

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2018] NZIACDT 52

Reference No: IACDT 005/17

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

**BY** **THE REGISTRAR OF  
IMMIGRATION ADVISERS**  
Registrar/Complainant

**AND** **LYNN NILAND**  
Adviser

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**DECISION**

**Date: 21 December 2018**

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**REPRESENTATION:**

Registrar/Complainant:

R Denmead, counsel

Adviser:

P Moses, counsel

## **PRELIMINARY**

[1] Ms Niland entered into an arrangement with a New Zealand company operating in the Philippines to bring in Filipino workers. The company found employment for the client, with Ms Niland supposedly managing the immigration application. However, apart from an initial skype consultation, the clients had no real contact with Ms Niland.

[2] The Registrar of Immigration Advisers (Registrar) has accordingly made a complaint to the Tribunal contending that Ms Niland's business practice is contrary to her professional obligations. The breaches are largely admitted by her and she has ceased operating in this way.

[3] The essential issue to consider is whether Ms Niland set up a business practice to deliberately circumvent her professional obligations or whether, as her counsel contends, she was careless in permitting staff of the company to perform immigration services which only a licensed adviser can undertake.

## **BACKGROUND**

[4] Ms Niland is a licensed immigration adviser. Her company is Visas NZ Ltd. She is based in New Zealand.

[5] Ms Niland's business relationship with Immigration Placement Services Ltd (IPS) started in 2012. IPS is a New Zealand registered company operating in both New Zealand and the Philippines. None of its staff are licensed immigration advisers. IPS sourced jobs in New Zealand for Filipino workers. Ms Niland was then supposed to be responsible for providing immigration services, including completion of the required visa applications. Once completed, the applications were filed by IPS with Immigration New Zealand.

[6] Each client of IPS was provided by that company with a "Client Agreement" and "Immigration Pack Agreement", with the former outlining the services to be provided. IPS would obtain a job offer with a New Zealand employer. The client agreement stated that the company was responsible for guiding clients through the immigration process and lodging the visa application. This would be done "in conjunction" with Ms Niland, identified as the immigration adviser. Each client was required to pay an immigration adviser's fee.

[7] Once the client had signed the agreements, there would be a skype interview between Ms Niland and the client.

[8] After the interview, Ms Niland sent each client the page of the client agreement signed by her, the advisers' Code of Conduct 2014 (the Code) and her company's complaint procedure.

[9] The documents supporting the work visa application for each client, such as the employment agreement and offer of employment, were sent by IPS to Ms Niland for review.

[10] Once approved by Ms Niland, IPS staff in the Philippines would lodge with Immigration New Zealand the work visa application, including the employment agreement and offer. Ms S from IPS was listed in each lodged application form as the contact for communication with Immigration New Zealand. She would liaise with the client, Immigration New Zealand, Ms Niland and the New Zealand employer. In practice, Immigration New Zealand corresponded with both Ms Niland and Ms S.

[11] The Registrar's complaint is based on three visa applicants from the Philippines, all of which were unsuccessful.

*Mr L*

[12] On 16 April 2015, Mr L signed a "Client Agreement" on IPS letterhead between himself and IPS (with "in conjunction with [Ms Niland], Immigration Adviser 200902257" written after the name of IPS where it first appeared). Ms Niland signed the agreement on 27 July 2015 in her capacity as the immigration adviser.

[13] In the client agreement, IPS stated that, on instruction from Ms Niland, it would prepare and compile all information relating to the work visa application. In particular, it would make an initial assessment of his visa options, review his documents, promote his CV to New Zealand employers, arrange a job offer, provide guidance on all the necessary documents, arrange a skype interview with Ms Niland, assist in recording information on the application forms, lodge the visa with Immigration New Zealand and organise travel to New Zealand.

[14] The agreement required Mr L to pay the fees set out in the attached "Immigration/Job Pack". He could make a complaint about the services provided. To this end, the adviser would provide him with the Code and her "Internal Complaints Procedure". Ms Niland's contact details were given. If Mr L was not happy with the response to an immigration complaint, he could refer it to the Immigration Advisers Authority (the Authority), whose address and contact details were given. His signature acknowledged that he had received a copy of the Code and had "read and understood it and an explanation of it".

[15] A "Skype Interview and Declaration by IPS's Client" was signed on 16 April 2015 by Mr L and an employee of IPS. It was on the letterhead of Visas NZ, Ms Niland's company, and identified her as the licensed adviser and the person who conducted the interview. It was not signed by Ms Niland.

[16] The declaration recorded that there had been a skype interview that day with Ms Niland. Mr L declared that he had received a copy of the Code and complaints procedure from her, that all immigration advice would be given by her and that he could contact her if it was not clear. Ms Niland's contact details were given. Mr L further declared that IPS staff had assisted him in recording information on the visa application form and had lodged the application with Immigration New Zealand. He acknowledged having the right to lodge a complaint with Ms Niland, IPS or the Authority at any time, pursuant to the processes explained in the Code and client agreement.

