IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 71

Reference No: IACDT 027/18

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**NT** Complainant
AND	**DAMON PARKER** Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
(Sanctions)
Dated 16 October 2019

REPRESENTATION:

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

INTRODUCTION

[1] The complaint by the complainant, Mr Parker's client, had been referred by the Immigration Advisers Authority (the Authority) to the Tribunal. It upheld this complaint against Mr Parker, the adviser, in a decision issued on 4 September 2019 in *NT v Parker*.[1]

[2] The Tribunal found that Mr Parker had breached the Licensed Immigration Adviser's Code of Conduct 2014 (the Code). In particular, he had failed to personally take responsibility for client engagement, having left it largely to his staff (notably his wife) to communicate with the complainant. There were other breaches of the Code, including filing an expression of interest with Immigration New Zealand which had little chance of success without advising the complainant of its likely fate.

[3] It is now for the Tribunal to determine the appropriate sanctions, if any.

BACKGROUND

[4] The narrative leading to the complaint is set out in the decision of the Tribunal upholding the complaint and will only be briefly summarised here.

[5] Mr Damon Parker, a licensed immigration adviser, is a managing director of Swiftvisa. The complainant is Ms [NT], a national of China, who had studied in New Zealand and was working as a chef. She had been offered a permanent position and contacted Swiftvisa to assist her to obtain residence.

[6] It was Mr Parker who was the immigration adviser responsible for the complainant's applications to Immigration New Zealand. He met her at the commencement of the engagement, but then left it to his staff to obtain from her the necessary information and documents. In particular, the bulk of the communications were between the complainant and Ms Cheng, an unlicensed employee (described as a managing director of Swiftvisa) who is also Mr Parker's wife.

[7] An expression of interest was filed with Immigration New Zealand by Mr Parker and when this succeeded, he filed a residence application on behalf of the complainant.

[8] On receipt of the residence application, Immigration New Zealand sent a letter to Mr Parker raising a concern about the high number of points claimed in the expression and therefore whether the complainant had provided false and misleading information and/or withheld relevant potentially prejudicial information. It was noted that the

---

[1] *NT v Parker* [2019] NZIACDT 62.

expression had been automatically selected following a *prima facie* assessment of the points claimed. The complainant had claimed 60 points for current skilled employment for 12 months or more, but in fact she had been with her then employer for only about two and half months when the expression was filed. The immigration instructions stated that factually inaccurate information would be considered misleading unless there was a reasonable basis for the information. An explanation from the complainant was requested.

[9] On the same day, Ms Cheng informed the complainant by telephone that a letter of concern had been received from Immigration New Zealand. The complainant requested the letter, but Ms Cheng would not send it to her, explaining that false allegations had been made by Immigration New Zealand which Mr Parker was contesting.

[10] In response to the letter, Mr Parker engaged in an exchange of communications with the relevant immigration officers as to whether false information had been produced and/or whether material information had been withheld, and therefore whether there had been any breach of the immigration instructions. While it was accepted by him that his office had made an error entering information in the online application and that too many points had been claimed, all of the relevant information, including when the complainant had commenced her latest employment, had been supplied.

[11] However, Immigration New Zealand maintained in the email exchange that there had been a false declaration of current skilled employment for 12 months or more, that the complainant had supplied false and misleading information, and that she had withheld relevant information.

[12] Within a few days, Ms Cheng had provided to the complainant Mr Parker's email exchange with Immigration New Zealand. About two weeks later, Mr Parker explained the issue to the complainant in a telephone call. On the same day, he sent to the complainant Immigration New Zealand's letter of concern.

[13] The complainant then engaged a solicitor to represent her on the residence application filed by Mr Parker. Despite representations from the solicitor, Immigration New Zealand declined the application on the ground that she had provided false and misleading information, and had withheld potentially prejudicial information.

Decision of the Tribunal

[14] It was found that Mr Parker had left it to the unlicensed staff, largely his wife, to communicate with the complainant about the information or documentation required to

support the expression and later residence applications. This was a breach of cl 2(e) of the Code.

[15] Mr Parker raised an issue as to whether Immigration New Zealand had correctly interpreted the immigration instructions concerning current skilled employment and therefore as to the number of points that could be claimed by the complainant, but it was found that his argument was not tenable on the basis of the law as it stood at the time the applications were filed. The Immigration and Protection Tribunal had decided against Mr Parker's interpretation before the complainant's expression had been filed. Mr Parker was found to have breached cl 9(a) and (b) of the Code, in that he had filed an application which had little chance of success without providing written advice of this to the complainant and obtaining her written instructions to proceed in any event.

