IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 42

Reference No: IACDT 020/19

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**NMS** Complainant
AND	**ROWEL MERCADO** Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 1 October 2020

REPRESENTATION:

Registrar:	Self-represented
Complainant:	Self-represented
Adviser:	S Laurent, counsel

PRELIMINARY

[1] Mr Rowel Mercado, the adviser, acted for NMS, the complainant who sought residence in the skilled migrant category. At the time, she was working as the manager of a franchised restaurant/takeaway store.

[2] Due to concerns expressed by Immigration New Zealand as to whether this was skilled employment, the complainant was engaged by the director of the business (the director or Mr Z) as a Personal Assistant (PA) in another one of his companies which operated a café. The arrangement was that while she would spend most of her time as a PA in the café owning company, part of her work would involve managerial duties for the takeaway store. Mr Mercado advised that such an arrangement would be acceptable to the agency, provided there was an outsourcing agreement between the two companies.

[3] However, the work visa sought and granted was limited to the PA role at the café company. Immigration New Zealand later discovered the complainant was also working at the store, so declined her subsequent residence application.

[4] The complainant's complaint to the Immigration Advisers Authority (the Authority) was referred to the Tribunal by the Registrar of Immigration Advisers (the Registrar). It is alleged that Mr Mercado has been negligent, a ground of complaint under the Immigration Advisers Licensing Act 2007 (the Act), or alternatively he has breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[5] The essential issue to consider is whether Mr Mercado was negligent in advising the complainant she could undertake work for two companies on a visa limited to one company.

BACKGROUND

[6] Mr Mercado, a licensed immigration adviser, is a director of Horizons New Zealand Immigration Consulting Inc (Horizons), a company in the Philippines, with a branch in Auckland.

[7] The complainant is a national of the Philippines who was living in New Zealand with her family. She was working as a manager of a franchised restaurant/takeaway store owned by ABC Ltd (ABCL). The sole director/shareholder is the director, Mr Z. Her employment agreement with ABCL commenced on 10 May 2017.

[8] On 18 May 2017, the complainant signed a client agreement with Horizons (unsigned by Mr Mercado). The adviser who was supposed to perform the work was not expressly named, though Mr Mercado was identified as the intended signatory. Horizons contracted to prepare an expression of interest and residence application. The fee was $4,500 (excl. GST).

[9] An expression of interest was filed with Immigration New Zealand by Mr Mercado on behalf of the complainant. It has not been produced to the Tribunal, but was presumably based on her role as the store manager at ABCL.

[10] On 10 June 2017, Immigration New Zealand invited the complainant to file a residence application.

[11] Mr Mercado filed a residence application for the complainant and her family on 17 July 2017. It was based on the store manager's position at ABCL.

[12] Immigration New Zealand advised Mr Mercado on 13 November 2017 of concerns regarding the complainant's position. Her position as the store manager did not match that for skilled employment. They were asked for further information.

[13] By this time, the director had acquired a franchised café at a different location, using another one of his companies, DEF Ltd (DEFL).

[14] Mr Mercado sent an email to the complainant on 21 November 2017 noting the director's offer to consider her for a PA position, due to his acquisition of the café business. It would require a new work visa. She was asked to advise if she would seek the position. He noted that she already had a residence application in process.

[15] On 27 November 2017, Mr Mercado informed the visa officer that the complainant had applied for the PA role and requested an extension of one week to reply to the officer's letter, in order to see if she would get the new role.

[16] Mr Mercado duly advised the complainant on 28 November 2017 that he had sought an extension. She was asked to notify him if she was offered the role, as the reply to Immigration New Zealand's letter was due that day. He would have to apply for a new work visa that day and request the officer to assess residence based on the new position.

[17] The officer refused the extension that same day, 28 November 2017.

[18] An offer for the PA role was made to the complainant also on 28 November 2017. It was on the letterhead of ABCL/DEFL. She promptly accepted, signing an employment

agreement with DEFL that day. It was for 40 hours weekly, the place of work being the address of the café.

