMISSIONS ON SANCTIONS

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

[59] A timetable is set out below. Any request that Mr Kim undertake training should specify the precise course suggested. Any request for repayment of fees or the payment of costs or expenses or for compensation must be accompanied by a schedule particularising the amounts and basis of the claim. The Tribunal will take into account Mr Kim's disciplinary record in assessing the sanctions.

Timetable

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

- (1) The Registrar, the complainant and Mr Kim are to make submissions by **13 February 2024**.
- (2) The Registrar, the complainant and Mr Kim may reply to submissions of any other party by **28 February 2024**.

ORDER FOR SUPPRESSION

[61] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.¹⁶ It must balance the public interest in knowing of wrongdoing by advisers and of the Tribunal's jurisprudence, with the privacy of individuals.

[62] There is no public interest in knowing the name of Mr Kim's client or Ms Z's family name.

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

D J Plunkett
Chair

¹⁶ Immigration Advisers Licensing Act, s 50A.