BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2013] NZIACDT 28

Reference No: IACDT 027/11

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**Immigration Advisers Authority**
	Authority
Between	**Amabelle Dablo**
	Complainant
AND	**Alyssa Lopez Tan**
	Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: R Nand, Patel Nand Legal, Lawyers, Auckland

Date Issued: 20 May 2013

DECISION

Introduction

[1] Ms Tan is a licensed immigration adviser. The firm which employs her assisted Ms Dablo with immigration matters, and she subsequently moved to New Zealand. Ms Tan and Ms Dablo have a personal friendship going back to when they attended school together.

[2] The issues in the complaint arise at a point when Ms Dablo faced some difficulties with her immigration position. Her work permit expired and, within days of that, she received an invitation to apply for residence in New Zealand.

[3] As Ms Dablo was in New Zealand unlawfully at that time, she could not apply for residence without leaving New Zealand, and she needed skilled employment for her application to be successful. She was not in skilled employment at the time.

[4] Immigration New Zealand did have some discretionary power to consider an application made while Ms Dablo was in New Zealand unlawfully. There was some prospect of that power being exercised to grant a temporary permit to allow Ms Dablo time to put her affairs in order.

[5] Ms Tan needed to make a case to Immigration New Zealand that Ms Dablo had got into the position of being in New Zealand unlawfully through personal difficulties; and had a realistic prospect of putting matters in order if she was allowed some latitude. If that failed, Ms Dablo had to leave New Zealand or she could well imperil her prospects of ever gaining residence in New Zealand.

[6] Ms Tan claimed that she did give appropriate advice, and Ms Dablo chose to ignore that advice and act in defiance of New Zealand immigration requirements.

[7] Ms Tan lodged two applications. First, Ms Tan lodged an application with Immigration New Zealand to issue Ms Dablo a further work permit. Ms Tan failed to make a case for the exercise of the discretion delegated to Immigration New Zealand; or indeed acknowledge that Ms Dablo required the exercise of that discretion.

[8] Second, Ms Tan lodged a residence application with the Shanghai branch of Immigration New Zealand, which could not be considered as Ms Dablo was in New Zealand unlawfully.

[9] Ms Tan has not produced a record showing she was properly engaged work with Ms Dablo in accordance with the Code, or that she gave advice the appropriate advice.

[10] The issue for the Tribunal to determine is whether Ms Tan gave appropriate advice to Ms Dablo and deal with her engagement properly. Ms Tan accepts that she did not deal with her engagement in a wholly compliant manner.

[11] The Tribunal has been satisfied that Ms Tan failed to accurately identify her client's position and advise her of her options. Instead, the Tribunal found that Ms Tan embarked on lodging applications that had no hope of success without advancing a case for the exercise of Immigration New Zealand's discretion. The Tribunal has also been satisfied that Ms Tan did not complete her engagement correctly.

[12] The Tribunal has also determined that Ms Tan encouraged Ms Dablo to believe that non-compliance was an option for her to pursue.

[13] Ms Dablo's complaint also related to an appeal that had been lodged with the Removal Review Authority; the Tribunal has determined Ms Tan was not responsible for that work.

The Complaint

[14] Ms Dablo lodged a complaint on the following basis.

[15] Ms Tan is a licensed immigration adviser. She has been licensed since 11 March 2009. Her practice is located in the Philippines, although some of the events occurred when Ms Tan was in New Zealand.

[16] Ms Dablo has made a complaint relating to an extended course of dealing between herself and Ms Tan.

[17] Ms Dablo signed a written agreement with Asia and New Zealand Consultants Ltd (the company where Ms Tan conducts her practice) on 28 May 2007. Another employee of the company, Mr Mehta, assisted Ms Tan to lodge an "expression of interest". In a letter to the Authority dated 15 April 2011, Ms Dablo described Mr Mehta as Ms Tan's "*de facto*" partner. Mr Mehta is not a licensed immigration adviser.

[18] When Ms Tan began dealing with Ms Dablo she did not provide a copy of the Code of Conduct or her internal complaint procedure, enter into a written agreement for the work she was undertaking, or agree on fees for the services to be provided.

[19] Ms Dablo received a Work to Residence visa on 22 July 2008, after which time she came to New Zealand to take up skilled employment.

[20] Ms Dablo's first dealings with Ms Tan of which she complains occurred in August 2009. They met in Rotorua, New Zealand. Mr Mehta was also present at that meeting.

[21] At this point in time, Ms Dablo had received an invitation to apply for residence; she was notified by letter from Immigration New Zealand dated 21 August 2009. However, her work permit had expired on 19 August 2009, so she was in New Zealand unlawfully at that point in time. It appears Ms Dablo did not appreciate that her unlawful status precluded her from making any application for a visa or permit while she remained in New Zealand.

[22] From the time her permit expired on 19 August 2009, Ms Dablo was not entitled to be in New Zealand, and she did not obtain any further permit that altered that position.

[23] In August 2009, Ms Dablo was working in low-skilled employment not related to her professional skills. Economic circumstances had affected her ability to continue to do the skilled work she had originally come to New Zealand to undertake.

[24] Ms Tan requested a payment of $700, which was paid in cash. After the meeting, Ms Dablo received a request for another payment of $700, which she also paid. She did not receive a receipt or invoice for either payment.

Application for work permit (section 35A)

[25] Ms Tan submitted an application for a work permit for Ms Dablo on 24 August 2009. This application was to allow her to continue in the low-skilled employment where she was engaged.

[26] The application was declined by Immigration New Zealand and notice given in a letter dated 15 October 2009. This letter made it clear that the application had been considered under section 35A of the Immigration Act 1987, which applies when a person is in New Zealand unlawfully without a permit. Section 35A permitted an application for the exercise of ministerial discretion (it would usually be determined within Immigration New Zealand under delegation).

[27] Ms Tan did not lodge an application for residence at this time.

Appeal to Removal Review Authority without authority

[28] Ms Dablo was told an appeal had been lodged with the Removal Review Authority, and shown an appeal form that had been completed and signed as though she had signed it. In fact, Ms Dablo had never signed the form or given instructions for it to be completed. The appeal form was dated 24 November 2009.

[29] Ms Dablo regards the appeal as "fake", given it was drafted and signed without her involvement or authority.

