

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

Decision No: [2013] NZIACDT 58

Reference No: IACDT 003/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

MSC

Complainant

AND

Rosemarie Scholes

Adviser

NO INFORMATION IDENTIFYING THE COMPLAINANT TO BE PUBLISHED

DECISION

REPRESENTATION:

Registrar: In person.

Complainant: Mr H Weischede, NZ Immigration Help Services Ltd, Auckland.

Adviser: In person.

Date Issued: 10 September 2013

DECISION

INTRODUCTION

- [1] The Registrar has referred a complaint brought by the complainant against Ms Scholes; she is a licensed immigration adviser.
- [2] The complainant is a nurse who qualified in the Philippines and who sought assistance with gaining nursing registration in New Zealand. She wanted to get a work permit and employment in New Zealand.
- [3] Ms Scholes initially engaged with the complainant through an unqualified agent in the Philippines.
- [4] Later Ms Scholes met the complainant, but the complainant says that at no time was she given the professional advice necessary to achieve her goals. Instead, she was channelled into an inappropriate English language course at a school in which Ms Scholes has a financial interest.
- [5] Ms Scholes enrolled her in the school to study, and obtained a visa for a course intended as preparation for International English Language Testing System (IELTS) Level 5. The course was a serious financial burden for the complainant and her family.
- [6] However, when the complainant first engaged Ms Scholes, she had already passed an IELTS test at Level 6.5; she required Level 7 to qualify to apply for nursing registration. By the time Ms Scholes lodged the application resulting in the limited purpose visa, the complainant had already passed IELTS Level 7.
- [7] The complaint has raised a number of other issues relating to how she was treated, in addition to being enrolled in the inappropriate course rather than having a proper professional evaluation of her immigration opportunities. They include whether the professional relationship was initiated properly and whether the unqualified agent acted properly in a number of respects.
- [8] Ms Scholes denies the complaint on the grounds she did provide proper advice and she is not responsible for her agent's conduct. She also says the complainant did not communicate important information to her.
- [9] To resolve the complaint it is necessary to evaluate the nature of Ms Scholes responsibilities, including the role of the unqualified agent, then determine what she knew or ought to have known, and finally to evaluate the professional services provided in these circumstances.
- [10] For the reasons set out below, the Tribunal has found that Ms Scholes breached the requirements of the Code of Conduct in a number of respects.
- [11] The most significant findings are that Ms Scholes:
 - [11.1] Failed to evaluate her client's immigration opportunities and instead channelled her to a course which would lead to Ms Scholes benefitting financially; the course was not required by, or appropriate for, her client. She disregarded the serious financial burden imposed on her client and failed to provide disinterested professional advice.
 - [11.2] Allowed an unqualified person to provide professional services which she was required to deliver personally (or through another licensed immigration adviser). That person was not supervised or supervised adequately and they took the opportunity to exploit the complainant and her family.
 - [11.3] Filed an application for a student visa without personally ensuring that the financial support required to grant the visa was in place.

- [11.4] Filed a second application for a student visa, on which a limited purpose visa was issued, without first satisfying herself that the course of study was necessary or appropriate for her client.

THE STATEMENT OF COMPLAINT

- [12] The Registrar filed the complaint in the form of a statement of complaint. It contained the following information regarding the grounds on which the Registrar had exercised his statutory power to lodge a complaint with the Tribunal.

Illegible record

- [13] The papers filed in support of the complaint are, in some cases, only partly legible to the extent that the nature and content of some documents is not evident to the Tribunal.
- [14] The Registrar indicated he was not in a position to provide legible copies. The other parties have neither identified illegible content as significant, nor provided substitute copies.

Material facts

Parties

- [15] The material facts in the Statement of Complaint commenced in 2010 in the Philippines, where the complainant lives. She engaged a local agent, Ms Rubio. She was an agent for ANZSIIS International School (the School), located in Auckland.
- [16] Ms Rubio operated ANZ Bicol Consulting Incorporated. An agreement dated 30 May 2010 appointed her as an agent for the School in her personal name. Ms Rubio is not a licensed immigration adviser.
- [17] Ms Scholes is a licensed immigration adviser; she is the sole director of the company that operates the school, and also the sole director of ANZSIIS Consulting Ltd.

The complainant's situation

- [18] The complainant wanted to gain registration as a nurse in New Zealand. Ms Rubio told her that improving her English language skills would assist in that. She recommended a course at the School in Auckland, to prepare for IELTS Level 5, and offered to assist with applying for a Student Visa.
- [19] The complainant had, prior to the advice to attend the school to prepare for IELTS at Level 5, passed an IELTS test at Level 6.5. The higher the IELTS score is, the higher the level of attainment.
- [20] The complainant paid Ms Rubio PHP 23,000, which she believed was a "sign on" fee for her student visa application.
- [21] The sign on fee was paid on 27 July 2010, and was not at the time necessarily connected with Ms Scholes.

Engaging Ms Scholes

- [22] On 13 August 2010, the complainant signed an agreement authorising Ms Scholes to act on her behalf in relation to seeking a student visa. The agreement provided for a PHP 25,000 signing fee, a PHP 35,000 lodgement fee, and a PHP 60,000 final settlement (PHP 60,000 in total). Though the fee would have been PHP 120,000 if successful.
- [23] The complainant signed a conflict of interest form and it noted Ms Scholes had a financial interest in promoting the School, as she was a director of the company operating it.
- [24] The complainant had been dealing with Ms Rubio.

- [25] On 22 August 2010, Ms Scholes was in the Philippines, in Ms Rubio's office. She had been presenting a seminar there. She met with the complainant. It was the first time Ms Scholes and the complainant met. Ms Scholes took no notes of the meeting. Ms Rubio gave Ms Scholes a number of documents that the complainant had already signed engaging her in a professional relationship. Though it is not undisputed, as the complainant has said she only met Ms Scholes later.