[19] An "ADDENDUM" signed by the complainant and the director, also on 28 November 2017, set out a job description. The complainant's key responsibility was "liaison, coordination and organisational tasks" in support of the director of DEFL, ABCL and another company owned by the director. She would spend 70 per cent of her time on "Liaising Duties", "Administration" and "Reception Duties" and 30 per cent on:

- Management
- Accepting Deliveries
- Making bulk orders
- Doing weekly reports and inventories
- Customer service

[20] Mr Mercado amended the document before sending it to Immigration New Zealand (unsigned) as the first schedule to a new employment agreement. The key responsibility remained the same, except reference to the third company was deleted by him. He removed the percentages and the management section, at the same time expanding the "Liaising Duties", "Administration" and "Reception Duties" sections. Of relevance are the following entries:

- liaising on matters relating to the organisation's operations such as accepting deliveries, managing bulk orders and coordinating with Head offices and suppliers as required
- collecting and summarizing weekly reports on sales and inventories

[21] A fresh work visa application was made by Mr Mercado on behalf of the complainant on 4 December 2017, based on being a PA with DEFL.

Visa to work at DEFL issued

[22] Immigration New Zealand issued the complainant with a work visa on 27 December 2017. It was for fulltime employment. A condition of her visa was, "The holder may only work as Personal Assistant in Auckland for [DEFL]".

[23] The visa officer conducted a phone interview with the complainant on 12 March 2018. She told him she was working for ABCL's store every Wednesday (managing and reporting on stock) and Thursday (accepting deliveries). Furthermore, she covered shifts for employees who were sick or on leave.

[24] On 20 April 2018, Immigration New Zealand advised the complainant of certain concerns regarding her residence application:

1. The employer did not appear to be complying with employment and immigration laws.

2. She may not be working fulltime for her current employer.

3. Her employment may not be sustainable, and

4. She may have provided false and misleading information.

[25] In particular, according to the agency, the complainant was doing bulk ordering and other work for the store. DEFL had hired her but the director shifted her around between his two companies. Her employment did not comply with the visa conditions. She was invited to provide further information.

[26] Mr Mercado advised the complainant on 20 April 2018 of the adverse information letter from Immigration New Zealand. He said in his email that he had understood that the store work was due to an outsourcing agreement, specifically "[franchise name] report bulk ordering". The employer had to provide evidence that the complainant's work for the store was contracted. In the absence of an outsourcing agreement, her only role was as a PA at DEFL. Immigration New Zealand had grave concerns about her covering shifts for staff on leave as this was outside the job description. She was asked to discuss the issue with her employer.

[27] On 30 April 2018, Mr Mercado advised the complainant to seek independent legal advice on employment law. He followed this up with an email on 1 May 2018 setting out a number of questions she should ask the lawyer. This included whether the arrangement was allowed under employment law, given the visa was employer specific, and also whether she was permitted to go to the store to gather information or to do the work.

[28] On 7 May 2018, Mr Mercado responded to the visa officer's letter of 20 April 2018. He said that DEFL traded as the [named] café and ABCL as the [named] store. They had the same sole director and shareholder. ABCL contracted to DEFL the store's inventory control, ordering of ingredients and other liaising tasks supporting the director. The complainant was employed by DEFL and received a salary only from that company. ABCL regularly reimbursed DEFL for her salary payments. The annual report of DEFL for the March 2018 financial year showed a $3,716 subcontractor's payment.

[29] Mr Mercado provided supporting documents to Immigration New Zealand:

1. A statutory declaration from the complainant (3 May 2018). She had worked as a store manager for ABCL from May to 26 December 2017, then transferred on 27 December to DEFL as a PA for the director, Mr Z. As a PA she performed liaison, coordination and organisational tasks for the director, including for his other business, ABCL. Her full salary came from DEFL. She performed tasks for ABCL such as inventory, reporting, encoding and covering shifts. In the absence of the store manager, Mr Z had to perform the tasks, but he was too busy, so he assigned them to her. She was not aware she was breaching her visa conditions. Her presence at the store had now stopped and she was doing the contracted work from her workplace at DEFL.

2. A statutory declaration from Mr Z (5 May 2018). He offered the PA position to the complainant as he needed someone to assist him with the overall administration of the business. He decided to outsource the work from ABCL to DEFL for inventory and other PA work. There were a few times the complainant covered shifts at ABCL, but he did not know this was not allowed. He had now implemented corrective measures. The complainant had signed an addendum to her job description for the ABCL contracted services. This work was now completed at her DEFL desk. She was a fulltime employee of DEFL. It was his understanding that her visa conditions were not breached as she was employed by DEFL as his PA. He had inadvertently failed to comply with immigration and employment law in requesting her to cover shifts on an emergency basis. She no longer did this.

