

LEGALWISE
IMMIGRATION SUMMIT – MARCH 2023

**Legal Ethics and Professional Conduct in the
Context of Immigration Advocacy**

Simon Laurent, Principal, Laurent Law



OVERVIEW

1. Recent IACDT case law
2. The principal's liability for their staff: where is the line?
3. Practical advice for dealing with complaints

1. Recent IACDT Case Law

Annual Report 2022 (31/1/23)

As I mentioned in my last two annual reports, the maximum financial penalty that can be imposed by the Tribunal is only \$10,000 and it can prohibit renewal of a cancelled licence for only two years. The Ministers are respectfully urged to consider a stiffer sanctions regime.

May be influenced by cases like *CL v Khetarpal* [2021] NZIACDT 23

1. Recent IACDT Case Law



IAA Complaints	2020-21	2021-22
• Received	58	49
• Closed	34	69
• Referred to IACDT	10	17



IACDT Complaints	1 July 2021	30 June 2022
• Outstanding	9	15
• Filed in financial year		17
• Upheld		11
• Dismissed		None

1. Recent IACDT Case Law

IAA power to close complaints per s 45 Licensing Act

Appeals against complaint closures – 5 out of 6 dismissed by IACDT

GX v Registrar [2022] NZIACDT 16 (5 July 2022)

IAA's power discretionary as to whether disciplinary threshold reached

[2022] NZIACDT 16 GX v Registrar (5 July 2022)

[84] The Registrar has a statutory discretion not to pursue a complaint if he regards it as a minor matter, notwithstanding evidence of wrongdoing. (s 45(1)(c)) There is a well established principle in disciplinary jurisprudence that misconduct must reach a certain threshold, albeit not high, to warrant a formal disciplinary process. *Immigration New Zealand (Calder) v Ahmed* [2019] NZIACDT 18 at [60].

[85] The Registrar found certain factors mitigated the adviser's potential wrongdoing, as listed in the letter of 27 January 2022. The Tribunal finds that exercise by the Registrar of his statutory discretion to be reasonable and lawful.

[2021] NZIACDT 25 – RH v Ji (8 November 2021)

Dishonest behaviour / adviser deliberately misled INZ and the IAA / conflict of interest / numerous breaches of obligations / Immigration Advisers Licensing Act 2007, s 442 / Code of Conduct 2014, cl1, cl5, cl7a, cl17a, cl17b, cl17c, cl18b, cl19l, cl22, cl31a / adviser did not engage with Tribunal / blamed an unknown offshore adviser and translation mistake for past false information / actually had a business relationship with that adviser, and was told false information was deliberate / acted without disclosing actual conflict of interest

1. Recent IACDT Case Law

Features

- Rubber stamping less frequent issue
- Failure to provide service agreements or invoices
- Dishonesty linked to contempt for disciplinary process
 - *RH v Ji* [2021] NZIACDT 25 (8 November 2021)
 - *CL v Khetarpal* [2021] NZIACDT 18 (10 August 2021)

1. Recent IACDT Case Law

Health

EQ v McCarthy [2022] NZIACDT 29 (19 December 2022)

ill-health not a defence to breaches, but will mitigate sanctions

BC v Lawlor [2022] NZIACDT 15 (29 June 2022)

[\[2022\] NZIACDT 15 - BC v Lawlor \(29 June 2022\)](#)
[\[PDF, 218 KB\]](#)

Sanctions / negligence / numerous breaches of Code / failed to file requests / failed to identify clients' ineligibility / failed to get approval to change visa category / failed to have written agreement / failed to respond to INZ letter / failed to inform clients they were unlawful & provide updates / failed to advise outcome / did not ensure payment for reconsideration application / failed to confirm details of material discussions in writing HELD / adviser accepted wrongdoing / first appearance before Tribunal / health issues at the relevant time / adviser censured / no training directed as misconduct explained by health / \$2,000 financial penalty ordered / no submissions for refund or compensation, none ordered

26. A licensed immigration adviser must:

- a. maintain a hard copy and/or electronic file for each client, which must include:
 - i. a full copy of the client's application or other immigration matter
 - ii. copies of all written agreements and any changes to them
 - iii. copies of all written communications (including any file notes recording material oral communications and any electronic communications) between the adviser, the client and any other person or organisation
- c. confirm in writing to the client the details of all material discussions with the client

1. Recent IACDT Case Law

Confirming material discussions in writing - not just a “trivial bureaucratic obligation” (Code cl. 26(c))

ZK v Li [2022] NZIACDT 27 (8 November 2022)

BUT

Cl. 26(a) does not require creation of material that doesn't exist

NI v Chak [2023] NZIACDT 1 (5 Jan 2023)

2. Principal's Liability for Staff

Licensing based on individual responsibility of LIA to client

cf “Individual Responsibility” page on Code of Conduct Toolkit

All stages of professional relationship engage professional duties, even where multiple LIAs involved

McLeod v Yap [2013] NZIACDT 19

Code talks of “a licensed adviser” and “the client”

McLeod v Yap

[41] . . . licensed immigration advisers are personally responsible for dealing with client funds, fees, and all professional obligations under the Code of Conduct. They cannot avoid personal responsibility for these matters by pointing to an employer or other party.