[16] The Tribunal also found that Mr Parker had been unprofessional in failing to promptly provide to the complainant a copy of Immigration New Zealand's letter of concern. This was a breach of cl 1 of the Code.

SUBMISSIONS

Registrar's submissions

[17] Counsel for the Registrar of Immigration Advisers (the Registrar), Mr Denyer, in his submissions of 26 September 2019, contends that Mr Parker should be cautioned or censured, and ordered to pay a penalty in the vicinity of $2,000.

Complainant's submissions

[18] On 26 September 2019, the complainant presented a claim for $12,672.50 as reasonable compensation for her financial loss and mental damage:

Expense/Damage	**Amount**
GST on refunded Swiftvisa fees	$750
Immigration NZ fees	$3,000
Lawyer consultation fees	$172.50 $300 $3,450
Mental damage	$5,000
	$12,672.50

[19] The complainant states that she has been living for two years under great pressure due to the character accusation imposed by the government. She and her partner live in fear of being caught and deported. Each time they apply for a visa, they have to face Immigration New Zealand's interrogation and spend money to hire legal professionals to address the agency's concern. Such a social stigma brings endless frustration and pain. All the suffering came from Mr Parker's unprofessional wrongdoing.

[20] In further submissions made on 10 October 2019, the complainant contends that Mr Parker should bear some responsibility for the character issue blamed on the immigration officer, since if Mr Parker had disclosed the risk from the beginning, she would not have lodged the application. Furthermore, she had to seek urgent help from a lawyer as Mr Parker did not give her the letter from Immigration New Zealand until 14 August 2017, the deadline to respond to the letter.

Mr Parker's submissions

[21] In his memorandum of 30 September 2019, Mr Laurent, counsel for Mr Parker, records that the Tribunal's findings as to the breaches of the Code are accepted without demur. Mr Parker has already taken steps to avoid falling into the same error and is focused on ensuring that his clients contact him directly. His communications with them are well documented. Two of his staff have now secured provisional adviser licences which reduces the pressure on him to rely on his wife to communicate with those for whom English is not their native language.

[22] The decision to file the expression without securing the complainant's explicit understanding of, and consent to, that course of action was symptomatic of a lack of direct communication with the client.

[23] The alternative interpretation of the immigration instructions which led to the filing of the expression concerned a specific section of the instructions and did not reflect a systemic misunderstanding by Mr Parker of the instructions.

[24] As to withholding Immigration New Zealand's letter of concern from the complainant, Mr Parker now sees that this was unprofessional practice. He has amended his approach to ensure that clients are notified of key events when they happen.

[25] In response to the claim for compensation from the complainant, it is noted that Mr Parker had already refunded $5,000 in fees paid by the complainant, prior to the complaint being made. This included part of the fee for a work visa application which

was successful. In answer to the claim now for GST of $750, it is noted that the complainant received some value from the engagement.

[26] It is accepted that it might be appropriate to repay Immigration New Zealand's fees of $3,000.

[27] As for the lawyer consultation fees of $172.50 and $300, no detail is given as to what these relate to, nor any proof of such fees having been charged. The fee of $3,450 for the lawyer to respond to Immigration New Zealand's character issue was the result of Immigration New Zealand's erroneous approach to the application and not due to any error attributable to Mr Parker. Nor is there any proof of an invoice or payment for this fee.

[28] As for the mental damage claim of $5,000, it is acknowledged that there is a discretion to reward such compensation but the Tribunal has previously expressed the view that such a sanction should not become routine.[2] The complainant strongly links her stress to the adverse character issue, which was not the fault of Mr Parker.

[29] It is submitted that retraining is not appropriate, as Mr Parker has demonstrated his understanding of what is required to discharge his professional obligations. He has gained a greater appreciation of these in the course of the complaint. He regularly attends continuing professional development.

[30] Mr Laurent also notes that Mr Parker has been, and continues to be, an active contributor to the immigration advice industry. He is a past board member of the New Zealand Association for Migration and Investment (NZAMI), a vice-chair of its policy committee, a presenter at its seminars and a member of Immigration New Zealand's delegations project. His lapses concerning the complainant do not reflect his general approach to being a member of the profession.

[31] There is an affirmation from Mr Parker, affirmed on 26 September 2019. Mr Parker confirms the submissions made by Mr Laurent, particularly his acceptance of the Tribunal's conclusions as to his failures. He accepts that he failed to provide an adequate level of service to the complainant as he had left her with the impression that he was generally unavailable to respond to her questions, which was not his intention. He has helped thousands of people and it has never been his intention for them to feel that he is not available to answer their queries. Even before receiving the Tribunal's decision, he had made changes to ensure that this impression is never given to a client again and that they can contact him directly with their questions.