3. An amendment to the complainant's employment agreement signed by her and Mr Z (26 April 2018). The "contracting" services accepted by DEFL from ABCL were expressed to be part of the work of the complainant as a PA and should be no more than 10 hours weekly. They were:

   – Inventory work such as ordering and producing inventory report to the Director every week.

   – Other personal assisting work required in support of the Director such as sending announcements or memoranda and sending letter on behalf of the Director.

   – The work should be finalised and completed at [DEFL] office.

   – Place of work – The employee will normally carry out her duties at [address of café], however she may also be required to work at the other

> addresses as reasonably requested by the Employer in order to carry out her role as a Personal Assistant to the Director.

4. Letter from an accounting firm (2 May 2018) stating that the author was informed by Mr Z in December 2017 that "[ABCL] contracted the services of [DEFL] for inventory control, ordering of ingredients and other liaising tasks" in support of the director. The complainant received a salary only from DEFL, with ABCL reimbursing DEFL her salary.

Residence declined by Immigration New Zealand

[30] Immigration New Zealand declined the residence application on 21 May 2018. This was because the complainant's employer did not comply with employment and immigration laws and she was not working fulltime for her employer. She had not adhered to her visa condition. Prior to 26 April 2018, the date the amendment to the employment agreement took effect, the complainant had not been contracted to do the café's work.[1] The tasks being performed at the café business were not those of a PA, such as inventory work. She was performing two roles, that of a PA and that of an inventory clerk. Furthermore, the records kept by the employer did not allow the agency to assess how many hours were spent at each establishment.

[31] Mr Mercado then sent the amendment to the employment agreement to another immigration officer (a technical adviser) on 5 June 2018 and asked whether the outsourcing of work for a different company with the same owner was a breach of the visa conditions. The officer informed Mr Mercado on 6 June that if the complainant intended to work for ABCL, she required a new work visa.

[32] On the same day, 6 June 2018, the director cancelled the amendment to the complainant's employment agreement, so that all her work was as a PA at DEFL.

[33] On 29 June 2018, Mr Mercado advised the complainant that the visa officer may have erred in declining the visa. He said an appeal to the Immigration and Protection Tribunal (IPT) could be prepared.

[34] An appeal to the IPT was filed on 2 July 2018.

[35] The IPT issued a decision on 14 February 2019 declining the appeal. It was found that the complainant had not complied with the visa condition that she only work as a PA for DEFL, as she worked every Wednesday and Thursday at ABCL's store. This

[1] The visa officer has muddled the impermissible store's work with the legitimate work at the café business.

included managing and reporting on stock and deliveries, as well as covering shifts for staff who were sick or on leave. Even with the outsourcing agreement, she continued to work at ABCL. It was open to her to stop such work or seek an amendment to her visa conditions. In undertaking the store's stocktaking, handling of deliveries and covering of shifts, the complainant was clearly not working as a PA for the café. The outsourcing agreement did not cure the breach of the visa condition linking her employment to the café business only.

[36] Mr Mercado advised the complainant of the IPT's decision on 16 February 2019.

[37] The complainant and her family returned to the Philippines in July 2019.

COMPLAINT

[38] Meanwhile, on 27 May 2019, the complainant made a complaint to the Authority against Mr Mercado.

[39] The complainant explained that she was working as the manager of a franchised restaurant/takeaway store. Mr Mercado advised her that she could apply for residence. When she did so, Immigration New Zealand took the view that her manager's role was not skilled. At the same time, the owner of the store bought a franchised bakery/café and was looking for a PA to help him with the paperwork. Mr Mercado told the complainant that this new position could be the answer to Immigration New Zealand's letter. He advised her that she could be a PA in the café business for 70 per cent of the time and still spend 30 per cent of her time in the managerial role at the store.

[40] According to the complainant, Mr Mercado changed the new job description on the employment contract sent to him, removing the percentages between the different businesses and inserting a requirement that she could only work as a PA in DEFL's business. It was his idea to have contracted services between the two companies, which he thought would be accepted by Immigration New Zealand. She became fed up with his negligence and spent a huge amount of money hiring a lawyer to answer a second adverse letter, but her visa application was still declined. The complainant wanted a refund of the fees paid, as well as the protection of future clients.

[41] The Authority formally wrote to Mr Mercado on 12 September 2019 notifying him of the details of the complaint and inviting his explanation.