[17] An "Immigration Pack Agreement" on IPS letterhead was signed by Mr L, also on 16 April 2015. It was not signed by IPS or Ms Niland. The latter was not mentioned. Mr L agreed to purchase the agreement in accordance with staged fees set out. This included the payment of 50,000 pesos as an immigration adviser's fee, upon approval of his visa. The agreement seems to comprise just one page dealing with the fees.

[18] A "Note on invoicing of client", apparently written by Ms Niland, appears in the supporting documents sent to the Tribunal concerning Mr L and the other two clients relevant to this complaint. It is different for each client. It is unclear from that file note how much of the P50,000 was paid to Ms Niland, as she records that only P5,000 was paid, or indeed if additional fees were payable to her.

[19] A "Skype Assessment Sheet" was completed by Mr L on 16 April 2015. It was on a blank letterhead but someone wrote "IPS" across the top. Mr L answered a number of questions relating to his visa and ticked a list of "Points to explain" concerning the processing time for the visa and the like. It is assumed Mr L or someone else ticked them as the skype interview progressed through the points.

[20] An individual employment agreement was signed by the employer on 13 July 2015. The employer addressed a letter of offer of employment to Mr L on 31 July 2015, attaching the agreement. The agreement was signed by Mr L on an unknown date.

[21] IPS sent the employment agreement and offer to Ms Niland to peruse on 27 July 2015. An amended agreement was sent to her on 5 August 2015.

[22] On 29 July 2015, Ms Niland sent to Mr L, copied to IPS, an email attaching the last page of the client agreement signed by her, the Code and her company's "Client Complaints Procedure".

[23] The visa application for Mr L was lodged by IPS with Immigration New Zealand on 13 August 2015 (the date of Mr L's signature on the form is illegible). An employee of IPS was identified on the application form as the person who had assisted Mr L by recording information on the form and Ms S was identified as the contact for communications with Immigration New Zealand. Ms Niland was described as the immigration adviser.

[24] As the employer advised Immigration New Zealand that there was no job for Mr L, it wrote to Ms Niland and Mr L on 24 August 2015 stating that he did not appear to meet the policy. His comments were invited.

[25] Ms Niland sent an email to Immigration New Zealand on 25 August 2015 concerning a miscommunication within the employer company which would be sorted out the following week.

[26] Ms S, who described herself as a consultant, sent an email to Immigration New Zealand on 4 September 2015 advising that they had been able to get a further job offer for Mr L. She requested an extended deadline to send the documents. Her email was copied to Ms Niland.

[27] On the same day, Immigration New Zealand declined to extend the deadline.

[28] Immigration New Zealand subsequently wrote to both Ms Niland and Mr L on an unknown date advising that the latter's work visa application had been declined.

*Mr A*

[29] The documentation concerning another client and visa applicant, Mr A, is almost identical to that concerning Mr L.

[30] The standard client agreement between Mr A and IPS was signed on 22 September 2015. There was a skype interview between Mr A and Ms Niland on that day. The standard skype interview and declaration was signed by him, also on 22 September. The template immigration pack agreement was signed by Mr A on 22 September as well.

[31] There was no skype assessment sheet for Mr A, but there was an “Immigration Questionnaire” on Visas NZ letterhead (undated). It was completed by Mr A and included information about himself, his family and other matters relevant to immigration.

[32] Mr A and the New Zealand employer both signed a general employment agreement, but their signatures were undated.<sup>1</sup> The associated offer of employment and notice of a job opening (in the form of a letter) from the employer were also undated. Neither were signed by the employer or countersigned by Mr A, though an unknown person has initialled the offer and notice at the top.

[33] IPS sent the work visa documents to Ms Niland on 1 October 2015.

[34] Ms Niland sent an email to Mr A, copied to IPS, on 6 October 2015. She apologised for the skype discussion during which they could not speak properly. She sent him the relevant page of the client agreement containing her signature, as well as the Code and her company’s complaint procedure.

[35] The visa application for Mr A was lodged with Immigration New Zealand by IPS on 10 October 2015. Mr A had signed the form on 24 September 2015. An employee of IPS was identified as the person who had assisted Mr A by recording his information on the form and Ms S was identified as the contact for communications. Ms Niland was recorded as the immigration adviser.

[36] Immigration New Zealand wrote to Ms Niland and Mr A on 28 October 2015 advising that the employment agreement did not contain guaranteed hours, so it did not meet the work visa instructions. Furthermore, there was a concern that the employer had not made genuine attempts to attract New Zealanders. Additionally, Mr A needed further medical results. Their comments were invited.

[37] It would appear that the employment agreement was resent to Mr A, under cover of an offer of employment from the employer.<sup>2</sup> The offer was undated. It was expressed to be for permanent fulltime employment. Both the agreement and the offer were signed by the employer on an unknown date and by Mr A on 2 November 2015.

[38] Ms Niland exchanged emails with IPS and Immigration New Zealand in relation to the concerns expressed by Immigration New Zealand. Ms S dealt with Mr A regarding the medical test requested.

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<sup>1</sup> Registrar’s supporting documents at 156–162.

<sup>2</sup> Registrar’s supporting documents at 200–202.

[39] On 11 December 2015, Immigration New Zealand wrote to Ms Niland and Mr A declining his work visa application. It was not satisfied his job offer was sustainable. If he reapplied, he would need to provide additional medical information.