[30] The form had the name of another licensed immigration adviser who also worked for the company. That adviser was based in Auckland. The form is required to be signed by the appellant and a signature appears in the appropriate place, but it is not Ms Dablo's signature.

[31] Ms Tan was apparently aware the appeal was lodged without Ms Dablo's involvement, as she said Ms Dablo needed a copy so she could answer questions if the Authority contacted her.

[32] This appeal was rejected and notice given in a letter from the Authority on 20 January 2010, as it was filed out of time.

Further payments without receipt

[33] Mr Mehta again met with Ms Dablo in New Zealand. The meeting was in Auckland and it appears to have likely been in November 2009.

[34] A further $700 was requested by Mr Mehta and paid in the Philippines, but no receipt was issued.

[35] Mr Mehta delivered various documents relating to a proposed application for residence.

Application for residence permit

[36] On 17 December 2009 Ms Tan submitted an application for a residence permit for Ms Dablo. It could not be considered by Immigration New Zealand, as Ms Dablo was in New Zealand unlawfully, and in such circumstances the application could not be made.

[37] By letter dated the same day, Immigration New Zealand wrote:

> "We have not accepted your application because you do not hold a valid permit that allows you to be in New Zealand. We are therefore returning your application without processing it.
>
> Under sections 17(2) and 25(3) of the Immigration Act 1987, people in New Zealand whose permits have expired are not allowed to apply for further permits.
>
> We can find no exceptional circumstances in your application that might allow Immigration New Zealand to grant a permit as a matter of discretion."

Instant messaging discussing Ms Dablo's options

[38] On 26 January 2010, using instant messaging, Ms Dablo said that her employer had taken issue with her not having a work permit. Ms Tan replied "find [work] in the other company".

[39] On 19 February 2010 Ms Tan said that she needed to know Ms Dablo's plans. When asked for suggestions, she indicated that Ms Dablo might enrol in a short course and apply for a student visa. Ms Dablo said she would wait for the answer, and then enrol if necessary. She suggested enrolling in the latter part of the year, and Ms Tan said she should try and enrol that month.

[40] On 1 March 2010 the discussion by instant messaging continued. Ms Tan said that an application had been declined, and a letter could be expected the following day. Ms Dablo asked "so I will stop working?", and Ms Tan replied "not yet".

[41] In a further message of 5 March 2010 Ms Tan said she would file Ms Dablo's case with the Office of the Ombudsman, as it was Immigration New Zealand's fault in delaying serving the letter. This appears to be a reference to the Removal Review Authority appeal being rejected for being filed late. Ms Tan appeared to regard this as Immigration New Zealand's fault for not processing the application for a work permit more quickly.

[42] Ms Dablo responded to the message immediately and asked "So I am still safe working now?", to which Ms Tan replied "yes, just continue doing your job".

[43] On 12 July 2010 there was a further series of instant messages between Ms Dablo and Ms Tan. Ms Dablo expressed concern that she was going to have to stop work, as her employers required a work permit. She wanted them to know she had a consultant, and suggested Ms Tan send an email to them to explain that. It appears Ms Tan sent an email to one of Ms Dablo's employers, and on 11 August 2010 Ms Dablo sent an instant message to Ms Tan requesting that she send a similar message to the other employer.

[44] On 16 December 2010 Ms Dablo sent an email to Ms Tan explaining she was seeking work in her professional field, and wanted to know whether the Ombudsman would approve her case if she was offered work. Ms Dablo said she had had difficulty finding professional work, as she did not have a work permit. She said she had been offered "cash [in] hand" at a bakery.

[45] On 24 January 2011 Ms Dablo sent an instant message to Ms Tan and asked how the application to the Ombudsman was progressing.

Letter to the Minister

[46] On 26 January 2011 Ms Tan wrote to the Minister of Immigration.

[47] In this letter Ms Tan identified the key difficulty with Ms Dablo's immigration status as:

[47.1] On 21 August 2009 she was granted an invitation to apply for residence;

[47.2] Her work permit had expired on 19 August 2009;

[47.3] When her application for residence was made, it was returned as she did not have a valid permit, and she lodged the application while in New Zealand.

[48] The letter indicated:

[48.1] Steps to remove Ms Dablo from New Zealand had been taken, and she received notification in a letter dated 15 October 2009.

[48.2] That letter gave notice of a right to appeal to the Removal Review Authority, which ran from 42 days after notification of the decision to decline the original application.

[48.3] That date was 15 October 2009 (the date of the notification letter), however through various circumstances Ms Dablo had misunderstood, Ms Tan attributed responsibility to Immigration New Zealand.

[48.4] Ms Dablo had lodged an appeal with the Removal Review Authority on 24 November 2009, and the last day was 27 November 2009. However, the Removal Review Authority rejected the appeal for being outside the 42-day period. This, Ms Tan said, was "a lapse of understanding by the Government agencies of [Ms Dablo's] case."

[48.5] Ms Dablo has been in New Zealand for more than two years, she had occupational skills that entitled her to live and work in New Zealand, and skilled employment was available to her; however being without a permit had resulted in her being employed in unskilled work.

[48.6] As she was in New Zealand unlawfully, essentially all opportunities for putting her immigration status in order were closed to her.

Consulting a new immigration adviser

[49] Ms Dablo approached another immigration adviser in January 2011. She explained that she understood there was an appeal pending, and her new adviser made inquiries with the Immigration and Protection Tribunal. On 18 January 2011 the Tribunal said Ms Dablo was not recorded in their database, so had no applications before the Tribunal.

Refusal to refund fees

[50] Ms Dablo requested a refund of fees from the company, but the request has been refused.

The Response

[51] Ms Tan has responded to the complaint through her counsel, providing a written statement and supporting material. The key elements in the response are as follows.

[52] Ms Dablo had originally come to New Zealand with her former partner. His qualifications and experience were the basis for the expression of interest lodged.

[53] Ms Dablo's former partner returned to the Philippines, and Ms Dablo was not eligible to rely on the original basis on which she sought residence. Ms Tan helped Ms Dablo lodge her own expression of interest, as she had qualifications and experience that allowed her to make her own application for residence.