Fees paid to Ms Scholes and Ms Rubio

- [26] On 8 September 2010, the complainant paid Ms Scholes PHP 176,000, which the complainant understood to be a fee for a course at the School.
- [27] She also paid, on the same day, a fee to Ms Rubio of PHP 25,000, which she understood to be a fee for applying for a visa.

Visa application - declined

- [28] On 22 September 2010, Ms Scholes lodged a visa application for the complainant.
- [29] On 4 October 2010, Immigration New Zealand requested information regarding the complainant's financial situation.
- [30] On 11 October 2010, Ms Scholes responded to Immigration New Zealand's request with further information.
- [31] On 29 October 2010, Immigration New Zealand declined the complainant's application.

Response to declined visa application

- [32] Initially the complainant's mother wrote to Ms Scholes and told her to cease work on seeking a visa and requested a refund. After discussion, that was deferred and instructions given to apply a second time for a visa.
- [33] Ms Scholes advised the complainant that to succeed with the application, she would need to provide adequate evidence of financial support.
- [34] In January 2011, Ms Rubio told the complainant that to successfully apply for a visa she would need to show Immigration New Zealand she had PHP 300,000 in her bank account. The complainant said she did not have that much money, and Ms Rubio offered to lend her PHP 165,000 at an interest rate of 5% per month, which she accepted.

Further IELTS test

- [35] The complainant sat a further IELTS test, and gained an overall score of 7.5.
- [36] She told Ms Scholes, who said she would qualify for a higher level course at the school.

Second visa application – limited purpose visa issued

- [37] On 6 April 2011, a second visa application was lodged by the adviser.
- [38] On 17 April 2011, Ms Scholes told the complainant's mother she would be able to find a Competency Assessment Programme provider to assist with the complainant getting registration as a nurse in New Zealand.
- [39] The complainant's mother paid Ms Rubio PHP 8,250 as interest on the loan in late April 2011.
- [40] Immigration New Zealand offered a limited purpose visa rather than a student visa.
- [41] Ms Rubio told the complainant that if she did not accept the limited purpose visa she would risk being "blacklisted" by Immigration New Zealand and was unlikely to get a visa in the future.

- [42] The limited purpose visa was issued, the primary purpose being: "undertaking a Certificate in Preparation for IELTS Level 5 from 9 May to 4 November 2011".

The limited purpose visa was not useful and the complainant terminates the instructions

- [43] The complainant's mother repaid PHP 65,000 of the loan on 18 May 2011, and on 25 May 2011 gave Ms Rubio a post-dated cheque for PHP 105,000, which included the 5% interest. That resulted in the loan being repaid on the terms on which it was issued.

- [44] The complainant and her family realised the limited purpose visa was not useful, as it had a six month time limit. It would not be sufficient to complete the course and file her application with the Nursing Council to gain registration in New Zealand. They wrote to Ms Scholes on 25 May 2011 explaining this and seeking a refund of tuition fees.

- [45] The following day the complainant wrote to Ms Scholes instructing her to withdraw the application for a student visa, and instructed her that the Complainant would personally deal with Immigration New Zealand in relation to her limited visa. The letter requested that Ms Scholes arrange for her agent Ms Rubio to release her passport to her father.

- [46] On 27 May 2011, Ms Scholes wrote to the complainant saying she had to let Immigration New Zealand know of her changed circumstances and would forward the passport to Ms Rubio.

- [47] On 29 May 2011, the complainant replied, and said:

[47.1] There was no need to communicate with Immigration New Zealand as that had already been done.

[47.2] She wanted the refund of tuition fees within 7 days.

[47.3] She expected her passport to be returned in the Philippines no later than 31 May 2011.

- [48] On 30 May 2011, Ms Scholes emailed Immigration New Zealand saying "this applicant wishes to cancel her LPV."

- [49] The complainant says that Ms Scholes retained her passport as there was an outstanding fee.

- [50] On 1 June 2011, the tuition fee of PHP 176,000 was refunded in full.

- [51] The complainant instructed a new adviser who, on 7 June 2011, wrote to Ms Rubio informing her that she was improperly withholding a passport and personal documents, claiming they were held in due to unpaid fees. He said as Ms Scholes' agent she was obliged to comply with the Code of Conduct. The complainant had previously been refused the documents when she went to Ms Rubio's office and the adviser had been similarly refused over the phone.

- [52] On 7 June 2011, the documents were released.

Grounds on which the Registrar referred the complaint

- [53] The Registrar referred the complaint pursuant to section 45(2) of the Immigration Advisers Licensing Act 2007 ("the Act"), and identified the grounds for referral of the complaint. The grounds were that there was a case that Ms Scholes breached the Licensed Immigration Advisers Code of Conduct 2010 ("the Code of Conduct") in the following respects:

[53.1] The agreement was signed and a payment made for professional services prior to Ms Scholes meeting or consulting with the complainant. This breached:

[53.1.1] Clause 1.5(a), and

[53.1.2] Clause 1.4(a) of the Code of Conduct.

[53.2] The signed agreement did not set out the fees in fact paid, or record a "no win no fee arrangement" that was in place. This breached:

- [53.2.1] Clause 1.5(e), and
- [53.2.2] Clause 3(c) of the Code of Conduct.
- [53.3] The initial application for a student visa was not prepared with due care, in breach of cl 1.1(a) of the Code of Conduct.
- [53.4] Lawful informed instructions were not carried out as Ms Scholes contacted Immigration New Zealand saying the complainant withdrew her limited visa despite having been instructed not to do so by the complainant. This breached cl 1.1(b) of the Code of Conduct.
- [53.5] The complainant's passport and personal documents were not returned promptly when requested. This breached cl 1.3(b) of the Code of Conduct.
- [53.6] The complainant already met the requirements for nursing in New Zealand, the English language course her visa related to was unnecessary. This breached cl 1.1(d) of the Code of Conduct.
- [53.7] When meeting with the complainant, Ms Scholes did not take any notes, and did not record changes in the fee arrangements. This breached cl 3(f) of the Code of Conduct.