[40] Further information appears to have been sent to Immigration New Zealand and the visa was again declined on about 13 January 2016.

*Mr F*

[41] The documentation concerning Mr F, another client and visa applicant, is also almost identical to that concerning Mr L.

[42] The immigration pack agreement was signed by Mr F on 5 September 2015. A client agreement between Mr F and IPS was signed on 22 September 2015. Ms Niland signed it on 8 October. There was a skype interview between Mr F and Ms Niland on 22 September. The skype interview and declaration document was signed by an employee of IPS on the same day, but Mr F did not sign it until 24 or 29 September (the recorded date is unclear). There was no skype assessment sheet or immigration questionnaire.

[43] The individual employment agreement was signed by the employer on 21 September 2015 and by Mr F on an unknown date. The offer of employment signed by the employer was dated 24 September. It was signed by Mr F on 27 September.

[44] Ms Niland received Mr F's employment agreement and offer from IPS on 9 October 2015 (though she cannot locate the relevant email).

[45] On 9 October 2015, Ms Niland sent an email to Mr F, copied to IPS, attaching the relevant page of the client agreement signed by her, the Code, Visas NZ's client complaint procedure and page nine of his visa application form (which recorded her details).

[46] On 21 October 2015, IPS lodged the visa application for Mr F with Immigration New Zealand (it had been signed by Mr F on 2 October). A staff member from IPS was identified as having assisted Mr F by recording his information on the form. Ms S was the contact for communications. Ms Niland was identified as the immigration adviser.

[47] Immigration New Zealand wrote to Ms Niland and Mr F on 25 November 2015 advising that Mr F's previous work experience could not be verified. Their comments were invited.

[48] There is an email exchange between Ms S and Immigration New Zealand concerning the latter's letter. Ms Niland was copied in on this exchange and may even

have drafted Ms S's email of 1 December 2015 to Immigration New Zealand. Ms S obtained an affidavit from Mr F as to his work experience.

[49] On 10 December 2015, Immigration New Zealand wrote to Ms Niland and Mr F declining the visa application. It had not been able to verify his work experience.

## **COMPLAINT**

[50] The Authority wrote to Ms Niland on 29 November 2016 advising that certain information in the application to renew her licence suggested there could be grounds for a complaint to the Tribunal.

[51] In particular, in relation to Messrs L, A and F, it was noted that there was no record of the skype discussions, she had not conducted proper client engagement before proceeding and the clients had signed written agreements prior to being provided with the complaints procedure and the Code. It also appeared that an employee of IPS provided immigration advice on all three applications. Furthermore, a more comprehensive assessment of the clients' circumstances should have been carried out, given Immigration New Zealand's reasons for declining the applications. The Registrar had determined that there existed grounds for a breach of the Code.

[52] Ms Niland responded at length to the Authority on 15 December 2016. She set out her process. Prior to the skype interview, she had the client's CV, so already had a fair amount of information. In the case of these three workers, her focus was on the health and character aspects of their applications. She had been lodging Essential Skills work visas for a long time and knew what information was needed. Hence, she did not write copious notes, as their detailed CV was a sufficient record of the discussion. It was not always possible to have an in depth conversation with a migrant for the first time on skype.

[53] In her letter, Ms Niland stated that the clients were given a copy of the Code and the complaints procedure by IPS staff, to whom she had provided copies for their office. It was appreciated the written agreements were signed before these documents were provided, but the clients were fully aware before the skype interview that their applications would be handled by her as the licensed adviser. She was at pains to point out to them in the skype call that she represented them and what that meant in terms of their protection under the Authority.

[54] According to Ms Niland, Ms S no longer worked for IPS, but she had been acutely aware of the restrictions on offering immigration advice. Ms Niland trusted Ms S to refer



all immigration matters to her. The other employees of IPS physically recorded the information on the form, which was checked once sent to Ms Niland.

[55] It was acknowledged that for Mr A, the email with a copy of the Code and complaints procedure arrived after his signature on the application form, which was not the normal procedure. As for his employment offer, which did not guarantee a minimum of 30 hours weekly, it would have been ideal if this information had come to light before the application was lodged. It is true she did not identify it at the eligibility stage, but she did not have a copy of the employment agreement then. The skype connection with Mr A was poor and had to be abandoned.

[56] It was acknowledged by Ms Niland that the written agreement provided to clients did not provide a full description of the services to be provided, as it was rather brief. She accepted that there should have been a written record of the skype interview confirmed in writing to the client. Ms S was the clients' initial point of contact for their offer of employment. They formed a client relationship with her and spoke to her in their native language. In reality, Ms S was the main point of contact as a speaker of their language. She was in a good position to relay information to them. That did not diminish Ms Niland's role as the immigration adviser, providing immigration advice and arranging the work visa applications.

[57] In her letter, Ms Niland said she had opened up her files to the Authority in a transparent way, believing that her procedures were carried out being mindful of the Code. She took the Code seriously and always had the client's interests at heart. Her identified lapses were the result of complications in dealing with third parties overseas, not negligence or deliberate offending. She was committed to redressing possible lapses in record keeping and would think twice before entering into any third party arrangements in the future.