[54] Ms Tan says she was not acting professionally for Ms Dablo:

> "[Ms Dablo] and [Ms Tan] have been old school friends and the work carried out by the adviser in lodging an Expression of Interest on behalf of [Ms Dablo] as the principal applicant and other subsequent work had been solely on the basis of helping out a friend.
>
> [Ms Tan] had never taken any fees from [Ms Dablo] for any work carried out in relation to all the works alleged in the complaint. Any payment by [Ms Dablo] had only been to cover the filing fees."

[55] Ms Tan has, since July 2009, consistently advised Ms Dablo that to "remain lawfully in New Zealand" she needed to obtain an offer of employment and a work permit.

[56] There were five immigration steps in the relevant period, and Ms Tan comments on them as follows.

Expression of interest with Ms Dablo as the principal applicant

[57] On 29 July 2009 an expression of interest with Ms Dablo as the principal applicant was lodged. Ms Dablo met the requirements on the basis of her qualifications and work experience, however at the time she was having difficulty finding work in her field in New Zealand.

[58] I note there is no complaint regarding this aspect, and it resulted in an invitation to lodge a residence application.

Application for a work visa under section 35A of the Immigration Act 1987

[59] Ms Tan identifies the date she met with Ms Dablo on 22 August 2009. The day before, an invitation to apply for residence had been received. Ms Tan's statement to the Tribunal clearly identifies that Ms Dablo was in New Zealand unlawfully at this time.

[60] Ms Tan wrote to Immigration New Zealand on 24 August 2009 and said she wished to apply for a "three month extension of the work permit of our client [Ms Dablo]". The letter was accompanied by a passport, and employment contract. The employment was as a delicatessen assistant in a supermarket.

[61] The letter of 24 August 2009 which Ms Tan has produced neither makes reference to Ms Dablo being in New Zealand unlawfully, nor the necessity to apply under section 35A. No grounds for exercising discretion under section 35A appear in the letter.

Lodging a residence application

[62] Ms Tan received the material to support an application for residence on 15 December 2009.

[63] At this point, Ms Tan and Ms Dablo were waiting for Ms Dablo to receive a work permit pursuant to section 35A, which would allow the application for residence to be lodged.

[64] Ms Tan nonetheless lodged the application, and it was rejected as Ms Dablo was not in New Zealand lawfully.

Appeal to the Removal Review Authority

[65] The appeal to the Removal Review Authority dated 24 November 2009 did not have any input from Ms Tan.

Special direction request to the Minister

[66] Ms Tan submitted a special direction request to the Minister on 26 January 2011. The matter was closed when the Associate Minister's office became aware that Ms Tan no longer acted for Ms Dablo.

Ms Tan acknowledges potential breaches of the Code

[67] Ms Tan accepts she may have breached the Code as:

[67.1] she did not have a written agreement;

[67.2] she did not present Ms Dablo with a copy of the Code or internal complaints procedure; and

[67.3] she did not provide Ms Dablo with receipts for payments made.

[68] Ms Tan commented on various aspect of the complaint. The key elements are as follows.

Written agreement

[69] Ms Tan points to the fact there had been an agreement, and it was orally extended to cover the further work.

[70] Further, Ms Tan was a personal friend of Ms Dablo, and had provided assistance to Ms Dablo when she was in a difficult situation after her partner returned to the Philippines and she needed to pursue residence independently.

[71] Ms Tan met Ms Dablo in Rotorua when she came to New Zealand for a conference about 15 July 2009 (she has also identified the date as 22 August 2009). The immigration adviser who drafted the appeal to the Removal Review Authority was also present at that meeting. That was the occasion when Ms Dablo agreed to extend the 2007 written agreement to cover the current work. The terms were that Ms Tan would provide free services for preparing the expression of interest. She also told Ms Dablo at that meeting that she needed to find skilled work.

[72] Nonetheless, Ms Tan does acknowledge that in July 2009 she should have put the arrangement in writing and attended to the disclosure requirements of the Code. However, it was mitigated by the informal relationship with Ms Dablo, and the fact that the legislation was relatively new at the time.

Payments

[73] During the relevant period there have been three payments made by Ms Dablo to Ms Tan's company:

[73.1] $700 in cash at Rotorua on 22 August 2009 (the meeting Ms Tan also identifies as occurring about 15 July 2009);

[73.2] $700 by bank deposit to the company in Auckland,

[73.3] $700 paid to the company by Ms Dablo's sister in the Philippines.

[74] These funds were to pay $700 as the fee required by the Removal Review Authority to file an appeal, and $1,400 required by Immigration New Zealand to lodge a residence application. There were further fees paid by the company, namely the expression of interest fee of $400, and $200 to apply for a work visa. All of the fees were payable to the relevant authorities, not professional fees.

[75] Ms Tan offered to return the fees for the appeal and residence applications, at the time they were returned due to having failed lodgement.

[76] Ms Dablo said to hold the fees, and use them for a lawyer to pursue a complaint to the Ombudsmen, or special direction request to the Minister. Lawyers were too expensive, so Ms Tan drafted the application for a special direction herself.

Appeal to the Removal Review Authority

[77] Ms Tan says the appeal to the Removal Review Authority was entirely in the hands of another adviser and she was not involved.

[78] She also says she is not clear whether Ms Dablo is claiming her signature is a forgery (which does seem clear as part of her complaint). If so, Ms Tan says the allegation is fabricated.

[79] She says that Mr Mehta was in New Zealand in October 2009, and he presented the document to Ms Dablo and she signed it.

Advice relating to enrolling in a course

[80] Ms Tan challenges the account of a discussion relating to whether Ms Dablo should enrol in a course of study.

[81] There does not appear to be any significance in this issue for present purposes, and accordingly it is not necessary to record any further detail.

Advice relating to working unlawfully in New Zealand

[82] Ms Dablo was in New Zealand unlawfully after 19 August 2009, and she was well aware of that.

[83] Ms Tan advised Ms Dablo of the risks of staying in New Zealand unlawfully, and the consequences of doing so. However:

> "[Ms Tan] kept on taking different steps to help [Ms Dablo] minimise the risk for her to be located and deported."