The complainants' arguments in support of the complaint

- [54] The Statement of Complaint identified the complainants' key arguments in support of the complaint as:
 - [54.1] She did not sign an agreement with Ms Scholes or her company, and was not provided a copy of the Code of Conduct.
 - [54.2] She was not advised on the financial requirements before applying for a student visa.
 - [54.3] Ms Scholes did not explain the conditions relating to the limited purpose visa.
 - [54.4] She should have been told by Ms Scholes that she did not need to continue with enrolling in the School and seeking a student visa when she had passed an IELTS test that met the Nursing Council requirements.
 - [54.5] Her personal documents should have been returned without delay.

Ms Scholes' response to the complaint

- [55] The Statement of Complaint identified the key elements of Ms Scholes' response to the complaint in the following way.

Ms Scholes' response to the material facts

- [56] Ms Scholes said the complainant signed an agreement dated 13 August 2010 after consultation with, and seeking an explanation, from Ms Scholes.
- [57] The complainant had expressed interest in studying IELTS and was offered options to study English, at the School and also in the Philippines.
- [58] Ms Scholes was not aware of the loan from Ms Rubio.
- [59] The delay in returning the personal documents was due to Ms Rubio thinking that the complainant not her mother was supposed to uplift the material.
- [60] The complainant was aware of, and acknowledged, the conflict of interest relating to Ms Scholes' involvement in the School.
- [61] Ms Scholes only became aware of the complainant passing the second IELTS test by email on 3 May 2011, the same day the limited visa was approved.

- [62] The complainant was informed of the conditions and restrictions associated with a limited visa.

The written material provided by Ms Scholes

- [63] Ms Scholes provided a written response to the complaint, as outlined at [55] to [62], and various documents from her file.

Ms Scholes' response to the grounds of complaint:

- [64] Ms Scholes rejected the complaint, but had not had the opportunity to address specifically the Registrar's grounds on which the complaint was referred.

- [65] Accordingly, all elements of the complaint were disputed.

Ms Scholes' legal and factual arguments:

- [66] The Registrar identified the key legal and factual arguments presented by Ms Scholes as:

[66.1] It was not practicable to conduct pre-assessments for candidates at immigration seminars due to numbers of attendees.

[66.2] The School does not exclude students from enrolling in IELTS programmes if they exceed the minimum entry requirements.

[66.3] She never guaranteed the complainant a Competency Assessment Programme, as that is part of the Nursing Council registration process, and not a service she provides, she is not a Nursing Council adviser.

[66.4] Ms Rubio and Ms Scholes offered assistance to the complainant to contribute to her immigration prospects, but did not guarantee success.

[66.5] The complainant decided to proceed with the student visa application as she had nothing to lose; she had previously agreed to only pay upon approval of the student visa.

[66.6] The School has no courses designed for nurses to prepare for a Competency Assessment Programme, so the complainant was not informed she was qualified for a Competency Assessment Programme.

Information gathered by the Registrar

- [67] The Registrar has investigative powers, and is permitted to gather information in relation to the complaint (ss 47 and 57 of the Act).

- [68] The Registrar obtained a copy of the application submitted on 6 April 2011 to Immigration New Zealand.

RESPONSES TO THE STATEMENT OF COMPLAINT

- [69] The complainant and Ms Scholes had the opportunity to respond to the Statement of Complaint, and to identify any facts or analysis that they disagreed with and to indicate whether they sought an oral hearing.

The complainant's response

- [70] The complainant lodged a Statement of Reply. She accepted the grounds of complaint, but reinforced some of the material facts contained in the Statement of Complaint. She did not seek an oral hearing.

- [71] The key points in the response were:

- [71.1] She could not be sure whether she signed an agreement for the provision of services; but there was no explanation of terms, and no chance for taking advice and consultation. Further, her parents were not warned of the financial support needed, and she was certainly not given a copy of any agreement that was signed.
- [71.2] The complainant was not told of opportunities in the Philippines to pursue an IELTS study course, she had pursued this of her own accord. When she met with Ms Scholes in February 2011, she had completed her IELTS with a score of 7.5, and had been denied a student visa. Ms Scholes nonetheless encouraged her to enrol at the School. At this meeting the complainant told Ms Scholes of her IELTS results and that Ms Scholes acknowledged this by responding that she could take a higher course at the School.
- [71.3] Whether or not Ms Scholes was aware of the loan from Ms Rubio, she expected Ms Scholes to be responsible for the conduct of her agent.
- [71.4] The personal documents were not delivered until her new agent intervened.
- [71.5] The complainant knew Ms Scholes was a director of the School, but did not recall signing any acknowledgement and did not get a copy of any such document.
- [71.6] Ms Scholes did not explain the terms or effect of the limited purpose visa. Ms Rubio said it could not be extended, but that the complainant could travel to Australia before it expired. She also said that she might be "blacklisted" if she did not accept the limited purpose visa.
- [71.7] Ms Scholes did not conduct any pre-assessment process. Her application for a visa was lodged without using any form of communication such as Skype, or Yahoo Messenger. The only discussion with Ms Scholes was in February 2011.

[72] The complainant did not seek an oral hearing.

Ms Scholes' response

- [73] Ms Scholes took issue with the Statement of Complaint. Her issues were in relation to the facts, grounds of complaint both admitted and denied, her arguments in support of her position and the issues to be determined.
- [74] Ms Scholes did not seek an oral hearing.
- [75] The central elements of Ms Scholes' response are as follows.

