

**BEFORE THE IMMIGRATION ADVISERS
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2013] NZIACDT 5

Reference No: IACDT 013/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

AND

Lindsay Sparks

Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: Mr G Riach, Harman's Lawyers, Christchurch.

Date Issued: 7 February 2013

DECISION

Introduction

- [1] This matter is an “own motion complaint” presented by the Registrar pursuant to section 46 of the Act. It concerns a New Zealand-based adviser dealing with a potential migrant located outside New Zealand.
- [2] The same circumstances have resulted in a complaint against both Mr Sparks and another licensed immigration adviser (Ms Maerean). They were both working together in Mr Sparks’ company in New Zealand. They have responded jointly to the complaint.
- [3] The essence of the complaint is that Mr Sparks’ company was engaged to assist a person in the Philippines to seek a work visa, and failed to act properly.
- [4] There were two companies, Mr Sparks’ company in New Zealand and a company in the Philippines. The Philippines company is independent. However, the two companies worked together cooperatively, which was required for compliance with Philippines law.
- [5] The Philippines company had its employee (not a licensed immigration adviser) fill out all the relevant immigration paperwork, and had the client sign an agreement for Mr Sparks’ company to provide immigration services.
- [6] Mr Sparks’ company first became aware of the client when the paperwork arrived, and Ms Maerean checked it and submitted it to Immigration New Zealand as a licensed immigration adviser. Mr Sparks and Ms Maerean first had contact with their client when he arrived in New Zealand from the Philippines to take up work. They met him in person when he arrived, not having previously had any form of direct communication.
- [7] The Authority investigated and, to put the matter briefly, complains that:
 - [7.1] Mr Sparks failed to act professionally in having his Philippines colleagues provide immigration services, which should have been personally provided by a licensed immigration adviser.
 - [7.2] He created a false record, and through Ms Maerean made representations indicating that his company was acting professionally for the client when, in fact, the Philippines company was undertaking the bulk of the immigration work.
 - [7.3] He was misleading in how he dealt with the Authority when it investigated.
- [8] The complaint largely turns on factual questions, although it is important to consider the extent of the constraints provided by the Act and the Code. The decision will identify the services that had to be personally performed by a licensed immigration adviser.
- [9] The Tribunal has concluded that Mr Sparks failed to meet some of the requirements of the Act and the Code; however that was the result of him misunderstanding his obligations. The Tribunal has not found the allegations of intentional deception or wilful impropriety to be made out.

The Complaint and the Response

The complaint

- [10] The complaint concerns Mr OBC’s application for a New Zealand work permit. He is a national of the Philippines and was located there.
- [11] He approached an organisation based in the Philippines named Greenfields International Manpower Services Inc (Greenfields). The organisation found work for him and prepared an application for a work permit. It was lodged on 20 October 2010.

- [12] As they were discussing Mr OBC's opportunities to work in New Zealand, Mr Labendia from Greenfields produced an agreement dated 1 July 2010 and asked Mr OBC to sign it. The agreement provided that a New Zealand company, Business International (NZ) Ltd (BIL), would provide immigration services. Mr Sparks is named as the licensed immigration adviser, and he is the managing director of BIL. Mr OBC signed the agreement
- [13] Mr OBC dealt only with Greenfields, and Mr Labendia helped him complete the application for a work permit which he signed and dated on 21 September 2010. After Mr OBC signed and dated the application, Greenfields sent the application to BIL in New Zealand.
- [14] Ms Maerean was an employee of BIL. She, like Mr Sparks, was a licensed immigration adviser located in Christchurch. She received the application, and added her name and contact details, indicating on the application that she was Mr OBC's licensed immigration adviser.
- [15] Ms Maerean included two representations in the application form, to which the Authority has drawn attention. She signed and dated the relevant parts of the form on 12 October 2010.
- [16] One representation on the form was:
- "I have provided immigration advice (as defined in the Immigration Advisers Licensing Act 2007)"
- [17] The second is:
- "I certify that the applicant asked me to help them complete this form and any additional forms. I certify that the applicant agreed that the information provided was correct before signing the declaration."
- [18] Immigration New Zealand made inquiries into whether Ms Maerean had in fact undertaken the responsibilities of a licensed immigration adviser, as the form indicated.
- [19] Mr OBC told Immigration New Zealand he had had no contact with Mr Sparks or Ms Maerean when his application was prepared. He said he had been assisted by Mr Labendia of Greenfields in the Philippines. Mr Labendia is not a licensed immigration adviser, and it is unlawful for him to give immigration advice.
- [20] Section 63 of the Act provides that a person commits an offence if they provide "immigration advice", without being either licensed or exempt from the requirement to be licensed.
- [21] Section 73 provides that a person may be charged with an offence under section 63, whether or not any part of it occurred outside New Zealand.
- [22] The scope of "immigration advice" is defined in section 7 very broadly. It includes:
- "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 ..."
- [23] The Authority investigated the circumstances regarding the apparent lack of contact between both Mr Sparks and Ms Maerean, and their client Mr OBC.
- [24] The Authority approached Mr Sparks to gather information. In a telephone interview on 25 March 2011, Mr Sparks said he had met Mr OBC in the Philippines and again when he came to New Zealand.
- [25] Ms Maerean was interviewed by the Authority and asked for an explanation. She said she had no contact with Mr OBC, but a colleague at BIL had conducted a "webcam" interview with Mr OBC.
- [26] Mr OBC was questioned further by the Authority. Ms Maerean and Mr Sparks were the two people in BIL who were licensed immigration advisers. Mr OBC said he had no contact with