[84] She went on to say she advised Ms Dablo to immediately cease working on 22 August 2009, and Ms Dablo elected not to take that advice. Later she said that Ms Dablo could continue, as there was no change in circumstances from the time Ms Dablo had taken the risk of continuing to work, and it would be worse if the employers became aware and Ms Dablo had to stop working. She needed to sustain herself financially.

Professional advice and direction

[85] Ms Tan claims she acted professionally and appropriately throughout.

[86] The communications in the electronic messages were as friends. However, Ms Tan appropriately continued to advise Ms Dablo that she needed to find work in her field in New Zealand and then get a permit.

[87] Ms Tan applied for a work permit under section 35A, and when it was declined on 15 October 2009, the time for lodging an appeal to the Removal Review Authority had expired. It was unreasonable for Immigration New Zealand to allow that to happen. The appeal to the

Removal Review Authority was lodged as soon as practicable after the section 35A application was declined.

[88] The residence application was lodged, knowing it did not meet the lodgement requirements as Ms Dablo was unlawfully in New Zealand.

[89] Ms Tan discussed the possibility of a complaint to the Ombudsman; however, she did not pursue it as it was outside her expertise. Ms Tan had not intended to convey more than she was trying to get legal assistance and, through miscommunication, Ms Dablo believed that the matter had been pursued. This was clarified with Ms Dablo.

[90] Ms Tan, without cost to Ms Dablo, pursued a submission to the Minister of Immigration.

[91] Ms Tan says that Ms Dablo's complaint is fabricated; in various respects she has selectively presented information and made the complaint to assist her to remain in New Zealand. Further, she was responsible for being unlawfully in New Zealand, after choosing to give up her skilled employment and move to another centre to take up unskilled employment.

[92] Ms Tan offered to refund all the money paid and, in the alternative, claimed Ms Dablo should expect the Tribunal to order her to pay Ms Tan $7,500 in fees, and various disbursements; and further fees for the appeal to the Removal Review Authority.

The Tribunal's Minute

[93] On 7 January 2013 the Tribunal issued a Minute which explained that the Tribunal had conducted a review of the material then before the Tribunal. The Minute identified apparent issues, potential factual findings, and emphasised that the parties would have the opportunity to respond, and that the Tribunal had reached no conclusions at that point.

[94] The key elements of the complaint, and the response identified in the Minute, were as outlined above.

[95] The Authority and the complainant do not lay charges, and are not responsible to prove them. The Tribunal is an expert inquisitorial body, which receives complaints, and determines whether the proof before it is adequate to uphold the complaint, and if so in what respects. Accordingly, the Minute identified issues and potential conclusions on the material presented before the Tribunal in order to give the parties the opportunity to consider their positions and provide submissions and further proof if they wish.

[96] The Minute emphasised its purpose was to identify potential findings on the basis of material presently before it, and quite different conclusions may follow if further information was presented, or submissions made as to the effect of the material presently held.

[97] The Minute related the potential factual findings to the professional standards required under the Code, and the Act.

[98] The Minute identified potential conclusions on the papers before the Tribunal at the time, with a view of giving the parties the opportunity to respond.

Request for an explanation from Ms Tan

[99] The Minute noted Ms Tan's response to the Authority of 17 August 2011. She and her counsel stated this Tribunal would be expected to order Ms Dablo to pay substantial fees and disbursements if the complaint was lodged with the Tribunal.

[100] This Tribunal has no jurisdiction to make an order against a person lodging a complaint. Both Ms Tan and her counsel ought to have been aware of that.

[101] Any attempt to stifle a complaint by threats would potentially amount to serious professional misconduct, and aggravated a complaint.

[102] Ms Tan and her counsel were requested to explain the basis on which they made the statements contained in paragraph 16.6 of the written explanation, which they both signed.

[103] In the absence of an explanation, the Tribunal put Ms Tan on notice it may conclude the statements were made to stifle the complaint, and in the knowledge that no such order could or would be made.

Ms Tan's response to the Minute

[104] Ms Tan responded in a submission which was received on 28 January 2013, together with an affidavit of Ms Tan dated 25 January 2013, and an affidavit from Mr Mehta of the same date.

The submissions

Miscellaneous issues

[105] The submissions say Ms Tan is not in a personal relationship with Mr Mehta; they are only professional colleagues.

[106] The expression of interest Mr Mehta assisted with was on the basis of Ms Dablo's then partner as the principal applicant, and Ms Dablo as the secondary applicant.

[107] Ms Dablo ceased to be in skilled employment and could not find another comparable position while she held a work visa, so the loss of the visa was not the reason for her not holding a position of skilled employment. Ms Tan had consistently advised Ms Dablo to find skilled employment, and that is evident in the record held by the Tribunal.

[108] Ms Tan maintains she did give Ms Dablo appropriate advice regarding the consequences of being in New Zealand unlawfully, how it prevented any application other than under section 35A, and advised her to leave New Zealand.

[109] It was not necessary for Ms Tan to refer to section 35A in her letter of 24 August 2009, as Immigration New Zealand would consider the section without reference to it.

[110] Immigration New Zealand's letter of 15 October 2009 was issued without the "potentially prejudicial information" being put. Ms Tan claims that was not correct practice, despite the application being considered under s.35A.

[111] Ms Tan had been instructed not to mention anything to do with Ms Dablo's former partner in the section 35A application to Immigration New Zealand.

[112] Ms Dablo gave instructions to proceed with the section 35A application after rejecting the advice to leave New Zealand.

[113] Ms Tan was "not involved" with the appeal to the Removal Review Authority.

[114] Ms Tan took no fees and the only money received by Ms Dablo was for costs and disbursements. There were two receipts issued.

Response to request for explanation regarding the threat of a claim for costs

[115] The submission said that when a complaint was lodged it was essentially out of the complainant's hands, so a threat of costs could not alter the course of the complaint.

[116] The claim was not intended to be a threat, only an open exploration of a way of resolving the dispute. The claim was withdrawn, and Ms Tan was willing to "refund the funds she holds in trust for the Complainant".

Failure to initiate the professional relationship in accordance with the Code

[117] Ms Tan honestly believed she had not been acting in a professional context but rather as a friend. Ms Tan submitted that she believed she was not provided immigration advice as no fees were charged or intended to be charged for the work performed. Ms Tan does accept that the scope of "immigration advice" includes services provided without a fee, and will ensure that all relevant work is treated as a professional engagement in the future.