Facts

- [76] She accepted that the complainant's objective was to achieve level 7 IELTS to gain registration as a nurse in New Zealand.
- [77] Ms Rubio was a "recruitment agent" for the School. She was "exempt from having a license [sic] to provide immigration advice about student visas".
- [78] On 19 July 2010, the complainant consulted Ms Rubio and was given a range of information, which Ms Scholes identified. It included a course at the School designed as preparation for achieving IELTS level 7, as a prerequisite for nursing registration in New Zealand.
- [79] In July 2010, Ms Scholes spoke with the complainant and her mother, more than once by telephone. She says the complainant failed to acknowledge these telephone conversations.
- [80] On 27 July 2010, the complainant paid Ms Rubio a consultation fee of PHP 23,000, and it was used in part to reimburse Ms Scholes for two Immigration New Zealand lodgement fees. On that day the complainant was given the option of pursuing the IELTS examination in the Philippines or New Zealand.
- [81] The School provided appropriate facilities and communicated well with prospective students.

- [82] On 10 August 2010, the Nursing Council indicated that it was not accepting new applications for registration from overseas, until further notice. This was drawn to the complainant's attention, as was uncertainty regarding the complainant migration prospects.
- [83] On 13 August 2010, the complainant "prematurely signed" an agreement for the provision of services, it had been presented for the purpose of disclosing potential terms and fees. She also signed a conflict of interest form on that date.
- [84] On 22 August 2010, the complainant and her mother attended a seminar presented by Ms Scholes. After that seminar, she personally met with the complainant and her mother; this was the first time they met in person. They agreed that the agreement that had already been signed would only apply if a student visa was approved. Following that her parents signed an "affidavit of support", which said they would "support [the complainant's] studies and stay in a foreign land". The affidavit did not contain any specific reference to amounts of money to do that.
- [85] The complainant had paid PHP 25,000, but Ms Scholes was not aware of that until later. She became aware of the fee later, and used the money to pay Immigration New Zealand lodgement fees and charged no professional fees.
- [86] On 9 December 2010, Ms Scholes wrote to the complainant with a report regarding the initial declined application for a student visa. The essence of the report was that Immigration New Zealand was concerned that the complainant's parents did not genuinely source the money purportedly available to support her. The documents supporting the application "do not reflect the income derived from the respective businesses and the income was relatively low." Ms Scholes says the complainant failed to disclose the funds were borrowed, and said they were sourced from her parent's resources.
- [87] Ms Scholes had no knowledge of any loan from Ms Rubio until May 2011.
- [88] Ms Scholes was not told of the complainant's second IELTS result until May 2011. Ms Scholes says:
 - [88.1] The complainant falsely claimed that Ms Rubio told her to get a low IELTS score to enrol at the School and study in Auckland.
 - [88.2] The School had no higher English courses available.
 - [88.3] For an unknown reason the complainant failed to inform Ms Scholes she had passed IELTS at a score of 7 until May 2011.
- [89] She told the complainant that as soon as she received confirmation of a Competence Assessment Programme from the Nursing Council, she would assist her by putting her in touch with a provider.
- [90] Ms Scholes knew nothing of the loan from Ms Rubio to the complainant's parents, and the complainant gave her contrary information.
- [91] The complainant was informed regarding a limited purpose visa before applying for a student visa. She decided to accept the limited purpose visa, and booked to travel to New Zealand on 29 May 2011. She changed her mind only after consulting another licensed immigration adviser, and being advised to lodge this complaint.
- [92] The complainant was told she could pursue the IELTS test in the Philippines, and apply for registration from there without having to get a student visa. She was given a full refund of the tuition fee.
- [93] Ms Scholes arranged for the complainant's passport to be delivered as requested.
- [94] She did not receive the complainant's directions not to deal with Immigration New Zealand and accordingly instructed that the complainant's limited purpose visa be withdrawn.

- [95] The refusal to release the complainant's personal documents to her mother was appropriate as it was not clear she had authorisation to uplift them.
- [96] Ms Rubio was threatened by the complainant's mother using the words "...I will make trouble for you and make a scandal to..." As a result she reported the matter to the police, and "in fear of her safety [Ms Rubio] fled with her family to relocate in a more secure location."
- [97] The current licensed immigration adviser representing the complainant is a commercial rival of Ms Scholes, and the complainant and that adviser have "presented false and damaging allegations" about Ms Scholes.

Grounds

- [98] Ms Scholes denied the grounds on which the complaint was referred; except she admitted she did not keep complete records of the initial pre-assessment, and noted she had since changed her practices.

Arguments supporting Ms Scholes' position

- [99] Ms Scholes challenged the complainant's claims that she had not received various materials.
- [100] She says the complainant's circumstances were properly evaluated, prior to an application for a student visa being lodged. The outcome was a result of "market conditions" affecting Immigration New Zealand's determination. The outcome was different from other comparable cases.
- [101] She had explained the conditions on a limited purpose visa a number of times.
- [102] Ms Scholes was not informed about the second IELTS results until May 2011.
- [103] She expected the complainant to collect the documents in person.

Issues

- [104] Ms Scholes did not challenge the issues the Registrar identified as relevant, but presented refutations that they could be determined against her.