[42] Mr Laurent, counsel for Mr Mercado, sent submissions to the Authority on 3 October 2019. According to the complainant, Mr Mercado had told her she could do 30 per cent of the job in managerial work for the store and 70 per cent as a PA for the

café business. This was not correct. Mr Mercado's understanding was that the complainant was to be employed solely by DEFL, that all her work was to be done at the café site, that the director could direct her to do work benefiting the store and that ABCL would reimburse DEFL by way of an outsourcing agreement. Contrary to Mr Mercado's understanding, she went to the store more than one day each week to handle shifts.

[43] Mr Laurent acknowledged that this aspect of the complaint would be referred to the Tribunal, but it should not be on the basis that Mr Mercado encouraged the complainant to work for two companies. Instead, it could be referred on the basis that his belief that the outsourcing arrangement amounted to a single employer, was wrong.

[44] An affidavit from Mr Mercado (10 October 2019) was provided in support. He set out the fees paid by the complainant ($3,500 excl GST) and offered a refund. At the time the complainant took up the PA role, he believed that she was supplied to ABCL on an outsourcing arrangement for which it would reimburse DEFL. She was therefore entirely employed and paid by DEFL. He advised that this was possible. The majority of the tasks were for the PA role in support of the director and any work done for ABCL was to be done at her DEFL desk.

[45] At the same time the complainant signed the offer for the PA role, 28 November 2017, she had signed an addendum to the employment agreement. This showed her responsibilities would be supporting the director for three of his companies – DEFL, ABCL and another one. It allocated 70 per cent of the work to the PA role and 30 per cent to other management. According to Mr Mercado, he did not approve this as it showed the complainant working for different companies. Nor was it his understanding of the proposed arrangement. He did not recommend she work 70 per cent for DEFL's bakery/café and 30 per cent for ABCL's store. Her sole employer was to be DEFL. He took the view that she was working fulltime as a PA for DEFL and her work for the store was part of her DEFL duties.

[46] Mr Mercado stated in his affidavit that the complainant told Immigration New Zealand that she was working at the store's premises doing inventory control and crew shifts when they were short-staffed. This had never been his understanding. He had told Mr Z and the complainant that she had to work exclusively for the café, with the work for the store outsourced. The employment documents did not mention covering crew shifts.

[47] In Mr Mercado's opinion, Immigration New Zealand did not deal with the acceptability of the outsourcing agreement in the emails of 5 to 6 June 2018. It did not confirm outright that the complainant was working in breach of her conditions. He

believed that the outsourcing arrangement was a valid way to work for a single employer and did not breach her visa conditions. If the Tribunal finds he was wrong, he will accept this as a learning.

[48] Mr Mercado noted that even after the complainant terminated his services, she immediately called his office for assistance which was provided. He "endorsed" her to another licensed adviser for a full consultation at no cost, and offered a discounted fee for a reconsideration by Immigration New Zealand and a possible s 61 application.[2]

Complaint referred to Tribunal

[49] The Registrar filed a statement of complaint in the Tribunal (17 October 2019) alleging that:

1. Mr Mercado was negligent, or alternatively breached cl 1 of the Code, in the following respects:

    1.1 advising the complainant that she could work for both DEFL and ABCL;

    1.2 not seeking clarification from Immigration New Zealand until after residence had been declined; and

    1.3 not providing clear advice to the complainant about his understanding of the arrangement.

JURISDICTION AND PROCEDURE

[50] 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 Act:

(a) negligence;

(b) incompetence;

(c) incapacity;

(d) dishonest or misleading behaviour; and

(e) a breach of the code of conduct.

[2] Immigration Act 2009, s 61.

[51] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.[3]

[52] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.[4] It has been established to deal relatively summarily with complaints referred to it.[5]

[53] 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.[6]

[54] The sanctions that may be imposed by the Tribunal are set out in the Act.[7] The focus of professional disciplinary proceedings is not punishment but the protection of the public.[8]

[55] 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.[9]

[56] The Tribunal has received the statement of complaint (17 October 2019) and supporting documents from the Registrar.

[57] No party has sought an oral hearing.