[58] The Registrar filed a complaint (dated 8 March 2017) with the Tribunal on 17 March 2017. It alleges that Ms Niland breached the Code in the following respects:

- (1) Failed to hold discussions with the clients beyond the initial assessment which did not include matters regarding their job offers and employment agreements, in breach of cl 2(e).
- (2) Failed to personally assess the client's employment documentation prior to lodging the visa application and to discuss material matters with them throughout the application, in breach of cl 2(e).

- (3) Presented a declaration to the clients to sign which incorrectly stated that the clients had read the employment documents that were not available to read, in breach of cl 1.
- (4) Allowed unlicensed individuals to provide immigration advice in relation to clients contracted to the adviser, in breach of cl 3(c).
- (5) Failed to provide in her written agreement a full description of the services to be provided by the adviser, in breach of cl 19(e).
- (6) Failed to explain significant matters in the written agreement to the clients before they signed it, in breach of cl 18(b).
- (7) Failed to advise the clients when their applications had been lodged and not providing ongoing timely updates including notifying them of Immigration New Zealand's letters expressing concerns and declines, in breach of cl 26(b).
- (8) Allowed visa applications to be lodged based on eligibility criteria which did not include an assessment of the employment agreement, in breach of cl 1, or alternatively;
- (9) Failed to assess the client's employment agreement accurately against relevant immigration instructions, in breach of cl 1; and
- (10) Failed to check whether the client's work experience was both verifiable and suitable to meet the minimum level of work experience required by Immigration New Zealand, in breach of cl 1.

## **JURISDICTION AND PROCEDURE**

[59] The grounds for a complaint to the Registrar made against an immigration adviser or former immigration adviser are set out in s 44(2) of the Immigration Advisers Licensing Act 2007 (the Act):

- (a) negligence;
- (b) incompetence;
- (c) incapacity;

- (d) dishonest or misleading behaviour; and
- (e) a breach of the Code of Conduct.

[60] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.<sup>3</sup>

[61] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.<sup>4</sup>

[62] After hearing a complaint, the Tribunal may dismiss it, uphold it but take no further action or uphold it and impose one or more sanctions.<sup>5</sup>

[63] The sanctions that may be imposed by the Tribunal are set out in the Act.<sup>6</sup> It may also suspend a licence pending the outcome of a complaint.<sup>7</sup>

[64] It is the civil standard of proof, the balance of probabilities, that is applicable in professional disciplinary proceedings. However, the quality of the evidence required to meet that standard may differ in cogency, depending on the gravity of the charges.<sup>8</sup>

[65] The Tribunal directed on 7 March 2018 and again on 30 November 2018 that the complaint would be heard on the papers. Further submissions were invited.

[66] Counsel for Ms Niland, Mr Moses, filed memoranda (dated 17 April 2017 and 1 December 2018) and sent an email on 14 December 2018. There is also a statement from Ms Niland (12 April 2017).

[67] The Tribunal received from the Registrar the statement of complaint and comprehensive supporting documents.

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<sup>3</sup> Immigration Advisers Licensing Act 2007, s 45(2) & (3).

<sup>4</sup> Section 49(3) & (4).

<sup>5</sup> Section 50.

<sup>6</sup> Section 51(1).

<sup>7</sup> Section 53(1).

<sup>8</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [101]–[102] & [112].

## ASSESSMENT

[68] It is useful to group together overlapping heads of complaint, the first grouping being:

- (1) *Failed to hold discussions with the clients beyond the initial assessment which did not include matters regarding their job offers and employment agreements, in breach of cl 2(e)*
- (4) *Allowed unlicensed individuals to provide immigration advice in relation to clients contracted to the adviser, in breach of cl 3(c)*
- (5) *Failed to provide in her written agreement a full description of the services to be provided by the adviser, in breach of cl 19(e)*
- (6) *Failed to explain significant matters in the written agreement to the clients before they signed it, in breach of cl 18(b)*
- (7) *Failed to advise the clients when their applications had been lodged and not providing ongoing timely updates including notifying them of Immigration New Zealand's letters expressing concerns and declines, in breach of cl 26(b)*

[69] The Registrar relies on the following provisions of the Code:

### **Client Care**

2. A licensed immigration adviser must:

...

- e. obtain and carry out the informed lawful instructions of the client

### **Legislative requirements**

3. A licensed immigration adviser must:

...

- c. whether in New Zealand or offshore, act in accordance with New Zealand immigration legislation, including the Immigration Act 2009, the Immigration Advisers Licensing Act 2007 and any applicable regulations.

### **Written Agreements**

18. A licensed immigration adviser must ensure that:

...

- b. before any written agreement is accepted, they explain all significant matters in the written agreement to the client

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

...

- e. a full description of the services to be provided by the adviser, which must be tailored to the individual client

#### **File Management**

26. A licensed immigration adviser must:

...

- b. confirm in writing to the client when applications have been lodged, and make on-going timely updates

#### *Fourth head of complaint – allowed unlicensed individuals to provide immigration advice*

[70] I will first assess the fourth head of complaint. This involves deciding whether the staff of IPS provided immigration advice in breach of the Act, as the answer to this is critical to the review of whether Ms Niland is in breach of her obligations under the Code as alleged.