DISCUSSION

The professional relationship and responsibilities of Ms Scholes and Ms Rubio

- [105] The first matter to consider is the status of Ms Scholes and Ms Rubio.
- [106] Ms Scholes is a licensed immigration adviser, and the material makes it clear she uses that status to promote herself and her practice. The complainant sought professional advice from Ms Scholes practice on the range of issues that affected her immigration opportunities. That included professional registration, which was an integral part of being able to get a visa to work in New Zealand.
- [107] Ms Rubio is not a licensed immigration adviser or qualified in any material way.
- [108] Ms Scholes has suggested Ms Rubio is exempt from being licensed. This is a reference to section 11(h) of the Act. It provides that where persons provide "advice only in respect of applications... for a temporary entry class visa-temporary visa-student visa", and do so offshore, they are exempt from the requirement to be licensed.
- [109] However, it appears that Ms Scholes has regarded that as authority for Ms Rubio to act on her behalf and perform her professional duties. That is not correct.
- [110] That is for two reasons; the Code of Conduct requires professional services that go far beyond immigration advice in relation to student visas. It is not possible to enter a professional engagement without doing so.

[111] The Code of Conduct requires, at the commencement of a professional engagement, a number of processes that require an understanding of the Code and the ethical standards of the profession. There is no exemption relating to that professional work. This essential work requires:

- [111.1] Briefing clients on the terms of the written engagement, and all significant matters relating to it (clause 1.5 of the Code of Conduct).
- [111.2] Attending to disclosure obligations, including explaining the obligations in the Code of Conduct (clauses 1.4, 7, 8 and 9 of the Code of Conduct).
- [111.3] Taking informed instructions, which will involve looking at all material issues arising in relation to prospective immigration.

[112] Ms Rubio was not qualified to undertake this work, and it was essential work. Some of the principles are discussed in *Immigration Advisors Authority v Van Zyl* [2012] NZIACDT 37.

[113] Regardless of Ms Rubio's lack of qualifications, Ms Scholes must take responsibility for her conduct. The documentation makes it clear, Ms Scholes allowed Ms Rubio to inform the complainant that she was represented by a licensed immigration adviser, and that adviser was Ms Scholes.

[114] Ms Scholes was aware that Ms Rubio was conducting herself in this manner and authorised her to do so.

[115] It follows Ms Scholes will be personally responsible for Ms Rubio's conduct. She has elected to conduct her professional practice through a person who is not qualified. However, that does not extend to attributing any dishonesty to Ms Scholes unless she was personally aware of it. This is a material issue, as it is evident that Ms Rubio advanced a loan, it was not represented to Immigration New Zealand accurately, and Ms Scholes says she knew nothing of the matter at the time.

[116] In this regard, there is no evidence Ms Scholes did know of the loan at the material time; however, she allowed an unqualified person to engage in improper conduct that was to the detriment of her client. She is responsible for allowing that to occur through failing to ensure that professional services were provided by a qualified person and failing to adequately supervise the person providing the services.

Records

[117] There is a considerable volume of documentation before the Tribunal. However, there are conspicuous parts of what should constitute the record that are not before the Tribunal, and Ms Scholes makes no claim that they exist.

[118] Clause 3(f) of the Code of Conduct requires that a licensed immigration adviser must confirm "in writing the details of material discussions with clients".

[119] Ms Scholes had claimed that important advice was given by telephone, but produced no record of that. If she did convey important information by telephone, that did not meet the requirements of the Code of Conduct.

Conflict of Interest

[120] Ms Scholes has produced a document in which the complainant acknowledged Ms Scholes had a conflict of interest, as she had a financial interest in the School.

[121] Some of the material Ms Scholes has produced leaves room for the view that she holds the opinion, that having disclosed the conflict, her obligations were at an end.

[122] That is not the case. The existence of a conflict of interest does not absolve a licensed immigration adviser from the obligation to act in their client's interests rather than the interests of the adviser. The purpose of disclosure is to put the client on alert; it does not absolve the

adviser from the overarching obligation to act professionally in accordance with the Code of Conduct and otherwise meet professional standards.

Facts

- [123] A large volume of material has been produced, with claims and counter-claims. However, there is little room for dispute regarding the essential facts.
- [124] The critical background is:
 - [124.1] The complainant was a nurse, qualified in the Philippines, and wanted to get registration in New Zealand with a view to getting work here.
 - [124.2] The immediate obstacle she faced was she had a score of 6.5 on an IELTS test; she needed a score of 7.0 to apply for professional registration.
 - [124.3] Ms Scholes is the director of an English language school in Auckland that has an English study course suitable for nurses developing English language skills for registration in New Zealand. At this time the course was for a "Certificate in preparation for IELTS Level 5".
 - [124.4] The complainant approached Ms Rubio in July 2010, who gave her advice regarding her immigration opportunities and what she could do to pass the test at the required level.
 - [124.5] On 13 August 2010, the complainant signed an agreement for the provision of professional services by Ms Scholes.
 - [124.6] On 22 August 2010, Ms Scholes met the complainant for the first time in person. I note the complainant has claimed she only met Ms Scholes once, and not on this occasion. She says she only met her in February 2011. Ultimately, little turns on the point. If this meeting occurred Ms Scholes failed to perform the duties required of her.
 - [124.7] On 22 September 2010, Ms Scholes lodged an application for a student visa.
 - [124.8] On 29 October 2010, Immigration New Zealand declined the application for a student visa.
 - [124.9] In January 2011, Ms Scholes explained to the complainant she needed PHP 300,000 in the bank to get a visa.
 - [124.10] Ms Rubio lent PHP 165,000 to the complainant's family at an annual interest rate of 60%.
 - [124.11] Having studied in the Philippines of her own accord, on 15 January 2011, the complainant passed the IELTS test at the 7.5 level.
 - [124.12] Ms Scholes met with the complainant in February 2011, and discussed her immigration situation. There is a conflict as to whether the complainant said she had passed IELTS at level 7, the previous month, or failed to say anything of that.
 - [124.13] On 6 April 2011, Ms Scholes lodged an application for a student visa, it resulted in the grant of a limited purpose visa for the purpose of "undertaking a Certificate in Preparation for IELTS Level 5 from 9 May to 4 November 2011" and provided that the course was the course at the School.
 - [124.14] The complainant took independent advice, then withdrew from the course at the School and terminated Ms Scholes' instructions.
- [125] These events, which are either uncontested or evident from the contemporaneous documentation, raise serious concerns regarding the events that led to the complainant being enrolled at the School and being issued a limited purpose visa to attend. The concerns include:

[125.1] First, it is evident the complainant was close to meeting the required IELTS standard; and from the outset her standard was higher than the primary aim of the course in which she was enrolled at the School.