Submissions by the complainant

[58] The complainant wrote to the Tribunal on 8 December 2019. She states that the work set-up was all Mr Mercado's idea. His idea of contracted services was not accepted by Immigration New Zealand. At a meeting she and Mr Z had with him in November 2017, he discussed the 70/30 percentages, with 70 per cent being PA work at the café and 30 per cent managerial work at the store. Mr Mercado's practice manager knew that she was working at the store. The complainant says she had no idea that such work would make her status complicated. She placed too much trust in Mr Mercado as a licensed adviser which ruined her family's future in New Zealand.

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[3] Immigration Advisers Licensing Act 2007, s 45(2) & (3).
[4] Section 49(3) & (4).
[5] *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].
[6] Section 50.
[7] Section 51(1).
[8] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).
[9] *Z v Dental Complaints Assessment Committee*, above n 8, at [97], [101]–[102] & [112].

[59] A letter (26 November 2019) from Mr Z was produced in support. He and the complainant attended a meeting with Mr Mercado in November 2017. Mr Mercado assured him that the complainant could work 70/30 for the two companies.

Submissions on behalf of Mr Mercado

[60] Mr Laurent has produced a statement of reply (15 November 2019) and memorandum (15 November 2019), together with the annual report of DEFL (from 28 August 2017 to 31 March 2018).

[61] According to Mr Laurent, the complainant originally worked as a store manager for ABCL, but when Immigration New Zealand questioned whether this was skilled employment, the employer offered her the position of PA in DEFL, which operated a café/bakery. However, a component of her duties continued to be some work for ABCL remotely. But the complainant went far beyond this, doing shifts at the store.

[62] Mr Mercado would accept a finding that he wrongly advised the complainant she could work in the way he advised, doing work benefiting ABCL under the aegis of a work visa for DEFL.

[63] The Tribunal is, however, asked to consider a number of arguments.

[64] The place of work as a PA specified in the employment agreement was that of the bakery. The key responsibility was PA work supporting the director. Mr Mercado anticipated that work for the store would largely fall under the liaison and administration headings. This included administrative work for ABCL. Her PA role contemplated duties relating to ABCL, but only in her capacity as a PA to the director of DEFL. Arguably, if the complainant had remained within the bounds of what was contemplated, this might have been an acceptable arrangement. Clearly, working for a second company would be contrary to the terms of the work visa, but Mr Mercado honestly believed her role did not involve being employed by the other company.

[65] In the event, Immigration New Zealand and the IPT deemed this arrangement to be a breach of the complainant's visa conditions. However, these negative findings were not due to Mr Mercado's want of care. While he may have been wrong in his interpretation of the arrangement, this does not necessarily equate to negligence.[10] In other words, not every mistake amounts to a professional wrong or crosses the disciplinary threshold.

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[10] *CO v DSI* [2011] NZIACDT 5 at [33]–[34].

[66] Mr Mercado was entitled to hold the view that the outsourcing arrangement was lawful. Furthermore, he was unaware of the complainant's on-site work at the store.

[67] It is submitted that, if the Tribunal takes the view that Mr Mercado was negligent, it was at a level whereby no further action need be taken under s 50(b) of the Act. It may not even meet the threshold warranting disciplinary action at all.[11] Mr Mercado took a conscientious approach to his duties, even if the Tribunal concludes it was misguided. In *Dua*, the Tribunal recast the common test for the professional disciplinary threshold, asking whether it would be "obvious to any competent adviser" that the application was "highly unlikely" to qualify.[12] Such an unequivocal statement could not be made about Mr Mercado's conduct.

[68] The IPT's decision supports the view that Mr Mercado was misguided in supporting the complainant's work arrangement, but there were no IPT decisions on this point prior to that. The IPT, like Immigration New Zealand, was influenced by the complainant's on-site work at the store. Counsel agrees that stocktaking, delivery handling and shift-work were not PA work for the bakery. They were not part of the job description. The complainant's work was to produce inventory reports for the director, all to be conducted from DEFL's office and to constitute no more than 10 hours weekly.

[69] The outsourcing arrangement proposed by Mr Mercado was in fact put in place. The annual account produced to Immigration New Zealand shows this. A sum of $3,716 appears as subcontractors' income and expenses for DEFL.

ASSESSMENT

[70] The Registrar relies on cl 1 of the Code:

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

1. Mr Mercado was negligent, or alternatively breached cl 1 of the Code in:

1.1 advising the complainant that she could work for both DEFL and ABCL

1.2 not seeking clarification from Immigration New Zealand until after residence had been declined

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[11] *KXBK v GVH* [2019] NZIACDT 74 at [73]–[74].
[12] *DJ v Dua* [2019] NZIACDT 6 at [57].