them by “webcam” or otherwise in the Philippines. He did meeting them in Christchurch, after he travelled to New Zealand. That was after his work permit application has been processed and he had come to New Zealand to work.

- [27] In a telephone interview with the Authority on 15 April 2011, Mr Sparks said he had a relationship with agencies in the Philippines, and Greenfields was one of them. He would go to the Philippines every two or three months and meet all prospective clients. That was facilitated by holding a seminar, where up to 50 people would attend. Some of the potential clients would sign written agreements for the provision of immigration services while he was there.
- [28] In the interview, Mr Sparks initially said he was present when Mr OBC signed his contract, but on reflection was uncertain and needed to check. On some occasions agreements would be emailed to and from the Philippines while Mr Sparks was in New Zealand, and that was probably what had happened with Mr OBC’s agreement.
- [29] In the interview the Authority suggested to Mr Sparks that it appeared he had signed an agreement, and later Ms Maerean had been listed as the licensed adviser on the application, which was not consistent with clause 2.1(h) of the Code of Conduct. That provision of the Code requires that a licensed immigration adviser must at all times “hold written authority from clients to act on their behalf”. Mr Sparks agreed Ms Maerean had not complied with the Code.
- [30] In this interview the Authority put to Mr Sparks that if no licensed immigration adviser had met, talked to or emailed a client during the application stage, the adviser had not acted lawfully. Mr Sparks disagreed with that proposition. He said his procedure was the same as every other agency in New Zealand for dealing with offshore clients, and the Act had made the correct procedure unworkable in the real world.
- [31] The Authority investigated Mr Sparks’ claim that he had travelled to the Philippines every two or three months. The investigations showed his only travel outside New Zealand in 2010 was to Australia on two occasions, and he had been away for approximately a week on each occasion. The investigation did not indicate whether he had travelled from Australia to the Philippines.
- [32] Mr OBC said he had attended a seminar in the Philippines, apparently arranged by Greenfields, but no representative of BIL was in attendance.
- [33] The Registrar has particularised the grounds of his complaint against Mr Sparks. In summary they are:
- [33.1] Breaches of the Code of Conduct’s requirements of care, respect, diligence and professionalism.
- [33.2] Being a party to a process in which misleading information was provided to Immigration New Zealand, in breach of the Act, the Immigration Act 2009 and Immigration New Zealand’s operating requirements. His role as a party was in not fulfilling his obligations under the agreement to provide professional services, then facilitating Ms Maerean acting for Mr OBC as a licensed immigration adviser and misrepresenting the assistance she provided to Immigration New Zealand.
- [33.3] Being a party to Mr Labendia unlawfully providing immigration advice, thereby breaching the Code and the Act, and failing to uphold the integrity of New Zealand’s immigration system.
- [33.4] Mr Sparks fabricated the existence of a professional relationship, and did so unprofessionally and without respect for Mr OBC.
- [33.5] Mr Sparks signed an agreement to provide professional services, and then failed to deliver the professional services, and allowed or encouraged Ms Maerean to perform some of the professional services without written authority from Mr OBC.