[118] Ms Tan did have an agreement, which she believed had been appropriately varied orally on 22 August 2009; but admits she failed to record that in writing.

Advice regarding being in New Zealand unlawfully

[119] Ms Tan did not encourage Ms Dablo to remain in New Zealand unlawfully. Her advice was that Ms Dablo had to leave New Zealand, and that she only considered alternatives after Ms Dablo refused to leave New Zealand.

[120] Ms Tan advised Ms Dablo appropriately in relation to section 35A.

[121] Immigration New Zealand had known Ms Dablo was working, and not pursued the issue after she ceased to hold a visa. The submission was advanced that:

> "This is suggestive that the various types of applications and appeals pending and it is not unusual for INZ to not take such actions as a matter of convention albeit no one openly or officially encourages this but everyone accepts these types of Applicants are in a vulnerable position and need to survive as no other form of benefit is available. In recent cases in Christchurch, this has overwhelmingly been the practice. Can it be argued that INZ is encouraging such activities of promoting overstayers to be gainfully employed? Nonetheless our client is extremely apologetic and realizes that she should have been very clear as to her advice."

[122] Once Ms Dablo had decided to stay in New Zealand, then seeking to put her situation in order using section 35A was the best option rather than ongoing non-compliance. Ms Tan considered that ultimately seeking a special direction under section 130 of the then current Act was the final step if section 35A did not produce a favourable outcome.

Failure to develop an appropriate strategy for Ms Dablo to seek residence

[123] Ms Tan's primary advice was for Ms Dablo to find skilled employment. After Ms Tan was told by Ms Dablo that she would remain in New Zealand unlawfully, the paramount issue for Ms Tan to deal with was Ms Dablo's unlawful status.

[124] Ms Tan recognises that she may have acted outside the scope of her expertise, and that is reflected in the fact another adviser dealt with the appeal.

The appeal

[125] Ms Tan denies any involvement in the appeal, and says that Ms Dablo had full knowledge of it as she made references to it in the "chat" messages. Ms Tan says that, as far as her knowledge extends, the signature on the appeal was Ms Dablo's signature, and the appeal was prepared on Ms Dablo's instructions.

Mr Mehta's affidavit

[126] Mr Mehta says he was not in a personal relationship with Ms Tan.

[127] He says he was at the meeting on 22 August 2009, and said:

[127.1] Ms Tan advised Ms Dablo to apply for residence;

[127.2] Told her that her work permit had expired on 19 August 2009,

[127.3] Advised her she had to stop working immediately; she could not make any applications for a permit normally while in New Zealand, and must return to the Philippines.

[127.4] Ms Dablo was determined not to return to the Philippines without exploring all alternatives.

[127.5] Ms Tan advised that in these circumstances she would assist Ms Dablo to apply to extend her work permit.

[127.6] In October 2009 Mr Mehta witnessed Ms Dablo sign the appeal form.

Ms Tan's affidavit

[128] Ms Tan said she was an "old school friend" of Ms Dablo, who had engaged Asia & New Zealand Consultants Limited. Ms Tan is employed by that company.

[129] Ms Dablo and her partner had successfully obtained visas and moved to New Zealand.

[130] Anything that Ms Tan did for Ms Dablo was on the basis of her being a friend rather than a paying client.

[131] Ms Tan says she had consistently advised Ms Dablo she needed skilled employment if she was to pursue residence in New Zealand.

[132] In 2009, Ms Dablo sought assistance as a friend remaining in New Zealand, and at that point it was apparent to Ms Tan that she was entitled to residence in New Zealand as a skilled migrant on her own account (though she had originally come to New Zealand as a secondary applicant with her former partner). Ms Tan agreed to prepare an application without charge.

[133] The result was an invitation, issued on 21 August 2009, from Immigration New Zealand to Ms Dablo for her to apply for residence.

[134] Ms Tan was in New Zealand with Mr Mehta and another colleague attending a conference on 21 August 2009 when the invitation was received. She arranged a meeting with Ms Dablo, during the meeting:

[134.1] Ms Dablo informed Ms Tan her work permit had expired;

[134.2] Ms Tan advised Ms Dablo she should stop working immediately, return to the Philippines, and apply for residence from there.

[134.3] Ms Dablo insisted on continuing to work, and wanted Ms Tan to explore all options to stay in New Zealand. Ms Tan accurately advised Ms Dablo of the difficulties, that she needed an offer of skilled employment, and then the issue would be discretionary as she was not in New Zealand lawfully.

[134.4] Ms Tan agreed to apply for a work permit under section 35A.

[134.5] Ms Dablo insisted that there be no reference to her former partner as she wished to apply in her own right.

[134.6] Ms Dablo paid $700 to Ms Tan in anticipation of fees payable to Immigration New Zealand for a work permit application, and a further $700 for the fees payable to Immigration New Zealand for a residence application.

[135] Later Ms Tan lodged the application under section 35A, and continued to communicate with Ms Dablo by email and "chat" messages. She always maintained the importance of obtaining skilled employment, and that she should return to the Philippines as failure to do so would be regarded unfavourably by Immigration New Zealand.

[136] The work permit application was declined, and an appeal was lodged with the Removal Review Authority, which Ms Tan had no involvement in. Ms Dablo's sister paid $700 for this work.

[137] While these initiatives were proceeding, Ms Tan was emphasising to Ms Dablo it was vital for her to gain skilled employment. On 17 December 2009, Ms Tan lodged an application for residence for Ms Dablo in Immigration New Zealand's Shanghai branch, however it was not processed as Ms Dablo was in New Zealand unlawfully.

[138] Ms Tan and her employer continued to assist Ms Dablo looking into the possibility of pursuing action with the Ombudsman's office, writing to the Minister, and continuing to advise her regarding finding work and complying with immigration requirements.

[139] Specifically in relation to the "chat" messages, they have been taken out of context as Ms Tan has always advised Ms Dablo she cannot work without a permit. She accepts that she said Ms Tan could continue working unlawfully, and should not have done so. However it was in the context of advice she should not do so, and only acknowledged that Ms Dablo might against her advice choose to do that.