1.3 not providing clear advice to the complainant about his understanding of the arrangement

[71] Immigration New Zealand declined the residence application because the complainant was not working fulltime for the designated employer, DEFL. She was regularly working part of the week at the site of another business owned by a different company, ABCL. Furthermore, she was performing tasks which were not that of a PA at a café owning company, such as inventory control at ABCL's restaurant/takeaway store. The agency regarded the work at ABCL as a breach of the condition attached to her visa that her fulltime employment was as a PA for DEFL in its bakery/café business.

[72] It is not contested by Mr Mercado that the complainant was working in breach of the visa condition that she work only as a PA for DEFL. Immigration New Zealand and the IPT were clearly correct.

[73] I am satisfied that it was Mr Mercado's idea, in the face of Immigration New Zealand's doubt as to whether the store manager role at ABCL was skilled, to combine a PA role at DEFL with part of the managerial role at ABCL and present it to the agency as one position which was skilled. He believed this could be achieved through an outsourcing agreement, whereby DEFL contracted to undertake some of the managerial work at ABCL.

[74] While I accept that Mr Mercado was not aware that the complainant undertook shifts when the store was short-staffed, part of a store manager's role but hardly that of a PA for another business, he should have known that an outsourcing arrangement regarding the other managerial duties at ABCL would not be acceptable. A professional and therefore knowledgeable adviser would not have believed that an outsourcing arrangement requiring work in another business would meet a condition to work fulltime in a specified business.

[75] It will be recalled that the employment agreement sent to Immigration New Zealand showed the complainant was to work 40 hours weekly in DEFL's bakery/café business. If an outsourcing structure was acceptable, it would be a common arrangement to circumvent the usual visa condition of working for a particular named employer. Mr Mercado may not have intended it as a subterfuge or ruse, but that is what it was. Immigration New Zealand would never have approved it.

[76] Not only was the complainant's role in ABCL's business contrary to the condition to work only for DEFL, it was also inconsistent with that of a PA, as Immigration New Zealand found. The complainant was not merely reformatting inventory or delivery

reports or data produced by another person at the store, into a preferred form for the director. Mr Mercado had no reasonable basis to believe that was all the complainant was doing. There is no evidence he was ever told that by the complainant or Mr Z. The complainant was checking the inventory and compiling the data herself in order to produce the reports. She had to attend the store to do that. Such a task could not be done from her desk at DEFL.

[77] There was another clue which should have alerted Mr Mercado to the extent of the complainant's role at the store and that was the number of hours required on a weekly basis. I am satisfied that Mr Mercado told the complainant she could spend 30 per cent of her time attending to the store's work. This would be 12 hours weekly (on the basis of a 40-hour week), or perhaps just the 10 hours specified in the amendment to the employment agreement of 26 April 2018. This is far more than would be required for reformatting reports/data from the store manager or supervisor concerning what was only one restaurant/ takeaway store.

[78] Mr Mercado should have realised that the complainant had to regularly attend the store for prolonged periods to perform the duties for ABCL (excluding crew shifts) which he knew about.

[79] Moreover, an outsourcing agreement would not have been required if the complainant was merely reformatting data into reports in a form acceptable to the director. That would be genuine PA work and not the work of a store manager at ABCL. The mere fact that Mr Mercado believed the arrangement required an outsourcing agreement should have alerted him to the complainant's regular attendance at the store in order to perform the managerial (not PA) work required of her.

[80] No reasonable or professional adviser, knowing of the time required and recognising the need for an outsourcing agreement, would have thought that the complainant was only doing PA work at her DEFL desk.

[81] A professional adviser would not have advised the complainant that the outsourcing arrangement would meet her visa condition. It is apparent from counsel's memorandum to the Tribunal that Mr Mercado does not disagree that his advice to the complainant and her employer was wrong.

[82] Unlike the Tribunal's decision in *CO* cited by counsel, this is not a situation where the interpretation of immigration policy (now called instructions) or of a visa condition, is nuanced.[13] No competent adviser would have thought that work in a second business

[13] *CO v DSI*, above n 10.

owned by a different company, whether through an outsourcing agreement or not, would have satisfied a condition requiring the client's fulltime work to be solely that of a PA for a specific company. Nor would a competent adviser need a prior IPT decision on this point to understand the complainant's visa condition restricted her work to a specific role in a specific company.