19. A licensed immigration adviser must ensure that a written agreement contains:

a. the name and licence number of any adviser who may provide immigration advice to the client

2. Principal's Liability for Staff

Lead Adviser needs to be responsible for their practice including unlicensed staff

Carley v Combrink [2015] NZIACDT 96)

But can delegate by (cl. 19(a))

- naming LIA managing particular case in Service Agreement
- plus any other LIAs likely to provide advice

2. Principal's Liability for Staff

Name, license number of Supervisor required on Service Agreements for clients of Provisional Licensees

YC v Wan [2021] NZACDT 14 (29 June 2021)

as Provisional licence holder was not identified in Agreement, it was Lead Adviser's responsibility to undertake work and maintain direct relationship with client

2. Principal's Liability for Staff

Unlicensed Staff

LIA has duty to

- Ensure they know what UL staff are doing
SU v Murthy [2022] NZIACDT 17 – LIA failed to check whether staff had filed NZQA application
- Train UL staff about what they're not permitted to do

19 c. if the adviser holds a provisional licence:

- i. a record that a provisional licence requires them to work under the direct supervision of a full licence holder, and that they must seek advice from the supervisor whenever necessary
- ii. the name and licence number of their supervisor, and
- iii. a record that they will disclose the client's personal information to their supervisor who is obliged to keep that information confidential

[\[2022\] NZIACDT 17 - SU v Murthy \(18 July 2022\)](#)

[\[PDF, 305 KB\]](#)

Diligence and due care / adviser failed to check whether staff had correctly filed NZQA application & did not personally check after being asked by client / HELD / breach of cl1 / failing to check on NZQA application for two months is an unacceptable delay / dishonesty allegations not established / adviser's responses to client regarding NZQA application inquiries in good faith, not dishonest / belatedly paid NZQA fee after complainant terminated work visa services / should have checked client wished to proceed, but payment not dishonest because of belief NZQA application services had not been terminated / advice that EOI selections would recommence unduly optimistic, not deceitful / breach of cl18a / no service contract for work visa / breach of cl28a & cl26c / no written confirmation of termination of services or oral advice given / complaint upheld

2. Principal's Liability for Staff

Arguably all LIAs responsible to ensure UL staff are compliant

Risk of LIA being party to criminal offence - s 63 Licensing Act

Matheis v Ling [2015] NZIACDT 91 – discussion of parameters of unlicensed work

- s 7 definition of “immigration advice”

- s 5 definition of “clerical work”

Matheis v Ling 7 (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.

S 5 **clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:

(a) the recording, organising, storing, or retrieving of information:

(b) computing or data entry:

(c) recording information on any form, application, request, or claim on behalf and under the direction of another person

3. Dealing with Complaints

Respond!

TA v Tian [2022] NZIACDT 7 (27 April 2022)

[50] A professional person has a duty to respond to complaint and disciplinary processes. The Tribunal will draw an adverse inference from her refusal to do so. *KX v Ji* [2020] NZIACDT 43 at [54].

BU v McCarthy [2022] NZIACDT 11 (18 May 2022)

[2022] NZIACDT 11 - BU v McCarthy (18 May 2022)

Adviser failed to lodge s 61 request /

failed to keep client informed of developments in a timely manner /

misled clients by pretending an application had been made

3. Dealing with Complaints

Use IAA Investigation stage fully

Many complaints closed early

- Do you have PI insurance?
- Take care to provide full client file when requested
- Identify what can / cannot be contested

3. Dealing with Complaints

Early admissions of fault

- demonstrate professionalism
- can reduce impact of sanctions

DD v Pabellon [2023] NZIACDT 2 (5 January 2023)

Hopelessly flawed EOI filed

TQ v Gibson [2022] NZIACDT 23 (7 September 2022)

[\[2022\] NZIACDT 23 - TQ v Gibson - Sanctions \(7 September 2022\) \[PDF, 107 KB\]](#)

Sanctions / diligence and due care / adviser failed to reply to PPI letter, provide timely updates, or inform complainant their application was declined / Immigration Advisers Licensing Act 2007, s3, s50, s51 / Code of Conduct 2014, cl1, cl26b / HELD / isolated occasion of wrongdoing that had serious consequences, as complainant's residence application was declined / adviser **acknowledged mistake and apologised, improved business practices and hired additional help & fully refunded fees that were paid to prior business owner (\$10,000) / adviser cautioned / ordered to pay \$1,000 financial penalty / compensation of \$2,000 awarded for distress, considering the full refund and the financial penalty ordered**

3. Dealing with Complaints

Need to accept IACDT findings when addressing sanctions

*** But what about if you want to appeal?

Could file appeal against 1st decision before sanctions considered, seek stay

3. Dealing with Complaints

Importance of having Counsel

Many IACDT cases self-represented

HT v Shaikh [2021] NZIACDT 24 - application not made on time due to absence of supporting document

Consequences serious - complainant became unlawful

- adviser cautioned
- no public interest in punitive sanction
- no financial penalty ordered