[71] The obligations set out in the Code are personal to the licensed immigration adviser and cannot be delegated.<sup>9</sup>

[72] The Tribunal has adversely commented in previous decisions on the practice which developed in the immigration advisory industry of what is known as “rubber stamping”.<sup>10</sup> This occurs where the licensed adviser becomes the ostensibly legitimate front for unlicensed individuals who provide the bulk of the immigration services.

[73] Typically, this occurs where a licensed immigration adviser uses offshore agents to recruit the clients, prepare the immigration applications and send them to the licensed adviser to sign off and file with Immigration New Zealand. It can also occur where the offshore agent initiates the relationship with the adviser. There is little, if any, direct contact between the licensed adviser and the client.

[74] The practice is plainly unlawful. A person commits an offence under the Act if he or she provides “immigration advice” without being licensed or exempt from licensing.<sup>11</sup>

<sup>9</sup> *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [29], [34] & [47].

<sup>10</sup> *Stanimirovic v Levarko* [2018] NZIACDT 3 at [4], [36]–[38]; *Immigration New Zealand (Calder) v Soni* [2018] NZIACDT 6 at [4], [50]–[61].

<sup>11</sup> Immigration Advisers Licensing Act 2007, s 63.

A person may be charged with such an offence even where part or all of the conduct occurred outside New Zealand.<sup>12</sup>

[75] The statutory scope of “immigration advice” is very broad:<sup>13</sup>

## 7 What constitutes immigration advice

(1) In this Act, **immigration advice**—

- (a) means using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward; but
- (b) does not include—
  - (i) providing information that is publicly available, or that is prepared or made available by the Department; or
  - (ii) directing a person to the Minister or the Department, or to an immigration officer or a refugee and protection officer (within the meaning of the Immigration Act 2009), or to a list of licensed immigration advisers; or
  - (iii) carrying out clerical work, translation or interpreting services, or settlement services.

(2) To avoid doubt, a person is not considered to be providing immigration advice within the meaning of this Act if the person provides the advice in the course of acting under or pursuant to—

- (a) the Ombudsmen Act 1975; or
- (b) any other enactment by which functions are conferred on Ombudsmen holding office under that Act.

[76] The exclusion from the scope of “immigration advice” relevant here is subs (1)(b)(iii) concerning clerical work, translation or interpretation services. The question that arises is whether Ms S and the other staff of IPS have performed such permitted work only.

[77] “Clerical work” is narrowly defined in the Act:<sup>14</sup>

**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:

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<sup>12</sup> Sections 8 & 73.

<sup>13</sup> Immigration Advisers Licensing Act 2007, s 7.

<sup>14</sup> Section 5, “clerical work”.

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

[78] It is self-evident that Ms Niland did not take charge of the engagement with the client on immigration matters, as she is required to do under the Code. It is therefore inevitable that Ms S and the other IPS staff stepped beyond permissible clerical and interpretation work into the impermissible area of providing services amounting to immigration advice.

[79] Aside from one skype interview, Ms Niland had no real engagement with the three clients. In her letter to the Authority of 15 December 2016, she acknowledges the inadequacies of the first (and only) skype interview with Filipino clients whose first language is not English. Indeed, in respect of Mr A, it would seem even the skype interview could not be completed.

[80] There is one disclosed email between Ms Niland and each of the clients which is particularly brief and does no more than send certain documents. Aside from the skype interviews, of which there is no record of what was said,<sup>15</sup> Ms Niland provided no advice directly to the clients on immigration matters. This was done through Ms S or other staff of IPS.

[81] It is apparent that Ms S and the other employees of IPS were left to obtain from the clients the information necessary for immigration purposes. It is inevitable they would have assisted and advised the clients as to the specific information and documents required by Immigration New Zealand. After all, there is no evidence Ms Niland did this.

[82] Indeed, the client agreement states that IPS will perform much of the immigration service (*verbatim*, with IPS being “**OUR**” and “**WE**”):

#### 1. Our Services

- 1.1 We will, upon instruction from **Lynn Barbara [Niland], Licensed Immigration Adviser**, prepare and compile all information relating to your application for Immigration to New Zealand (INZ) for **WORK VISA**;
- 1.2 As part of this, **WE** will;
  - Make initial assessment on the visa options which apply to your situation;
  - Review all information and documents provided by YOU and You undertake not to provide any false information or documents to us;
  - Advertise, promote your CV to NZ employers;

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<sup>15</sup> Itself a breach of cl 26(a)(iii) of the Code.

- Arrange job offer with employers that match your skills;
- Provide guidance on the necessary documents required including assistance in taking the medical examination with INZ accredited doctors;
- Arrange Skype interview with prospect NZ employers;
- Assist in receiving immigration advice and arrange Skype interview with the Licensed Immigration Adviser;
- Assist in recording information on the application form;
- Lodge visa application with INZ;
- Organize travel to New Zealand;
- Assist family members (spouse and children) in their visa application (with additional fee);
- Provide settlement information if already in New Zealand.