[83] It is contended that the Tribunal recast the common test for negligence and diligence in its finding in the *Dua* case that it would have been "obvious to any competent adviser" that the application was "highly unlikely" to meet the immigration instructions.[14] However, the Tribunal was not recasting the test, merely making a factual finding justified by the evidence in that case. The test for negligence, diligence or due care is whether or not the adviser's advice *could* have been given by a professional, reasonable and therefore knowledgeable adviser. If so, the advice is not negligent or lacking in due care.

[84] I find in this case that no professional adviser exercising reasonable skill and care would have advised that the outsourcing agreement was valid.

[85] Mr Laurent also submits that Mr Mercado's mistake may not meet the threshold warranting disciplinary action.[15] Even if it does, it is further submitted the Tribunal could uphold a finding of negligence but decide to take no further action. [16]

[86] I find that the disciplinary threshold is met. This is not a case of momentary inadvertence or mere excusable human error. It is not a case where different advisers could reasonably interpret the visa condition in different ways. There was a high degree of carelessness. No reasonable adviser should have misunderstood the meaning of the visa condition. Furthermore, there were serious consequences for the complainant. Not only did the application fail, but she was found to be in breach of a visa condition. This could make it more difficult for her to travel to New Zealand in the future, particularly to work.

[87] It is further found, as alleged by the Registrar, that Mr Mercado lacked due care in seeking clarification from Immigration New Zealand as to the validity of the arrangement on 5 June 2018, only after residence was declined. I agree that if he had any doubt, he should have done so before advising the complainant to apply. However, I do not regard the late failure to seek clarification as an act of negligence separate from negligently advising the complainant that the outsourcing agreement was valid. It will not add to any sanctions.

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[14] *Dua*, above n 12.
[15] *KXBK v GVH*, above n 11.
[16] Immigration Advisers Licensing Act 2007, s 50(b).

[88] The Registrar also alleges that, while Mr Mercado is now clear about his understanding of the arrangement, he did not provide clear advice to the complainant as to his understanding. This had a serious adverse impact on her and her family.

[89] I do not see Mr Mercado's fault in terms of his communication skills. It was his understanding of the validity of the arrangement that was at fault, not any miscommunication of his understanding. Everyone understood the arrangement. What he got wrong was that it was valid. The exception might be a lack of advice from him that ABCL's work had to be done from the complainant's DEFL desk. It is not clear whether he ever told her or Mr Z that. In any event, any such fault is overshadowed by his wrong advice as to validity.

[90] As for the crew shifts, there is no evidence even from the complainant that Mr Mercado ever advised her that was acceptable, so I see no miscommunication there either. If the complainant believed that was acceptable, Mr Mercado is not to blame.

[91] As to Mr Laurent's submission that no further action be taken apart from upholding the complaint, that will be a matter for sanctions. I address this briefly shortly.

Conclusion

[92] It follows that, in advising the complainant that she could undertake work for both companies through an outsourcing agreement, Mr Mercado lacked reasonable skill and care. He was negligent. His advice lacked diligence and due care.

OUTCOME

[93] I uphold the complaint. Mr Mercado was negligent, a statutory ground of complaint. Nor did he conduct himself in a professional and diligent way or with due care. He therefore also breached cl 1 of the Code. These are alternative wrongs, not cumulative. There will be only one set of sanctions, if any.

SUBMISSIONS ON SANCTIONS

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

[95] A timetable is set out below. Any request that Mr Mercado undertake training should specify the precise course suggested. Any requests 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.

[96] While the Tribunal will consider the applicability of s 50(b), the discretion to take no further action, this may not be appropriate in view of the degree of carelessness and the consequences for the complainant.

Timetable

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

(1) The Registrar, the complainant and Mr Mercado are to make submissions by **27 October 2020**.

(2) The Registrar, the complainant and Mr Mercado may reply to submissions of any other party by **10 November 2020.**

ORDER FOR SUPPRESSION

[98] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[17]

[99] There is no public interest in knowing the name of Mr Mercado's client, the complainant, nor the names of the companies employing her.

[100] The Tribunal orders that no information identifying the complainant or her employers is to be published other than to Immigration New Zealand.

D J Plunkett
Chair

[17] Immigration Advisers Licensing Act 2007, s 50A.