[33.6] Mr Sparks created a “paper trail” that falsely gave the impression that he and Ms Maerean were acting professionally as immigration advisers for Mr OBC, when that was not true.

[33.7] There is also an allegation relating to the truthfulness of Mr Sparks’s responses when interviewed by the Authority:

[33.7.1] First, by wrongly stating he had met Mr OBC in the Philippines.

[33.7.2] Second, by falsely stating he went to the Philippines every two or three months and met all potential clients, when in fact he neither travelled to the Philippines as regularly as that, nor met all potential clients.

The response

[34] Mr Sparks responded through his counsel in a letter dated 24 May 2011.

[35] The first point was that Mr Sparks has a busy practice which he has successfully managed for some 23 years.

[36] The letter categorised the complaint as having four components, and Mr Sparks responded to them as follows.

Wrongly stating that he met Mr OBC in the Philippines

[37] The response essentially points out that the circumstances indicate that Mr Sparks was uncertain as to whether he had met Mr OBC in the Philippines, and provided accurate information as soon as practicable after the opportunity of making inquiries.

[38] In relation to establishing a professional relationship, the agreement was properly signed without Mr Sparks being present when Mr OBC signed the agreement, and it also contained a notification that Mr OBC was free to seek independent legal advice.

Failing to perform services and carry out lawful informed instructions of clients

[39] The submission is to the effect that Mr Sparks and BIL did nothing wrong in terms of the service provided.

Facilitating provision of advice by an unlicensed person

[40] The letter contends that it is not evident that Mr Labendia did give any “immigration advice” as defined in the Act, or that Mr Sparks had any role in that or responsibility for it if that did occur.

Fabrication of a professional relationship

[41] The submission is that the professional relationship was in accordance with professional obligations, and occurred in the following manner:

[41.1] Mr OBC has skills in the English language, so he understood written communications and the process he was engaged with.

[41.2] The process began with Mr Garlick having a “webcam” interview in September 2009. Mr Garlick is an employee of BIL, not an immigration adviser, and he assessed Mr OBC’s suitability for employment opportunities in New Zealand.

[41.3] BIL found employment for Mr OBC.

[41.4] Mr OBC then entered into the agreement for the provision of immigration services, understanding the agreement and its implications.

- [41.5] Ms Maerean then dealt with compiling the application for a work permit, to fulfil BIL's responsibilities under the agreement.
- [41.6] Mr OBC gained a work permit, and is entirely happy with the service provided.
- [42] The submission suggests the Act does not deal appropriately with licensed immigration advisers providing services, in two respects:
- [42.1] It licenses individuals, and does not adequately regulate the provision of services through corporate structures.
- [42.2] Immigration practices may be multi-disciplinary, and provide employment recruitment services as well as immigration services.
- [43] Further, the scope of "immigration advice", being the area of work reserved to licensees and persons who are exempt from licensing, excludes significant aspects of immigration services due to the "clerical work" limitation in the definition.
- [44] The letter also refers to the complaint against Ms Maerean, and characterises any deficiency in her role as "ticking" the wrong box on Mr OBC's application form.

The Tribunal's Minute and Response

- [45] The Tribunal issued a Minute dated 14 August 2012, which identified the complaint and response previously outlined, the issues raised, and indicated the views that were potentially open on the material then before the Tribunal. The parties were given an opportunity to respond.
- [46] Mr Sparks and Ms Maerean responded with the following material:
- [46.1] an affidavit from Mr Acdal, the operations manager of Greenfields;
- [46.2] an affidavit from Mr Sparks;
- [46.3] an affidavit from Ms Maerean; and
- [46.4] submissions from counsel, for Mr Sparks and Ms Maerean.
- [47] The Authority did not challenge the response provided by Mr Sparks and Ms Maerean in their affidavits, and the submissions in support.

Mr Acdal's affidavit

- [48] The key elements in Mr Acdal's affidavit were that the principal role of Greenfields was to place people in employment. There had been an association between Greenfields and Mr Sparks for some five years.
- [49] Greenfields would provide clients with general information regarding what they required to pursue offshore employment opportunities and gather information for the processes required to take up offshore employment.
- [50] Mr Labendia was an employee of Greenfields and he undertook this work. His practice was to explain to clients who wanted to work in New Zealand that BIL could provide both immigration and recruitment services.
- [51] The usual practice was to have *Skype* interviews so BIL could promote the client to New Zealand employers. Greenfields would gather information so that BIL could process the clients' immigration and employment applications.

