

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2019] NZIACDT 65

Reference No: IACDT 041/17

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **NTT**
Complainant

AND **ZHINAN (CINYEE) GONG**
Adviser

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 12 September 2019**

REPRESENTATION:

Registrar: M Denyer, counsel
Complainant: No appearance
Adviser: S Laurent, counsel

INTRODUCTION

[1] The Tribunal upheld this complaint against Ms Gong, the adviser, in a decision issued on 5 August 2019 in *NTT v Gong*.¹

[2] It found that Ms Gong failed to properly document the professional relationship, as she had known the client socially prior to being instructed on the immigration matter. Ms Gong had admitted breaching the Licenced Immigration Advisers Code of Conduct 2014 (the Code).

[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] Ms Zhinan (Cinyee) Gong is a licenced immigration adviser based in Auckland. She is an employee of Asia Pacific International Consulting Ltd.

[6] The complainant, a New Zealand citizen, married another Chinese national in New Zealand. The complainant's wife, the client, approached Ms Gong a few months after the marriage in order to obtain a partnership-based work visa application. They had already met through a tramping club.

[7] Ms Gong then acted for the client and filed an application for a work visa. An interim visa was granted by Immigration New Zealand on 28 February 2017. A character concern was raised by the agency in April 2017 leading to the client terminating Ms Gong's services about two weeks later.

[8] The complainant lodged a complaint against Ms Gong with the Immigration Advisers Authority (the Authority) on 23 April 2017. It was alleged there was no proper contract or invoices.

Decision of the Tribunal

[9] In its decision, the Tribunal found that Ms Gong failed to:

- (1) provide the client with a written agreement;

¹ *NTT v Gong* [2019] NZIACDT 56.

- (2) issue invoices;
- (3) deposit monies paid in advance into a separate client account;
- (4) keep a full copy of the client's file and provide it to the Authority upon request;
- (5) confirm in writing to the client the lodgement of the work visa application;
and
- (6) confirm in writing to the client the details of all material discussions.

[10] Ms Gong was found to have breached cls 18(a), 22, 25(c), 26(a)(i), (b), (c) and (e) of the Code. It was accepted by the Tribunal that Ms Gong's failings had arisen from one fundamental mistake. Due to the way the relationship had originally developed, she had not treated the immigration side of the relationship objectively and professionally. Ms Gong had admitted this.

[11] The Tribunal observed that Ms Gong's conduct illustrated the danger of mixing personal and professional relationships, particularly communications containing both. While there was no justification for the casual communication and file management, the Tribunal would take into account in determining the sanctions that the violations all arose from that one critical mistake. It was also accepted that Ms Gong had learned a lesson from the complaint.

Submissions

[12] Counsel for the Registrar of Immigration Advisers (the Registrar), Mr Denyer, in his submissions of 27 August 2019 contends that Ms Gong should be censured and ordered to pay a penalty in the vicinity of \$1,000.

[13] In his submissions of 27 August 2019, Mr Laurent, on behalf of Ms Gong, accepts that it may be appropriate to direct a full or partial refund of the professional fees, a financial penalty and/or a payment towards the cost of the investigation. He contends that it is not a case where suspension or cancellation of the licence or any form of prohibition is warranted. It is accepted by Ms Gong that retraining is a live issue and she is willing to retrain, though he points out that some of the options are onerous. If retraining is directed, she could undertake the professional practice module offered by Toi-Ohomai, LAWS7015.

[14] There is an affirmation from Ms Gong, affirmed on 27 August 2019. She notes that she has previously admitted all of the grounds of complaint and expresses her continued acceptance of responsibility in the service delivery failures. She has ceased working for herself and is now employed by Asia Pacific International Consulting Ltd, which enables her to avoid running her own business and to focus on providing professional advice.

[15] Ms Gong addresses every item of the complaint and sets out her response in terms of upgrading the processes within the consultancy. She has learned a great deal from the complaint. Ms Gong notes that she has been a licensed adviser for nine years and has recently obtained a renewal of her licence. She has also been approved as the supervisor of a provisional licence holder. Ms Gong attends compulsory professional development to maintain her knowledge of the immigration field. She believes that she has the experience and the maturity of a professional to take what she has learned from the complaint and put it into practise.

JURISDICTION

[16] 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:²

50 Determination of complaint by Tribunal

After hearing a complaint, the Tribunal may—

- (a) determine to dismiss the complaint:
- (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.

[17] 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:

² Immigration Advisers Licensing Act 2007.

- (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.

[18] 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.

[19] 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.

...

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] & [151] (citations omitted).

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.

[20] 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 profession itself.⁴

[21] 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

[22] 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

[23] I noted in my earlier decision that while there is a rather long list of breaches of the Code, they all arose from one critical mistake. Essentially, Ms Gong failed to establish a professional relationship with someone known socially at the outset of the immigration instructions. There was a failure to put in place proper documentation. That is important in providing certainty as to the services being provided, the obligations of

⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Z v Dental Complaints Assessment Committee*, 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].

the adviser and the cost to the client. It also provides transparency, particularly in respect of monies obtained from the client. The professional requirements regarding documents cannot be dismissed as merely clerical or insignificant obligations of an adviser.

[24] Ms Gong admitted her wrongdoing at an early stage of the complaint process and having been advised by counsel, she clearly understands her obligations. I accept that Ms Gong has learned from the experience and altered her practice to fully comply with them. Her response in comprehensively reviewing her practices is to be applauded.

[25] I agree with Mr Laurent that no issue as to the suspension, cancellation or any form of prohibition arises. None of these sanctions have been sought by the Registrar.

[26] I see no need for retraining, as I am confident Ms Gong understands her obligations.

[27] No refund of fees has been sought by the complainant who has made no submissions on sanctions, despite the invitation to do so. I do not therefore propose to order any refund.

[28] I do not propose to order any part of the costs of the investigation to be paid by Ms Gong as it was not a particularly extensive investigation and her conduct in the face of the investigation did not exacerbate the cost.

[29] The only sanctions that need to be considered are whether Ms Gong should be cautioned or censured, and any financial penalty.

Caution or Censure

[30] While Mr Denyer seeks censure, I propose to caution Ms Gong only. This is her first appearance before the Tribunal and she has shown insight, maturity and a professional attitude to the complaint. Should she return to the Tribunal for any reason, censure would almost certainly be appropriate.

Financial Penalty

[31] I agree with Mr Denyer that a financial penalty is appropriate. I will take into account in determining the quantum that Ms Gong readily admitted the complaint and put in place changes to her practice to ensure that there was no repeat of the wrongdoing. Despite the number of breaches, a high penalty is not warranted. The penalty will be set at \$1,000.

OUTCOME

[32] Ms Gong is:

- (1) cautioned; and
- (2) ordered to immediately pay to the Registrar a financial penalty of \$1,000.

ORDER FOR SUPPRESSION

[33] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.⁷

[34] There is no public interest in knowing the name of Ms Gong's client.

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

D J Plunkett
Chair

⁷ Immigration Advisers Licensing Act 2007, s 50A.