[125.2] Second, the services were available in the Philippines and the cost of coming to New Zealand was a serious burden; to the extent her family was prepared to borrow money at a rate of 60% pa.

[125.3] Third, the initial student visa application did not meet the requirements of Immigration New Zealand.

[125.4] Fourth, Ms Rubio advanced the loan, when Immigration New Zealand would not accept loan advances as qualifying, and did so at interest rates that raise the question of whether she was exploiting the complainant's family. Ms Rubio did that with the intention that the money would be presented to Immigration New Zealand as not being borrowed.

[125.5] Fifth, the complainant was enrolled for at the School in which Ms Scholes had a financial interest for a course which was below the level for which she had already qualified, and Immigration New Zealand issued a visa for that purpose. In fact, by that time the complainant had already met the relevant requirement for nursing registration.

[125.6] Sixth, it appears that the complainant was not advised of what would be effective to gain her nursing registration in New Zealand; she was instead diverted to an inappropriate course.

[126] This presents a picture that both Ms Scholes and Ms Rubio failed to ensure that the complainant:

[126.1] had a professional evaluation of her migration opportunities, and

[126.2] received disinterested advice on what she should do to maximise those opportunities.

[127] The Code of Conduct is designed to ensure that will not occur when a client engages with a licensed immigration adviser.

[128] It is necessary to consider Ms Scholes' response to the issues raised.

Ms Scholes' response

[129] An element that runs through Ms Scholes' response to the complaint is that she was entitled to rely on Ms Rubio and is not responsible for what she did. For the reasons discussed, that is not a satisfactory answer except to the extent that I cannot attribute any intentional misconduct on Ms Rubio's part as Ms Scholes' intentional conduct; without being satisfied there is evidence of her own state of mind.

[130] Ms Scholes claims that the professional relationship was initiated properly and in accordance with the Code. However, the material before me establishes very little of the essential steps to establish a proper professional relationship occurred.

[131] The requirements of the Code are clear. There must be a process in which a licensed immigration adviser engages with a prospective client, and:

[131.1] Ascertain the nature of the professional services they require;

[131.2] Negotiates and records the cost of those services;

[131.3] Creates a written agreement that regulates the provision of the services;

[131.4] Ensures the client understands both the agreement and all significant matters relating to the instruction; and

[131.5] Explains the Code of Conduct to the client.

- [132] There are also formal disclosure requirements relating to providing a copy of the Code of Conduct, and the internal complaints procedure.
- [133] For that procedure to be meaningful, an essential element is a professional evaluation of the services required. There are occasions where that is simple, for example a client may have an existing work permit and wish to extend it for a fixed period of time as they intend to leave New Zealand at that point. There is little scope for a wide examination of immigration prospects generally.
- [134] The complainant's circumstances were quite different. She sought to migrate to New Zealand, the initial phases involved gaining professional registration, and then she would have required a work visa; and potentially needed to have some understanding of how that may lead to a residence visa, if she wished to pursue that course.
- [135] There can be no doubt that, with Ms Scholes' knowledge, the complainant was led to believe she was engaging a licensed immigration adviser. The agreement of 13 August 2010 and the conflict of interest disclosure leave no room for a different view. Ms Scholes says that the documents were signed "prematurely". It is evident Ms Scholes had given these documents to Ms Rubio, who presented them to the complainant. They were signed and they became part of the file.
- [136] If Ms Scholes regarded the steps as premature at the time, she wholly failed to correct the situation. On 22 August 2010, Ms Scholes says she personally met with the complainant; she had an obligation to put the professional relationship on a proper footing at that point if she was not satisfied with what occurred.
- [137] On 22 September 2010, Ms Scholes undertook the professional work of filing an application for a student visa. By that point, Ms Scholes needed to be satisfied that the professional relationship had been established properly; she personally knew the point had been reached where there needed to be a professional relationship and it needed to comply with the Code.
- [138] I am satisfied that Ms Scholes is responsible for failing to have established a proper professional relationship by this point. The papers, and the statements made by the parties, establish that the agreement had been signed, along with the conflict of interest disclosure. There were also various materials of a general nature regarding the School, nursing opportunities, and the like.
- [139] However, the complainant says she was never given an adequate review of her options and what immigration strategy she ought to pursue. Ms Scholes says she did that in telephone conversations. However, Ms Scholes has not produced the written confirmation that the Code of Conduct requires when important advice is given in telephone conversations.
- [140] Even more significant in terms of evaluating Ms Scholes' explanation is the fact that her subsequent conduct is inexplicable if she had undertaken a professional evaluation of the complainant's circumstances.
- [141] The complainant had demonstrated English language skills above IELTS level 5, she had already achieved 6.5. She went on to achieve in excess of level 7, which was all she required in terms of English language skills. However, Ms Scholes enrolled the complainant in a course at her School and had Immigration New Zealand issue a limited purpose visa to prepare for "IELTS Level 5". This, Ms Scholes seeks to justify on the basis that being overqualified was no barrier to being accepted for the course. The explanation lacks reality. The complainant was always close to the standard required, and exceeded it when Ms Scholes had a limited purpose visa issued.
- [142] Ms Scholes claims she was not told until the time the limited purpose visa was issued, that the complainant had passed IELTS at above level 7. In contrast the complainant says she met with Ms Scholes and told her she had passed at that level and Ms Scholes said she could study at the School at a higher level. It is not plausible the complainant would withhold the information; it was obviously in her interests to tell Ms Scholes and get advice on how she should pursue her nursing registration. Regardless, Ms Scholes had a duty to make proper inquiries regarding what the complainant's true needs were.