- [52] When the visa to work in New Zealand was approved, there were Philippines' regulatory requirements. Greenfields was obliged to ensure that the engagement was genuine and the employee had the protection of insurance and the like.

Mr Sparks' affidavit - background

- [53] Mr Sparks said he had been working in immigration for some 24 years, undertaking a substantial volume of work. His history demonstrated a commitment to professionalism.
- [54] He said that his company had associations with organisations in other parts of the world. There was a regulatory environment where many governments would be concerned to ensure foreign employers and agents would not exploit their citizens. That was so in the Philippines, and accordingly BIL had gained accreditation in the Philippines. Mr Sparks produced a copy of the accreditation certificate issued by the Philippines Department of Labor and Employment, recording that BIL: "may undertake the recruitment, hiring, and employment of contract workers for its project in New Zealand" through Greenfields.
- [55] Mr Sparks said the way this collaborative process mandated by Philippines law operated in practice was:
- [55.1] He did not know what if any immigration advice was provided by Greenfields to clients.
- [55.2] BIL was introduced to clients and BIL's employment personnel would interview them (usually by webcam).
- [55.3] BIL would forward an agreement to Greenfields for the client to agree to engage BIL. The form of this agreement was approved by the Authority when Mr Sparks was licensed as an immigration adviser in New Zealand, and produced when he renewed his licence.
- [55.4] Mr Sparks has found it difficult to reconcile BIL being a service provider, with the fact that only individuals may be licensed as an immigration adviser.
- [55.5] Mr Sparks knows that Greenfields does assist with gathering information to process applications to submit to Immigration New Zealand, however what is actually done is not known to Mr Sparks. He had not previously thought that what it did amounted to providing immigration advice. He or another licensed immigration adviser would generally have met the client, in person or through electronic means.

Mr Sparks' affidavit – this complaint

- [56] Mr Sparks identified the crux of the complaint as relating to difficulties in implementing the regime when the Act came into effect, and in particular Ms Maorean signing Mr OBC's application without having contact with him.
- [57] Mr Sparks explained that he and Ms Maorean understood that as licensed immigration advisers they were entitled to sign on behalf of BIL. Mr OBC was certainly a client of BIL, and was receiving recruitment services as well as immigration services.

Mr Sparks' affidavit – earlier statements

- [58] Mr Sparks commented on his statements made to the Authority's investigator.
- [59] He said the first telephone call was on 25 January 2011, and it was unexpected. He had not had time to check his file and answered as best he could. Further, he challenges the accuracy of the record in relation to meeting Mr OBC. Mr Sparks believes he said he could have met him, and he certainly did not intend to mislead the Authority.
- [60] His estimate of the amount of travel to the Philippines was only a rough guess.

Mr Sparks' affidavit – acceptance of non-compliance

- [61] Mr Sparks accepted he had not always complied correctly with the Code of Conduct, as he had not had the personal contact with clients that is required, having regarded compliance as a company issue rather than requiring the personal compliance of the licensed immigration adviser.
- [62] Mr Sparks has taken steps to ensure that he and others he works with understand this obligation, and the necessity of ensuring people he works with comply. Ms Maerean has not renewed her licence.

Ms Maerean's affidavit

- [63] Ms Maerean explained that she migrated to New Zealand some 10 years ago. As a result of the complaint Ms Maerean has decided not to renew her licence.
- [64] She accepted she had signed Mr OBC's application indicating she was the licensed immigration adviser. She had done so understanding that was proper as BIL was representing Mr OBC.
- [65] Ms Maerean confirmed the evidence regarding Greenfields acting with BIL as licensed recruiters. She said that as BIL was engaged to provide immigration services, it did not occur to her that she had to personally enter into a professional relationship.
- [66] Ms Maerean denies any element of deliberately misleading the Authority or attempting to circumvent the rules.