[140] Ms Tan is deeply apologetic for failing to comply with the Code's requirements to document the professional relationship. She states that her non-compliance resulted from her mistaken belief that she was simply acting in the context of a personal friendship.

Ms Dablo's response to the Minute

[141] Ms Dablo did not respond to the Minute and was not required to do so.

Discussion

[142] This Tribunal is required to decide complaints "on the papers", unless the circumstances require an oral hearing. The parties have not sought an oral hearing. The Tribunal does not consider it is appropriate, to do so on its own initiative.

[143] Accordingly, all the information will be considered and weighed.

Issues

[144] The issues that arise are essentially factual; the application of the Code and the Act is uncomplicated.

[145] The issues that require determination are:

[145.1] Whether Ms Tan had a professional relationship with Ms Tan and, if so, did she initiate it in accordance with the Code?

[145.2] Did Ms Tan comply with the Code in relation to identifying what money was paid for, and issuing invoices identifying that?

[145.3] Did Ms Tan give Ms Dablo proper and appropriate advice regarding the consequences of remaining in New Zealand unlawfully?

[145.4] Did Ms Tan develop and implement an appropriate strategy for Ms Dablo to seek residence?

[145.5] Was Ms Tan responsible for the appeal to the Removal Review Authority, and if so was there any irregularity?

Overview

[146] Ms Tan is a licensed immigration adviser who was employed by a company that provided immigration advice on a full commercial basis to Ms Dablo.

[147] Ms Tan and Ms Dablo had a personal relationship separate and apart from the work context.

[148] I am satisfied Ms Tan is not in a position where she can claim that she acted as a friend, rather than a professional adviser.

[149] I will approach the matter on the basis that the first point when Ms Tan's conduct is in question is from the time she and Mr Mehta met Ms Dablo in New Zealand on or about 21 August 2009.

[150] Ms Dablo had said that she thought Mr Mehta was in a personal relationship with Ms Tan. If that were so, it potentially provided a foundation for Ms Tan having regarded her role, at least initially, as personal; mediating between two people with whom she had a personal rather than professional relationship.

[151] However, Mr Mehta and Ms Tan have made it clear that Mr Mehta and Ms Tan were purely professional colleagues. Accordingly, Ms Tan can have been in no doubt at all, Ms Dablo, her employer and Mr Mehta had a professional relationship, which was independent of Ms Tan's friendship with Ms Dablo.

[152] Furthermore, at the material time (August 2009) only she and not Mr Mehta was entitled to provide immigration advice. By August 2009 the Act was in force, and Mr Mehta could no longer lawfully provide New Zealand immigration advice.

[153] There are occasions when a licensed immigration adviser can give informal or preliminary advice which does not turn into a professional engagement.

[154] However, Ms Tan gave important advice in August 2009, and then followed that with professional work, which she submitted to Immigration New Zealand and later the Minister of Immigration. Ms Tan says the work is so extensive she would be entitled to a fee of $7,500, though she has not charged a fee.

[155] Accordingly, I am satisfied Ms Tan was engaged in providing professional advice. She was fully aware of the circumstances that necessarily led to that conclusion; and was required to comply with the Code as it applies to professional engagements. Ms Tan rightly accepts that not charging a fee for a professional engagement does not exempt a licensed immigration adviser from complying with professional standards.

[156] There is a dispute between Ms Tan and Ms Dablo as to whether the work was paid. Ms Tan has not produced records which explain the situation adequately or fully.

[157] Ms Tan says that while she was involved three payments of $700 were made; the last of them Ms Tan says had nothing to do with her. Ms Tan says that the payments were for disbursements, and there is money held in trust as more than was required for disbursements was paid.

[158] Ms Tan accepts she did not properly document her engagement. Had the engagement been documented in accordance with the Code the situation would be clear.

[159] I will proceed on the basis professional fees were not paid or expected for Ms Tan's work.

[160] Accordingly, the original agreement was largely appropriate, but not fully compliant as it did not deal with Ms Dablo's then circumstances. It was necessary to document the work required at that point as a minimum.

[161] As no fees were to be charged and only disbursements paid, then the requirements of clause 8 of the Code were more limited. However, it was necessary to identify that no fees would be required, and what the disbursements would be. A copy of the Code and internal complaints procedure should have been supplied. There was also a need to document the work required.

[162] Ms Tan acknowledges the original agreement did not extend to services beyond an expression of interest; the situation on 21 August 2009 was quite different.

[163] The point in time when Ms Dablo received the invitation to apply for residence was critical.

[164] Ms Tan accepts she met with Ms Dablo on 21 August 2009 or thereabouts. The situation was:

[164.1] Ms Dablo's existing permit expired on 19 August 2009, she was in New Zealand unlawfully from that time;

[164.2] The invitation to lodge a residence application was issued on 21 August 2009.

[165] Being in New Zealand unlawfully was a very serious issue for Ms Dablo. Ms Dablo had professional skills that gave her every prospect of being able to live permanently in New Zealand, and it is apparent that she was anxious to take that opportunity.

[166] Mr Mehta and Ms Tan have both claimed that at the meeting on 21 August 2009 Ms Dablo said her work permit had expired, and she had not applied to renew it.

[167] Ms Dablo, in contrast, says that Ms Tan simply took instructions to apply for residence, in response to the invitation.

[168] Mr Mehta and Ms Tan's claim that Ms Tan was aware of Ms Dablo being unlawfully in New Zealand and that appropriate professional advice was given accordingly, is to be contrasted with Ms Tan's actions that followed.

[169] Ms Tan wrote to Immigration New Zealand on 24 August 2009. The letter failed to make reference to section 35A; the section the application had to be considered under.

[170] I do not accept the submission from Ms Tan's counsel that the letter required no reference to section 35A. The letter needed to make out a case for the exercise of discretion under section 35A. There were significant factors that could have been advanced (which were referred to some 18 months later in Ms Tan's letter to the Minister dated 26 January 2011),

[171] Mr Mehta and Ms Tan claim that Ms Dablo insisted that there be no reference to her former partner as she wanted to apply on her own account. I do not find this claim to be persuasive. Not only has she failed to explain why Ms Dablo gave instructions to exclude this information in Ms Tan's letter to the Minister of 26 January 2011, but Immigration New Zealand was already fully aware of Ms Dablo's former relationship. Mitigating circumstances, such as relationship breakdown, do not alter the fact Ms Dablo necessarily had to apply on her own account.