---

[2] *Ikbarieh v Hammadieh* [2014] NZIACDT 111 at [41]–[42].

[32] Mr Parker states that two of his staff have since become provisionally licensed. He has changed his practice to ensure that clients are informed as soon as possible of adverse letters or outcomes. As to whether he should do some retraining, he sets out a long list of seminars, webinars and conferences attended by him. Mr Parker regularly reviews the published decisions of the Tribunal.

[33] There are letters of reference from:

(1) June Ranson, chair of NZAMI (23 September 2019);

(2) Simon Moore, licensed immigration adviser (23 September 2019);

(3) Karishma Malek, licensed immigration adviser (23 September 2019);

(4) Arunima Dhingra, licensed immigration adviser (19 September 2019);

(5) Richard Small, lawyer (23 September 2019);

(6) TB, former client (undated);

(7) Unknown person, former client (undated); and

(8) Jialu Yu, client (12 September 2019).

[34] These testimonials attest to Mr Parker's considerable contribution to the immigration advisory profession, his professionalism and passion for his work, his tireless work for his clients, his willingness to help other advisers, his high ethical and professional standards, his unpaid work for clients and his accessibility to clients for their questions.

JURISDICTION

[35] The Tribunal's jurisdiction to impose sanctions is set out in the Immigration Advisers Licensing Act 2007 (the Act). Having heard a complaint, the Tribunal may take the following action:[3]

> **50 Determination of complaint by Tribunal**
>
> After hearing a complaint, the Tribunal may—
>
> (a) determine to dismiss the complaint:

[3] 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.

[36] 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.

[37] 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.

[38] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:[4]

> …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.

DISCUSSION

[39] It is a fundamental obligation of immigration advisers to engage directly and personally with their clients. While I accepted that Mr Parker personally undertook the immigration advice work, it was found that he had left the bulk of client communications to unlicensed staff, particularly his wife. It is no justification that it is easier for a client whose first language is not English to communicate with staff who speak the client's own native language. If necessary, an interpreter can be used, but that was not required in this case as the complainant and her partner had a reasonable level of English.

[40] As Mr Parker acknowledges, it was his failure to directly communicate with the complainant which led to the low chance of ultimate success of the residence application not being explained to her and then failing to obtain her consent to proceed nonetheless.

[41] I will consider the potentially appropriate sanctions in the order in which they appear in s 51 of the Act.

Caution or censure

[42] As noted above, it is a critical obligation of advisers to engage directly with their clients. I regard the breach of this obligation as serious. Clients are entitled to expect

---

[4] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citations omitted).

that advisers will personally handle their immigration applications and will directly communicate with them. Mr Parker will be censured, rather than just cautioned.

Training

[43] I agree with Mr Laurent that no retraining is necessary. It is apparent from the list of seminars and the like attended in the last few years by Mr Parker that he takes his professional development seriously. He has even presented at seminars. I am also satisfied that, as a result of this complaint and no doubt advice from Mr Laurent, Mr Parker understands the professional failures found by the Tribunal. I note that he has already put in place measures to ensure that they do not happen again.

[44] I commend him on encouraging his staff to become licensed advisers themselves, which will no doubt free him to spend more time communicating with the clients for whom he is responsible.

Financial penalty

[45] The starting point is the breach of the adviser's fundamental obligation to engage directly and personally with the client. This is a serious breach. However, Mr Parker's failure was not at the upper end of such breaches. He did have some contact with the complainant. Moreover, he did take personal responsibility for the application. A lack of engagement with a client is often coupled with a lack of engagement with the client's file, but that was not the case here.

[46] In addition, there was Mr Parker's failure to advise his client of the low chance of success and obtain her consent to proceed. Furthermore, Mr Parker was unprofessional in withholding from his client a letter of concern from Immigration New Zealand, though she was made aware of its existence and content shortly after it was sent. Mr Parker was not hiding the issue from his client.

[47] Mr Parker has acknowledged his misconduct and remedied the flaws in his professional practice. I note that he provided a full refund of his fees (minus GST), even before the complainant had lodged a complaint against him. He has also now acknowledged the need to refund to her Immigration New Zealand's fees.

[48] This is the first time Mr Parker has appeared before the Tribunal. I accept that his misconduct was out of character. This is obvious from the fulsome testimonials from his peers and clients. I will take into account the significant contribution he has made to the profession.