- [143] I am satisfied the material before me proves a failure to make proper inquiries into what the complainant's immigration prospects were and tailor an immigration strategy to meet them. Ms Scholes said in a letter dated 5 December 2011 to the Authority in response to the complaint, that she was not responsible as a licensed immigration adviser for dealing with nursing registration opportunities, saying she was not a Nursing Council adviser.
- [144] Ms Scholes is entitled to claim she lacked expertise in nursing registration, though some of the material the complainant received would have likely led her to think that she would be assisted in that regard. However, it does not assist Ms Scholes in justifying the foundation for the professional relationship. The complainant engaged Ms Scholes as a licensed immigration adviser to advance her prospects of gaining nursing registration in New Zealand; she accepted the instruction and lodged applications with Immigration New Zealand. If there was an area of specialised expertise Ms Scholes lacked, then she needed to advise the complainant of that so that another adviser could be sought.
- [145] It is inescapable that what occurred was that Ms Scholes had a financial interest in a school in New Zealand, and the complainant was enrolled at that School, and her family was put under financial stress to do that. Immigration New Zealand issued a visa for the purpose. It was a course the complainant did not require when the visa was issued and it was not appropriate when Ms Scholes was first consulted.
- [146] I am satisfied that Ms Scholes failed to undertake any, or any adequate, evaluation of her client's circumstances and directed her client to a course which advanced her own personal financial interests to the detriment of her client.
- [147] Furthermore, she allowed an unqualified person, Ms Rubio, to engage with her client where she exploited the complainant's family. She provided a loan at an interest rate of 60% per annum and did so when Immigration New Zealand was clear the source of funding could not be a loan advance.
- [148] Ms Scholes says she knew nothing of the loan and furthermore the complainant misled her. The explanation does not avoid Ms Scholes being responsible. If she did know of the loan, she would likely be facing a complaint of fraudulently lodging a deceptive application with Immigration New Zealand. What she is responsible for is allowing an unqualified and unsupervised person to engage with her client. I am satisfied the complainant is not responsible for any irregularities in the documentation. Ms Scholes created a situation where a person advancing a loan intended to exploit the complainant's family and to deceive Immigration New Zealand, was engaged in providing immigration advice and services to her client. It was not her client's fault that applications were lodged which improperly relied on loan funding.
- [149] The complainant told Ms Scholes her instructions were terminated and she was not to contact Immigration New Zealand. This specific instruction was in a letter dated 29 May 2011. Ms Scholes says she did not get the letter. The correspondence leaves that possibility open and accordingly this element of the complaint is not upheld.
- [150] Ms Scholes arranged for the complainant's personal documents to be sent for uplifting in her agent's office in the Philippines. There were delays, and it appears an attempt to withhold the documents to secure payments. If Ms Scholes were aware of that, it would amount to a serious breach of professional obligations. However, I am satisfied that Ms Scholes did send the documents to the appropriate place for release to the complainant and there is no evidence she was aware of any improper retention of the documents.

Standard of proof

- [151] 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 at [113]-[118]).
- [152] This complaint is serious. In essence it is a complaint that Ms Scholes has exploited her client for her own benefit and been delinquent in failing to provide the professional support her client was entitled to have. Furthermore, she allowed an unqualified person to establish the

foundation of the professional relationship and created a situation where that person has both failed to attend to professional responsibilities and also exploited the client and her family.

- [153] It is necessary for me to be sure before making the findings that follow.

The issues for determination

- [154] I now address the findings in terms of the issues identified in the Statement of Complaint, namely whether the following breaches of cl 1 and 3 of the Code of Conduct have been established:

- [154.1] **Issue 1:** Did Ms Scholes perform her services with due care, diligence, respect and professionalism:

Conclusion: Ms Scholes failed to meet her duties of care, diligence, respect and professionalism.

First, Ms Scholes failed to evaluate her client's immigration opportunities and instead channelled her to a course which would lead to Ms Scholes benefitting financially and which was not required or appropriate for her client. In doing so she disregarded the serious financial burden she was imposing on her client and failed to provide the disinterested professional advice her client was entitled to.

Second, she allowed an unqualified person to provide the professional services Ms Scholes was required to deliver personally (or though another licensed immigration adviser). That person was not supervised or supervised adequately, and took the opportunity of exploiting her client and her client's family.

Third, Ms Scholes filed the first application for a student visa in a form that was rejected. It was rejected as Ms Scholes had failed to personally ensure that the financial support required to grant the visa was in place; she had delegated that responsibility to a person who later advanced loan finance intending to deceive Immigration New Zealand.

Fourth, Ms Scholes filed the second application for a student visa on which a limited purpose visa was issued, without first satisfying herself that the course of study was necessary or appropriate for her client.

- [154.2] **Issue 2:** Whether Ms Scholes performed her services:

Conclusion: The complaint raises issues of lack of care, diligence, respect and professionalism in the performance of services and those findings appear under the preceding issue. There is no additional adverse finding regarding lack of performance.

- [154.3] **Issue 3:** Whether Ms Scholes carried out the lawful informed instructions of her client:

Conclusion: Ms Scholes failed to gain informed instructions for the reasons identified as part of the first issue.

I am not satisfied Ms Scholes acted contrary to any instructions she held at the time she acted. There will be no adverse finding under this issue.