[172] It was essential to approach Immigration New Zealand frankly on the basis Ms Dablo had just received an invitation to apply for residence, she was in New Zealand unlawfully, explain why, and deal with the mitigating circumstances. Ms Dablo did none of that. Any licensed immigration adviser ought to have been aware of the need to present a case dealing with the exercise of discretionary power.

[173] Ms Tan followed her deficient letter of 24 August 2009 with an application lodged in the Shanghai office of Immigration New Zealand, which did not refer to Ms Dablo being in New Zealand unlawfully; it was inevitable that application was returned, as it too could only be considered under section 35A.

[174] I find it implausible that Ms Tan was giving Ms Dablo appropriate and proper advice regarding both her immigration status and the need to put her affairs in order while, at the same time, filing wholly inappropriate applications with Immigration New Zealand. The applications failed to acknowledge Ms Dablo's status, which Ms Tan claims she had recognised and responded to professionally in terms of advice and actions.

[175] Ms Tan's "chat" messages of January to July 2010 (refer para.[38] and following above) give a clear impression Ms Tan failed to convey to Ms Dablo the consequences of working unlawfully in New Zealand; and to a degree encouraged her to continue to do so. For example, on 1 March 2010 Ms Tan said that an application had been declined and a letter could be expected the following day. Ms Dablo asked "so I will stop working?", and Ms Tan replied "not yet".

[176] I do not accept the submission of her counsel that the above interpretation of the "chat" messages is out of context; it is consistent with the written record of the inappropriate applications she filed, and also with what Ms Dablo says of the matters.

[177] I am satisfied that in August 2009 Ms Tan should have told Ms Dablo that, since she was in New Zealand unlawfully, she could not lodge an application for residence or any other permit to allow her to remain in New Zealand. There were only two options:

[177.1] she could apply under section 35A; or

[177.2] appeal to the Removal Review Authority.

[178] An application under section 35A is entirely within the discretion of Immigration New Zealand. When there has been a short-term irregularity, it is not uncommon for Immigration New Zealand to exercise such discretion favourably to allow a person to put their affairs in order.

[179] There were circumstances that would have counted in Ms Dablo's favour, a significant factor being that she had valuable occupational skills, and had been invited to apply for residence. In addition, there had been mitigating personal factors relating to her relationship, and her former partner's health issues. When Ms Tan put such factors into the record, some 18 months later when she wrote to the Minister, Ms Dablo's situation was much more problematic as she had been noncompliant for some 18 months, rather than a short number of days.

[180] Ms Dablo needed to understand she needed to be prepared to leave New Zealand and pursue her application for residence after leaving if necessary. There was no doubt her ability to gain residence in New Zealand could be irredeemably lost by remaining in New Zealand unlawfully.

[181] An appeal to the Removal Review Authority on the information before the Tribunal would have been very unlikely to succeed on its merits. The test for the exercise of the Authority's jurisdiction was "exceptional circumstances of a humanitarian nature". The Authority's jurisprudence relevant to Ms Dablo's circumstances would suggest that:

[181.1] she would have had to establish both that it was not reasonably possible for her to leave New Zealand and apply for a visa after doing so;

[181.2] she was in that position due to reasons that were both "exceptional" and "humanitarian" in nature.

[182] There is nothing before the Tribunal that suggests Ms Dablo had any realistic prospect of advancing a successful appeal.

[183] Clause 3 (f) of the Code required Ms Tan to confirm in writing advice she gave Ms Dablo.

[184] There is no record of proper and appropriate advice; and there is a documented course of conduct where Ms Tan has failed to deal appropriately and professionally with Ms Dablo's situation.

Failure to initiate the professional relationship in accordance with the Code

[185] I am satisfied Ms Tan failed to enter into a written agreement and attend to the disclosure provisions of the Code.

[186] This is mitigated by the fact there was an earlier written agreement, and Ms Tan could have varied it to accommodate work to be undertaken. However, she failed to do so, and the agreement did not contemplate this work at all.

[187] In August 2009, when Ms Dablo was unlawfully in New Zealand and also holding an invitation to apply for residence, Ms Tan should have recognised that Ms Dablo required clear and unambiguous professional advice. There was no room for anything other than a full professional response.

[188] Ms Tan undertook significant professional work. She lodged two applications with Immigration New Zealand and wrote to the Minister of Immigration.

[189] Accordingly, I am satisfied that Ms Tan failed to comply with the disclosure requirements in Clause 1 of the Code, and Clause 9.

[190] It was symptomatic of Ms Tan failing to recognise she was dealing with important professional work that required her to meet the standards in the Code.

Failure to issue invoices

[191] Ms Tan did not comply with clause 8 of the Code, which requires that fees and disbursements must be set out. She has variously said that receipts were not issued and that partially compliant receipts were issued.

[192] There is no doubt, on the material before me, that Ms Tan failed to set out what the money was paid for and issue an invoice identifying that.

[193] Consequently, it has left the position unclear as to the nature of payments.

[194] I accept Ms Tan's claim that the payments were all disbursements, and they will be refunded to the extent they were not expended appropriately.

Failure to advise Ms Dablo she imperilled her future by working in New Zealand unlawfully

[195] Ms Tan claims Ms Dablo was properly advised, and that Ms Dablo elected to unlawfully remain and work in New Zealand. Ms Tan submits that she is not responsible for such decisions made by Ms Dablo.

[196] I accept that Ms Dablo was aware she was working in New Zealand unlawfully. However, I do not accept she received professional and appropriate advice regarding the consequences of remaining in New Zealand unlawfully.

[197] I am satisfied:

[197.1] Ms Tan failed to warn Ms Dablo of the consequences of living and working unlawfully in New Zealand (she has not produced the records she was required to have under clause 3 (f) of the Code of giving such advice); and

[197.2] Ms Tan gave Ms Dablo some degree of encouragement to pursue that course of action, leading her to believe that her situation could ultimately be regularised. I have considered Mr Mehta and Ms Tan's evidence. Such evidence, when considered alongside Ms Tan's actions and the content of her communications in the "chat" messages, is not plausible.