[83] While the agreement states the services will be performed by IPS on the instruction of Ms Niland, the reality is otherwise. There is a paucity of evidence of the instruction of IPS. Ms Niland's involvement with the client was very limited and wholly inadequate. She largely left the interviewing of the clients, the completion of the application forms, the compiling of supporting documents and communications with the clients (particularly relating to Immigration New Zealand's concerns) to the IPS staff. For example, there is no evidence Ms Niland had any involvement in the creation of Mr F's affidavit.

[84] Ms Niland encouraged this by authorising the staff to use her name on the visa applications, though at the same time effectively delegated communication with Immigration New Zealand to Ms S of IPS. I am surprised Immigration New Zealand allowed that to occur, but this does not excuse Ms Niland's failure to personally perform her obligations under the Code.

[85] I appreciate it is more convenient for the client if communications from/to Immigration New Zealand are through Ms S who speaks their native language and is in their time zone. However, it is inevitable that Ms S will stray into the broadly defined, but exclusive, adviser's work in her communications with the client about Immigration New Zealand's criteria and later its concerns. If Ms Niland abdicates responsibility for obtaining the client's information and instructions in order to compile the application and later respond to the concerns raised, it is obvious Ms S will step into the void.



[86] In the absence of any real engagement with Ms Niland, the clients looked to Ms S to assist with their immigration matters. IPS holds itself out as providing immigration services. It is experienced in doing so, as Ms Niland accepts.<sup>16</sup> Ms S speaks their language and is in their time zone. The clients will naturally ask Ms S and other IPS staff for advice on such matters.

[87] Ms Niland accepts in her statement that it was a weakness of the business set up that the clients communicated through IPS and therefore maintained effective control of the relationship with the clients. It should have been controlled by her. Ms Niland concedes she did not recognise the compliance problem. Her counsel describes the business structure as fundamentally flawed. Having now recognised the problem, she ceased her arrangement with IPS in late 2016.

[88] Ms Niland has identified the real nub of the problem. By creating a structure which failed to clearly distinguish her role from that of IPS and allowing IPS to control all communications with her clients, the IPS staff will inevitably transgress the boundary between clerical work and immigration advice.

[89] There is no evidence that every step undertaken by IPS had been under Ms Niland's direction, but even if there was, the process would still be unlawful. This is because Ms Niland cannot delegate her professional obligations under the Act and Code, which are personal to her.

[90] I find that the staff of IPS, notably Ms S, provided assistance and gave advice to Messrs L, A and F which fell within the scope of immigration advice under the Act. They have committed offences under the Act.

[91] The unlawful conduct of the IPS staff has been facilitated by Ms Niland. She permitted this to occur. She knew what they were doing, even though she did not recognise it as a breach of the Act or Code. IPS could not have operated or held itself out to promote New Zealand immigration services without the use of her name as a licensed adviser. Immigration New Zealand would not have accepted visa applications from IPS without the name of Ms Niland being recorded on the forms as the licensed adviser.

[92] Ms Niland is therefore in breach of the obligation in cl 3(c) of the Code to conduct herself in accordance with the Act. This is the case in respect of all three clients, Messrs L, A and F.

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<sup>16</sup> Statement of Ms Niland, 12 April 2017 at [39].

*First head of complaint – failed to obtain and carry out instructions*

[93] Ms Niland failed to directly communicate with her clients and therefore failed to personally obtain the client's lawful instructions. There was only the skype interview at which Ms Niland says she did an initial evaluation as to eligibility. There was never any discussion or advice in relation to the employment offers and agreements, which were not then available. Communication with the clients on such matters was entirely left to Ms S and other staff of IPS.

[94] Ms Niland failed, not only to obtain, but also to personally carry out the client's instructions. She provided the early eligibility advice and later checked the employment documents, but otherwise left to IPS the completion of the application, compiling the supporting documents and responding to Immigration New Zealand's concerns (such as creating Mr F's affidavit).

[95] Ms Niland is therefore in breach of cl 2(e) of the Code in respect of all three clients.

*Fifth head of complaint – failed to provide description of services*

[96] As for the alleged failure to provide in the written agreement a full description of the services Ms Niland should have provided, there is a clear breach of cl 19(e) of the Code in respect of all three clients. Ms Niland accepts she may have breached this professional obligation.<sup>17</sup>

[97] For example, the agreement does not state that Ms Niland would be involved in communications with Immigration New Zealand. Nor does it clearly explain the fees payable by the client. Ms Niland has had to resort to unclear file notes to explain the fees. These notes refer to payments not set out in the written agreement with each client. It must have been Ms S who explained the adviser's fees to the clients.

[98] Moreover, the client agreement attributes most of the immigration work, which should have been performed by Ms Niland, to IPS. There is confusion in the agreement as to who is really responsible for immigration services. Accordingly, Ms Niland has failed to clearly identify in the agreement what services she was providing. That is an important requirement of the Code as to the written agreement.

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<sup>17</sup> Statement of Ms Niland, 12 April 2017 at [50]–[52].

[99] Ms Niland acknowledges the failure to state in the agreement that immigration work was her responsibility.<sup>17</sup> She recognises this breach of the Code results from the complications of a tripartite agreement. Ms Niland is right about that. She should have had her own agreement with each client.