- [154.4] **Issue 4:** Whether Ms Scholes returned personal documentation on request and without delay:

Conclusion: I am satisfied Ms Scholes took appropriate and adequate steps to comply with the request to return personal documentation. There will be no adverse finding under this issue.

- [154.5] **Issue 5:** Whether Ms Scholes ensured that her client was aware of the terms of the agreement and all significant matters relating to it:

Conclusion: I am satisfied Ms Scholes wholly failed to inform her client of the effect of the agreement, or the nature and extent of the professional services she in fact required. Furthermore, it failed to accurately record the fees paid and their purpose.

[154.6] **Issue 6:** Whether Ms Scholes ensured changes to the terms of agreements were recorded in writing:

Conclusion: I am not satisfied the agreement accurately recorded the arrangements. While it included the fees paid, and contingencies regarding liability for fees, the agreement was unsatisfactory from its inception. No additional adverse finding will be made in addition to the findings in relation to Issue 5.

[154.7] **Issue 7:** Whether Ms Scholes provided the complainant with a copy of the Code of Conduct, and explained it to her:

Conclusion: Ms Scholes failed to comply with this requirement; she delegated it to a person who was not qualified to initiate the instructions and failed to ensure the duty was completed.

[154.8] **Issue 8:** Whether Ms Scholes worked in a manner that did not unnecessarily increase costs:

Conclusion: There is no evidence of working in a manner that increased professional costs; the issues relating to financially exploiting and disadvantaging the complainant appear as findings on Issue 1. There will be no further adverse finding under this issue.

[154.9] **Issue 9:** Whether Ms Scholes obtained an agreement to any material increase in costs:

Conclusion: Ms Scholes failed to initiate a professional relationship with the proper disclosure of costs and on a basis where she had no informed instructions. The issues relating to financially exploiting and disadvantaging the complainant appear as findings on Issue 1. There will be no further adverse finding under this issue.

[154.10] **Issue 10:** Whether Ms Scholes maintained professional business practices including confirming in writing the details of material discussions:

Conclusion: The evidence does not establish that Ms Scholes had the discussions she claims to have had. The issues relating to acting without informed instructions appear as findings on Issue 1. There will be no further adverse finding under this issue.

DECISION

[155] Pursuant to section 50 of the Act, the complaint is upheld. I have found Ms Scholes breached the Code of Conduct in the respects identified which are grounds for complaint pursuant to section 44(2)(e) of the Act.

SUBMISSIONS ON SANCTIONS

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

[157] The Registrar and the complainant 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 Scholes is entitled to make submissions and respond to any submissions from the other parties.

[158] The Tribunal will potentially make orders that Ms Scholes:

[158.1] Is required to refund any money paid to her and Ms Rubio for fees and lodgement fees;

[158.2] Pays compensation for all expenditure, including interest relating to the loan advanced by Ms Rubio; and

[158.3] Pays other losses suffered by the complainant arising from the aspects of the complaint that have been upheld.

[159] The parties are requested to address the amount of any fees and lodgement fees not repaid and other matters in respect of which compensation may be sought.

[160] The Tribunal notes it is appropriate for a disciplinary tribunal to consider the financial burden of a complaint on the profession as a whole. The profession is levied to fund the disciplinary regime.

[161] The principles are discussed in *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850. In that case actual costs of investigation of \$76,000 had resulted in an award of \$40,000. The Court commented at [43]:

“An award of costs under s 129 of the 1982 Act (and the 2006 Act) is entirely discretionary. ... It is clear that expenses include salaries and staff and overhead expenses incurred by the societies that investigate and bring proceedings before the Tribunal.”

[162] Those principles appear to apply, with necessary modifications, to the Act and accordingly, the present proceedings.

[163] In *O'Connor v Preliminary Proceedings Committee* HC Wellington CP 280/89, 23 August 1990, where an order for costs of \$50,000 out of a total of \$70,500 was awarded Jeffries J said at 13:

“It is a notorious fact that prosecutions in the hands of professional bodies, usually pursuant to statutory powers, are very costly and time consuming to those bodies and such knowledge is widespread within the professions so controlled. So as to alleviate the burden of the costs on the professional members as a whole the legislature had empowered the different bodies to impose orders for costs. They are nearly always substantial when the charges brought are successful and misconduct admitted, or found.”

[164] Under the Act the mechanism is less direct as the Authority and the Tribunal are statutory bodies; nonetheless members are levied through an obligation to pay licensing fees. There can be little doubt the purpose of section 51(1)(g) is the same in effect as that applying in the authorities discussed.

[165] This present matter has been a substantial investigation, resulting in some 1,000 pages of material being filed with the Tribunal. It is evident Ms Scholes has, without merit, denied elements of the complaint and that that has resulted in significant expense. It is appropriate for the Tribunal to consider what orders should be made under section 51(1)(g).

[166] The Registrar, pursuant to section 49(4), is requested to provide a schedule particularising the expenses of his investigation, inquiry and dealing with the complaint before the Tribunal.

TIMETABLE

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

[167.1] The Registrar and the complainant are to make any submissions within 10 working days of the issue of this decision.

[167.2] The Registrar is to respond to the request for a schedule of expenses within 10 working days of the issue of this decision.

[167.3] Ms Scholes is to make any further submissions (whether or not the Registrar or the complainant make submissions) within 15 working days of the issue of this decision.

[167.4] The Registrar and the complainant may reply to any submissions made by Ms Scholes within 5 working days of her filing and serving those submissions.

[168] The parties are notified that this decision will be published with the names of the parties (apart from the name of the complainant; see paragraph [169] below) after five working days, unless any party applies for orders not to publish any aspect.

Suppression of name

[169] The name and other information that identifies the complainant is not to be published, at any time, in relation to this complaint.

DATED at WELLINGTON this 10th day of September 2013

G D Pearson
Chairperson