[49] The penalty will be $2,500.

Refund of fees or expenses

[50] Swiftvisa charged the complainant $2,500 for a work visa application, and $2,500 for an expression of interest and residence application. The work visa application was successful, but the residence application was not. Indeed, the expression should not have been successful either. If it had been properly assessed by Immigration New Zealand, it would not have been successful. Putting to one side Immigration New Zealand erroneously raising a character issue, neither the expression nor the application had sufficient points to succeed. They should never have been filed. The second tranche of $2,500 paid by the complainant was therefore completely wasted.

[51] Mr Parker refunded the entire fee of $5,000, but the complainant now seeks $750 for the GST paid. Mr Laurent accepts that the expression/residence fee should be refunded, but in the face of a claim for a refund of the total GST paid, he points out that the complainant received some value from the successful work visa application.

[52] I accept Mr Laurent's submission. Since the expression/residence work was of no value to the complainant, that component of the total fee ($2,875 including GST) was properly refunded. But Mr Parker refunded $5,000, which was more than the complainant was entitled to have back. There was, and remains, no reason to refund the fee of $2,875 (including GST) for the successful work visa application. I therefore decline to direct a refund of $750 for GST.

[53] Mr Laurent accepts that it may be appropriate to refund Immigration New Zealand's expression and residence application fees of $3,000. I agree. These applications should never have been made. Mr Parker will be directed to refund $3,000.

Compensation

[54] The complainant asks for $12,672.50. A breakdown is given earlier. I have already dealt with the items for $750 and $3,000 above under refunds.

[55] The complainant seeks three amounts for lawyer consultation fees. There is proof of payment of all three fees. The Tribunal has not been expressly told what the first two items ($172.50 and $300) are for. The timing of their payment (both on 16 August 2017) and the complainant's submission on 10 October 2019 indicate they relate to the character issue raised by Immigration New Zealand. The fees making up the item for $3,450 certainly concerned the character issue, as the complainant's schedule makes clear.

[56] As I analysed in the earlier decision, Immigration New Zealand wrongly made an adverse character finding. That was the fault of Immigration New Zealand. The applications should never have been filed in the first place, as the complainant had insufficient points to meet the threshold. While Mr Parker is responsible for filing futile applications, he is not responsible for Immigration New Zealand's erroneous character finding. I do not accept that he bears some responsibility on a 'but-for' analysis. He is not responsible for the error by Immigration New Zealand merely because that error could never have been made if no applications had been filed. Mr Parker's wrongdoing is too remote from the error by Immigration New Zealand. It is the latter which is causative of the complainant's immigration problem and expenses.

[57] The complainant's need to consult a lawyer arose from Immigration New Zealand's faulty assessment and refusal to reconsider its approach in response to Mr Parker's entreaty to do the same. Mr Parker certainly "hid" Immigration New Zealand's letter, as alleged by the complainant, but he did not hide its existence or the issue raised by the agency or his efforts to persuade the agency to change its mind.

[58] The lawyer's fees have not been shown to have arisen out of Mr Parker's wrongdoing. I decline to award any compensation for the lawyer's fees.

[59] There is also a claim for $5,000 compensation for mental damage.

[60] The Tribunal will award general damages for disruption and distress.[5] Again, it must bear some connection to the adviser's wrongdoing. It should not be a routine award, as it can be too easily claimed. To some extent, there could be said to be a level of inconvenience and anguish arising from every act of wrongdoing by an adviser, even if relatively minor. An award of general damages should not become a penalty in every case.

[61] The stress that I accept the complainant suffers arises out of the adverse character finding by Immigration New Zealand. I have already made the point that the agency wrongly interpreted the immigration instructions and should not have made that adverse finding against the complainant. I hope that the Tribunal's earlier decision on her complaint may assist her when the matter is next raised by Immigration New Zealand.

[62] As Mr Parker was not responsible for the character finding, I will not make any award for stress or mental suffering.

---

[5] *Ikabrieh*, above n 2; *Unnikrishnan v Goldsmith* [2017] NZIACDT 22 at [30]–[31].

OUTCOME

[63] Mr Parker is:

(1) censured;

(2) ordered to immediately pay to the Registrar a penalty of $2,500; and

(3) ordered to immediately pay to the complainant the sum of $3,000.

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.[6]

[65] There is no public interest in knowing the name of Mr Parker's client.

[66] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration New Zealand.

D J Plunkett
Chair

[6] Immigration Advisers Licensing Act 2007, s 50A.