*Sixth head of complaint – failed to explain significant matters*

[100] It is also clear that Ms Niland did not explain to her clients significant matters in the written agreement before they signed it. It is highly unlikely all such matters were explained in the skype interview. Certainly, that cannot have occurred with Mr A. The “points to explain” in Mr L’s skype assessment contain no reference to matters in the client agreement.

[101] Ms Niland acknowledges the skype interview was not about the client agreement.<sup>17</sup> She accepts the obligation to explain significant matters may have been breached.

[102] I find a breach of cl 18(b) of the Code in respect of all three clients.

*Seventh head of complaint – failed to advise clients of status of application*

[103] There is no record Ms Niland advised Messrs L, A and F of the lodging of their applications, the concerns expressed by Immigration New Zealand or their decline.

[104] For example, in relation to Mr A, the decline letter of about 13 January 2016 was sent to him on that day by IPS. In respect of Mr F, the decline letter of 10 December 2015 was sent to him on that day by IPS. Ms Niland accepts she should have communicated with Mr F about Immigration New Zealand’s letter of 25 November 2015.<sup>18</sup>

[105] Had these been isolated communications with the clients by IPS particularly if directed by Ms Niland, the disciplinary regime would not be engaged. But they are not isolated instances and there is no evidence of direction either. Ms Niland offloaded her client engagement obligation to IPS.

[106] Ms Niland has breached cl 26(b) of the Code in respect of all three clients.

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<sup>18</sup> At [55].

[107] I will now deal with the next group of complaints together, all of which essentially allege the same conduct:

- (2) *Failed to personally assess the client's employment documentation prior to lodging the visa application and to discuss material matters with them throughout the application, in breach of cl 2(e)*
- (8) *Allowed visa applications to be lodged based on eligibility criteria which did not include an assessment of the employment agreement, in breach of cl 1, or alternatively;*
- (9) *Failed to assess the client's employment agreement accurately against relevant immigration instructions, in breach of cl 1; and*
- (10) *Failed to check whether the client's work experience was both verifiable and suitable to meet the minimum level of work experience required by Immigration New Zealand, in breach of cl 1*

[108] In addition to cl 2(e) of the Code set out at [69] above, the Registrar relies on cl 1:

**General**

1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.

[109] All of these complaints are encapsulated by the second head. It is contended that Ms Niland failed to personally assess and discuss with each client their employment documentation prior to lodging their respective visa applications. She therefore failed to obtain adequate instructions and did not exercise diligence and due care.

[110] Mr L's application failed because there was no job for him. Ms Niland received the employment contract from IPS on 27 July 2015 and an amended contract on 5 August prior to the visa application being lodged by IPS with Immigration New Zealand on 13 August 2015. She says she reviewed the agreements for Mr L and the other two clients prior to certifying the visa applications, following which IPS would lodge them.

[111] My understanding is that Mr L's application failed because the employer subsequently withdrew the job offer. The director of the employer company with whom IPS was dealing was on leave when the company was called by Immigration New Zealand to verify the offer. The replacement manager replied that there was no job available.

[112] If there was any failure here in the services provided to Mr L, it was on the part of IPS which was responsible for the employment side of the service. There was nothing in the employment documents Ms Niland needed to raise with Mr L. There is no evidence of any failure by Ms Niland.

[113] Mr A's application failed because the job offer did not guarantee a minimum of 30 hours work weekly. It was more in the nature of an independent contractor who could be called upon as and when required.

[114] The employment agreement signed by Mr A on an unknown date and sent to Ms Niland on 1 October 2015 makes no mention of any hours of work. That agreement may have been accompanied by a letter of offer and notice of job opening to Mr A from the employer offering a permanent fulltime position.<sup>19</sup> Both are undated. Moreover, neither was signed by the employer nor countersigned by Mr A. A subsequent letter of offer signed by the employer on an unknown date and by Mr A on 2 November 2015 was for permanent fulltime work.<sup>20</sup> I understand that Immigration New Zealand did not accept this apparently valid offer, as the employer advised that after an initial trial period of 90 days, Mr A would become a contractor.

[115] Ms Niland should have exercised greater care in her scrutiny of the documents sent to her on 1 October, which are likely the documents sent to Immigration New Zealand on 10 October. The agreement itself says nothing about the hours of work. She should not have relied on the unsigned, undated letter of offer and notice. The valid 2 November letter comes too late, as that was after the visa application had been lodged. This defect in the earlier documents should have been raised with Mr A and the employer prior to the visa application being lodged.

[116] Mr F's application failed because his previous work experience could not be verified. Additionally, there was a medical issue on which further medical testing was needed.

[117] Ms Niland received Mr F's employment documents on 9 October 2015, prior to the visa application being lodged with Immigration New Zealand on 21 October 2015. She says she did review the employment contract and offer. She contests being responsible for verifying every aspect of a client's employment history. She says it was not apparent to her at the outset that his work experience could not be verified.

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<sup>19</sup> Registrar's supporting documents at 156–162.

<sup>20</sup> Registrar's supporting documents at 200–202.