[198] Clause 2.1 (f) of the Code requires a licensed immigration adviser to uphold the integrity of New Zealand's immigration system. A cornerstone of that system is that it is highly undesirable for a person to be in New Zealand unlawfully, and there are serious adverse consequences if that occurs. Ms Tan had a professional obligation to ensure that Ms Tan was fully aware of her circumstances, and the consequences of non-compliance. She needed to ensure that was recorded in writing.

[199] The professional response for Ms Tan appeared to be that she should have told Ms Dablo in August 2009 that her visa had expired, and if she remained in New Zealand unlawfully she could no longer apply for a further permit. In addition, if she persisted to reside and work in New Zealand unlawfully she could well put herself in the situation where her ability to migrate to New Zealand was lost permanently.

[200] The record does not show that Ms Tan provided advice to that effect. On the contrary:

[200.1] Ms Tan lodged two applications for permits, when it was obvious they would be rejected.

[200.2] Ms Tan did not lodge either of the applications with reference to section 35A, or establish grounds as to why that section of the Immigration Act should be applied.

[200.3] In her response to the complaint, she has admitted: "taking different steps to help [Ms Dablo] minimise the risk for her to be located and deported."

[201] I am satisfied Ms Tan failed to either appreciate or act in a manner consistent with the gravity of her client's predicament, and her own professional responsibilities to both her client and New Zealand's immigration system. She did so in breach of Clause 2.1 (f) of the Code.

Failure to develop an appropriate strategy for Ms Dablo to seek residence

[202] Ms Tan personally lodged two applications for Ms Dablo. The first was an application for a work permit, and it could only be addressed under section 35A. Ms Tan failed to refer to the section, and did not present a case for the exercise of the discretion under the section.

[203] Ms Tan did have circumstances that could have been advanced, and they were ultimately referred to in the appeal to the Removal Review Authority and the letter to the Minister. Ms Dablo had faced a partner with health issues, a relationship breakdown, disruption to employment which likely followed those events, and she needed a work permit to resume skilled work.

[204] The issues had to be raised and raised promptly but that did not occur. Applications for a work permit based on unskilled employment and a residence application lodged after months of being unlawfully in New Zealand were, in my view, hopeless. That they would be rejected was entirely predictable.

[205] I accept that Ms Tan did raise the importance of Ms Dablo gaining skilled work, and acknowledged that she was in New Zealand unlawfully. However, they lacked any sense of clear direction and urgency. I am satisfied the situation was clear; Ms Tan was first involved when Ms Dablo has been non-compliant for a very short time, she needed a work permit to find skilled work. She needed to be told clearly how urgent these matters were.

[206] Ms Dablo was entitled to be advised of an appropriate strategy, inevitably that:

[206.1] She apply immediately under section 35A for a short term work permit, with a view to resuming skilled employment and applying for residence. That needed the support of a reasoned case for allowing that as a discretionary concession.

[206.2] Ms Tan needed to emphasise to Ms Dablo she had to prepare to leave New Zealand either if the short term work permit was not granted, or she could not find skilled work if it was granted.

[207] The appeal to the Removal Review Authority and letter to the Minister had no realistic prospect of success. The former had no merit, the latter occurred only after an extended period of non-compliance.

[208] Ms Tan was only licensed to provide advice relating to "Residence – Skilled Migrant". Ms Tan has contended that she was outside her area of competence. I accept that was so, however she did elect to advise Ms Dablo, and apply to Immigration New Zealand for a work permit, and lodge an application for residence. Accordingly, she chose to engage in work that required her to have skills in this area. Ms Tan was certainly required to understand the fundamental principles that relate to a person who is in New Zealand unlawfully, and how that affects their status in relation to making applications to Immigration New Zealand.

[209] Regardless, if Ms Tan was operating outside of her expertise, clause 1.6 of the Code requires that a licensed immigration adviser must work within the scope of his or her individual knowledge and skills.

[210] I am satisfied Ms Tan failed to provide advice to Ms Dablo with due care, diligence and professionalism, and accordingly breached Clause 1 of the Code.

Appeal to the Removal Review Authority without instructions and forged signature

[211] The Tribunal must be satisfied its findings are made out on the balance of probabilities, but reflecting the gravity of the finding (sometimes, perhaps not wholly accurately, referred to as "a sliding scale").

[212] If Ms Tan either initiated or was a party to an appeal lodged without instructions, using a forged signature, that would amount to egregious dishonesty which has no place in the profession.

[213] The material before the Tribunal does not establish a basis for concluding Ms Tan had grounds to question the appeal lodged with the Removal Review Authority, or was involved in that process.

[214] I have taken account of Ms Dablo's evidence that Ms Tan told her she needed a copy of the appeal form to answer questions. While that may be consistent with Ms Tan knowing Ms Dablo had not seen the form before, it does not prove that. It is equally consistent with Ms Tan wishing to ensure Ms Dablo had a copy she could refer to. I am also left in some doubt regarding timing of this event.

[215] There are other persons involved in the appeal to the Removal Review Authority who are not parties to these proceedings. The Tribunal makes no finding regarding the appeal, and the circumstances in which it was lodged, other than to conclude it was not a matter in which Ms Tan had any material involvement.

Decision

[216] Pursuant to section 50 of the Act, the complaint is upheld, as Ms Tan has breached the Code in the respects identified, which is a ground for complaint pursuant to section 44(2)(e) of the Act.

[217] In other respects, the complaint is dismissed.

Submissions on Sanctions

[218] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions.

[219] The Authority and Ms Dablo have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, Ms Tan is entitled to make submissions and respond to any submissions from the other parties.

[220] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.

[221] Ms Tan is required to particularise the payments for disbursements she received, what was expended, and the balance in hand.

Timetable

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

[222.1] The Authority and Ms Dablo are to make any submissions within 10 working days of the issue of this decision.

[222.2] Ms Tan is to make any further submissions (whether or not the Authority or Ms Dablo make submissions) within 15 working days of the issue of this decision.

[223] The parties are notified that this decision will be published with the names of the parties after five working days, unless any party applies for orders not to publish any aspect.

DATED at WELLINGTON this 20th day of May 2013

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G D Pearson
Chair