Decision*Issues raised by the Complaint*

- [67] The allegation in the complaint, when related to Mr Sparks' professional status in the engagement with Mr OBC, is that he:
- [67.1] pretended to be engaged as a licensed immigration adviser, when in fact he provided no professional services to Mr OBC; and alternatively
- [67.2] he did take on the role of a licensed immigration adviser, but failed to provide the professional services he was required to deliver.
- [68] Further, he was a party to Mr OBC receiving immigration advice unlawfully.
- [69] The next element in the allegation is that he then effected a pretence with Ms Maerean. Immigration New Zealand was told she acted professionally as a licensed immigration adviser and prepared Mr OBC's application for a work permit, whereas the work that Ms Maerean was said to have undertaken had been performed unlawfully by an unlicensed person in the Philippines.
- [70] Mr Sparks is also alleged to have misled the Authority when these circumstances were investigated.
- [71] There can be no doubt that, if established, such conduct involves systematic and serious breaches of the requirements of the Act and the Code of Conduct. They are grounds for upholding a complaint (section 44(2)).
- [72] The issue for the Tribunal to determine is whether the allegations are established on the material before the Tribunal. To a significant extent that is a question of fact.
- [73] However, the allegation is that Mr Sparks was evading the legal restraints on how he was entitled to practice, and that motivated pretence. Accordingly, it is important to examine what the legal restraints were, to put Mr Sparks' explanation in a sensible context.

Work that can only be completed by a licensed immigration adviser

- [74] It is a criminal offence to provide immigration advice unless licensed or exempt, and the scope of immigration advice is broad.
- [75] As noted, sections 63 and 73 of the Act provide that a person commits an offence, and that is so whether or not any part of the actions constituting the offence occurred outside New Zealand.
- [76] The scope of “immigration advice” is defined in section 7 to include:
- “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 ...”
- [77] The expansive nature of this definition is important for two reasons in relation to this complaint:
- [77.1] There appears to be little doubt Greenfields and Mr Labendia used knowledge and experience to assist Mr OBC to prepare his application for a work visa. Accordingly, their actions will come within the definition at least to that extent.
- [77.2] By Mr Sparks entering into an agreement that he would represent Mr OBC, and Ms Maerean checking the application and identifying herself as Mr OBC’s representative to Immigration New Zealand, it seems likely they were also providing immigration advice as defined.
- [78] However, in relation to the client contact in the Philippines, there are exceptions that must be considered. Mr Sparks’ counsel has submitted the scope of that definition is materially reduced in relation to this case due to the “clerical work” limitation. Section 7 provides that the definition does not include “clerical work, translation or interpreting services”. Accordingly, the question arises as to whether the work Mr Labendia and Greenfields undertook came within that exception.
- [79] The scope of *clerical work* is an important limitation in the definition, as otherwise the very wide definition of immigration advice would likely preclude any non-licence holder working in an immigration practice in any capacity.
- [80] *Clerical work* is defined in section 5 of the Act in the following manner:
- “**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”
- [81] The definition is directed to administrative tasks, such as keeping general records, maintaining financial records and the like.
- [82] The definition deals specifically with the role a non-licensed person may have in the process of preparing applications for visas. They may record information “on any form, application, request, or claim on behalf and under the direction of another person”.
- [83] The natural meaning of those words is that the unlicensed person, relying on the “clerical work” exception, may type or write out what another person directs.
- [84] That other person may properly be the person who is making the application; a licensed immigration adviser or a person who is exempt from being licensed. The person typing or writing out the form in those circumstances is not giving immigration advice.

- [85] The definition does not give any authority for the unlicensed person to make inquiries and determine what is to be recorded on the form. Under “clerical work” they must do nothing more than “record” information as directed.
- [86] Another exception in section 7 is that immigration advice does not include “providing information that is publicly available, or that is prepared or made available by the Department”. Mr Sparks’ counsel has relied on that part of the provision also.
- [87] The scope of “immigration advice” is best considered in relation to the facts, as presently disclosed in the material before the Tribunal.