[118] I accept Ms Niland's contention that an adviser is not responsible for verifying all information produced by the client to the adviser. I am not aware that there was any indication from the face of the relevant documents of any problem with them. Certainly, Ms Niland cannot have known that Immigration New Zealand's medical adviser would require further medical information.

[119] I therefore uphold the second, eighth and ninth complaints concerning the failure to obtain instructions and exercise diligence and due care in relation to the job offer for Mr A. This is a breach of cls 1 and 2(e) of the Code. I dismiss the complaints in relation to Messrs L and F, in particular the 10<sup>th</sup> complaint *in toto*.

[120] Finally, there is the third head of complaint:

- (3) *Presented a declaration to the clients to sign which incorrectly stated that the clients had read the employment documents that were not available to read, in breach of cl 1*

[121] The skype interview between Mr L and Ms Niland was on 16 April 2015. Mr L signed the skype interview and declaration on the letterhead of Visas NZ on the same day. It contained the following declaration from him:

6. That I have read through the Work Visa Application form INZ 1015 and supportive documents supplied by the employer i.e. job offer, employment contract, esf, winz, proof of ads and am again invited to ask Lynn on matters not clear to me.

[122] It was not until 13 July 2015 that the employer signed the employment agreement. It was then sent to Mr L on 31 July 2015. It was signed by Mr L on an unknown date.

[123] As the employment agreement signed by the employer was sent to Mr L on 31 July 2015, it cannot have been seen or signed by him before that date. The practice of sending it to the client after the skype interview is confirmed by Ms Niland in her letter to the Authority of 15 December 2016. She stated that the client often did not have the employment agreement at the time of the initial assessment (the skype interview at which eligibility was discussed) if the employer was preparing it or it had not been sent to the "agency".<sup>21</sup>

[124] I find that Mr L had been required to sign the declaration that he had read through the employment offer and contract before he had seen them.

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<sup>21</sup> Registrar's supporting documents at 561.

[125] On 22 September 2015, Mr A signed the standard skype interview and declaration. It is unclear when Mr A first saw the employment offer and agreement, but Ms Niland accepts in her letter of 15 December 2016 that the information as to Mr A's hours of work were not available at the time of the skype interview. It is not known whether Mr A ever knew of this defect before it was raised by Immigration New Zealand. Again, I find Mr A was required to sign the declaration before he knew the full terms of the offer and agreement.

[126] Mr F's skype declaration was signed on 24 or 29 September 2015. The employer signed the employment contract on 21 September, but did not send it to Mr F until 24 September. Mr F's signature on the contract is undated, but he signed the offer on 27 September. Mr F's signature on the offer of 27 September could be before or after the declaration depending on when the latter was signed. Hence, it is not proven that Mr F had been required to sign the declaration before seeing the employment documents.

[127] Ms Niland would have known that Messrs L and A had not seen their employment documents at the time of their skype interview and declaration. After all, she had not seen them either at that stage.

[128] This is a breach of Ms Niland's obligation to Messrs L and A to be professional and diligent under cl 1 of the Code.

## **OUTCOME**

[129] I uphold wholly or partially all the complaints, bar the 10<sup>th</sup> complaint. Ms Niland is in breach of cls 1, 2(e), 3(c), 18(b), 19(e) and 26(b) of the Code.

[130] I agree with Mr Moses that there is considerable overlap in these complaints and that to a large extent they arise from the flawed tripartite relationship between IPS, the client and Ms Niland. There was a lack of clarity as to the respective responsibilities of Ms Niland and IPS. In addition to the confusing contractual structure, however, there was the breach of an adviser's critical obligation to personally engage with the client.

[131] Mr Moses describes Ms Niland's conduct as negligent, rather than deliberately employing a business model in clear and flagrant breach of her professional obligations. It is submitted she was careless as to the contractual arrangements and did not understand the limits of the clerical work exclusion to the statutory definition of immigration advice. She overlooked that the contract of engagement was entirely

unsuited to her needs and those of her clients. All the resulting Code breaches are said to be incidents of that negligence.

[132] While I see the fundamental failure to personally engage with the client as more than just a consequence of the muddled tripartite relationship, I accept Mr Moses' description of Ms Niland's conduct. Ms Niland did not set out to circumvent her professional obligations, but rather misunderstood the permitted scope of clerical work by the unlicensed staff.

### **SUBMISSIONS ON SANCTIONS**

[133] As the complaint has largely been upheld, the Tribunal may impose sanctions pursuant to s 51 of the Act.

[134] Given the overlap between the heads of complaints, some of which were advanced by the Registrar as alternatives, I will be mindful in determining the sanctions that there should be no double punishment of essentially the same conduct.

[135] A timetable is set below. Any request that Ms Niland undertake training should specify the precise course suggested. Any request for repayment of fees or the payment of costs or expenses or for compensation must be accompanied by a schedule particularising the amounts and basis of the claim.

#### *Timetable*

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

- (1) The Registrar and Ms Niland are to make submissions by **25 January 2019**.
- (2) The Registrar and Ms Niland may reply to any submissions by the other party by **8 February 2019**.

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D J Plunkett  
Chair