The role of Greenfields, and the commencement of the professional relationship

- [88] The Authority has not challenged the affidavits provided by Mr Sparks, Ms Maerean, and Mr Acdal.
- [89] They are the only sworn testimony, and the evidence is credible. In relation to the differences of view regarding Mr Sparks’ conversations with the Authority’s representative, the record of those conversations is in the form of file notes. The only evidence on oath from a participant in the conversation is Mr Sparks’ testimony. He provides a plausible explanation of potential misunderstanding and I am satisfied that explanation must be accepted.
- [90] Mr Sparks appears to have had no role in dealing with Mr OBC other than signing an agreement, until Mr OBC came to New Zealand. Ms Maerean appears to have had no involvement with Mr OBC’s application until after the application had been drafted, and presented for her review.
- [91] Further, Ms Maerean’s role was reviewing the documentation, identifying herself as the licensed adviser, and lodging the application with Immigration New Zealand.
- [92] There were two possibilities:
- [92.1] Greenfields and Mr Labendia initiated the professional relationship, assisted Mr OBC to complete the documents and provided any advice he required in relation to immigration issues; and alternatively
- [92.2] Mr OBC prepared the documents, with the company and its staff simply recording the information he directed them to record in the documents.
- [93] The first view would potentially involve the unlawful provision of immigration advice. The second would not.
- [94] The Tribunal is required to determine facts on the balance of probabilities; however the test must be applied with regard to the gravity of the finding (*Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1). I am mindful that a finding that a licensed immigration adviser was a party to the provision of immigration advice in breach of the Act is a serious finding, and I must be sure the evidence requires such a finding.
- [95] In Mr Acdal’s affidavit he said that information relating to immigration was “general information available at [BIL]’s website.” In relation to the process of completing the form, there is not sufficient information to be satisfied that Mr Labendia did more than complete the form as instructed by Mr OBC. I note Mr OBC had English language skills that equipped him to work in a professional position in New Zealand, using his professional skills and tertiary education. There is no reason to suppose he did not have the ability to instruct Mr Labendia what information he required to be supplied.

- [96] I have taken account of Mr OBC's statement that he regarded Mr Labendia as his immigration adviser. However, Mr Labendia did provide general advice from BIL's website, and section 7 excludes the provision of "information that is publicly available, or that is prepared or made available by the Department." It is of course quite a different matter to use such information to give advice on a person's particular circumstances. I cannot be satisfied that there was more than the provision of general information rather than advice to Mr OBC on his personal circumstances.
- [97] Accordingly, I am not satisfied immigration advice was provided unlawfully. It has not been established advice was provided that came within the scope prohibited by the Act.
- [98] However, there is still the issue of whether Mr Sparks and Ms Maerean engaged with Mr OBC in the manner necessary to establish a client relationship. They both accept they had a misconception of the corporate commercial relationship between BIL and Mr OBC, and their personal standing and responsibilities as licensed immigration advisers.
- [99] To initiate a client relationship in accordance with the Code requires the use of knowledge, and experience in immigration; it involves advising, assisting and representing another person in regard to an immigration matter. It does not come within any of the exceptions.
- [100] I am satisfied the Act requires that a licensed immigration adviser personally take responsibility for engagement with their client, initiate the client relationship, and personally provide immigration advice. The exceptions to personal professional service delivery are limited to genuine clerical processes, and narrowly defined.
- [101] I am satisfied:
- [101.1] Mr Labendia initiated the professional relationship, and in doing so gave immigration advice in the sense of assisting Mr OBC in regard to an immigration matter. He was neither qualified nor entitled to do so lawfully.
- [101.2] Mr Sparks and Ms Maerean knew their client needed to be assisted with the initial phases of client engagement (clauses 1.4(a), 9(b), and 1.5(a)), and failed to do so.
- [102] Mr Sparks and Ms Maerean simply checked the documents, put Ms Maerean's name on them, and submitted them to Immigration New Zealand. That does not discharge their professional obligations. Mr Labendia could not lawfully undertake that work on their behalf.
- [103] It appears they accept they misunderstood their obligations in this regard.
- [104] The consequence of lack of client contact was that they:
- [104.1] did not obtain informed instructions (clause 1.1(b));
- [104.2] failed to protect their client against the risk of inaccurate information being supplied to Immigration New Zealand (clause 2.1(f)); and
- [104.3] failed to initiate the client relationship in accordance with the Code, including providing an awareness of all significant matters relating to the agreement to provide professional services. (clauses 1.4(a), 9(b), and 1.5(a)).
- [105] However, I am satisfied that they failed to understand their professional obligations rather than this being a result of intentional wrongdoing.

Ms Maerean's representations

- [106] Ms Maerean's certification of Mr OBC's application is not primarily an issue for Mr Sparks; however it was part of the series of events in which Mr Sparks oversaw Mr OBC's immigration affairs.
- [107] I am satisfied Ms Maerean was acting as a licensed immigration adviser and providing "immigration advice", as she:

- [107.1] used her knowledge and experience of immigration matters to review the application, and submit it to Immigration New Zealand;
- [107.2] she was representing Mr OBC in relation to the application; and
- [107.3] the application was an immigration matter relating to New Zealand.
- [108] I am also satisfied Ms Maerean had no contact with Mr OBC, and had no (or no adequate) basis to be satisfied that:
- [108.1] a professional relationship had been established in accordance with the Code of Conduct;
- [108.2] Mr OBC had been given adequate and lawful advice regarding his immigration prospects, and the duties he had when completing his application;
- [108.3] she had any written authority, instructions from Mr OBC, or that he had the information required to give informed instructions.
- [109] Aside from the implication that she had discharged her full professional duties when she presented the application under her name, Ms Maerean misrepresented the work she had undertaken. She stated in Mr OBC's application:
- "I certify that the applicant asked me to help them complete this form and any additional forms. I certify that the applicant agreed that the information provided was correct before signing the declaration."
- That was not accurate:
- [109.1] First, she had no contact with Mr OBC. So he had not asked her for her assistance personally, as the words "asked me" convey.
- [109.2] Second, the form was complete before Ms Maerean had any knowledge of, or involvement with, the form.
- [109.3] Third, certifying that the applicant agreed the information was correct was a key representation, given the potential consequences for Mr OBC if the information was inaccurate in any respect.
- [110] Mr Sparks agreed to provide professional services to Mr OBC, he was in control of BIL, and in a position to direct Ms Maerean. He was in control of how professional services were delivered to Mr OBC, and aware of Ms Maerean's role.
- [111] However, I am satisfied that Mr Sparks and Ms Maerean both, incorrectly, believed that this was in order. They failed to appreciate the Act requires that individuals must take responsibility for the provision of professional services as a licensed immigration adviser. A corporate entity cannot be either licensed or be the person providing professional services.
- [112] Given the absence of any evidence regarding Mr Sparks or Ms Maerean intentionally failing to comply, or mislead in relation to Ms Maerean's certification, I make no finding against Mr Sparks in regard to the certification. He was not a party to intentional misconduct.

Misleading the Authority

- [113] The information presently before the Tribunal is also potentially grounds for concluding Mr Sparks misled the Authority when he claimed to have met all potential clients in the Philippines, and had been there every two or three months for that purpose. That would be grounds for upholding the complaint under the Code, clause 2, and section 44(2)(d) of the Act.
- [114] The Tribunal's Minute indicated the view was open that the complaint appears to question various aspects of the interview; however there did appear to be a reasonable likelihood that confusion or mistake were the cause of any incorrect statements.

- [115] Mr Sparks has responded with an affidavit explaining the discussion and stating that the recording of the discussion was not a complete or accurate record. The Authority has not challenged that.
- [116] I accept Mr Sparks' explanation. It may well be that the information he provided was not precise, and Mr Sparks accepts that. However, there is no basis to find that what he said was intentionally misleading. The interviews were unannounced discussions; inaccuracy was entirely possible without any attempt to deceive by Mr Sparks.

Conclusion

- [117] I find that Mr Sparks failed to initiate the client relationship in accordance with the Code, although that was the result of failing to understand how it applied. He was required to understand, and cannot excuse incomplete compliance based on inconvenience, cost, or that he had a different practice he regarded as satisfactory. The Act and the Code are compulsory.
- [118] Accordingly, I find that Mr Sparks was acting for Mr OBC, including overseeing Ms Maerean's work, and he:
- [118.1] did not obtain informed instructions (clause 1.1(b));
- [118.2] failed to protect his client against the risk of inaccurate information being supplied to Immigration New Zealand (clause 2.1(f)); and
- [118.3] failed to initiate the client relationship in accordance with the Code, including providing an awareness of all significant matters relating to the agreement to provide professional services. (clauses 1.4(a), 9(b), and 1.5(a)).
- [119] Accordingly, the complaint is upheld pursuant to section 44(2)(e) of the Act.

Submissions on Sanctions

- [120] As the complaint has been upheld, the Tribunal must either take no further action or impose any one or more of the sanctions provided in section 51.
- [121] The Authority and Mr Sparks 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, Mr Sparks is entitled to make submissions and respond to any submissions from the Authority.
- [122] 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.

Timetable

- [123] The timetable for submissions will be as follows:
- [123.1] The Authority is to make any submissions within 10 working days of the issue of this decision.
- [123.2] Mr Sparks is to make any further submissions (whether or not the Authority makes any submissions) within 15 working days of the issue of this decision.
- [124] 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 7th day of February 2013

G D Pearson
Chair