IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2021] NZIACDT 2

Reference No: IACDT 003/20

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

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 4 February 2021

REPRESENTATION:

Registrar:	Self-represented
Complainant:	T Alexander, licensed immigration adviser
Adviser:	P Moses, counsel

PRELIMINARY

[1] Ms Simona Marica, the adviser, acted for IMH, the complainant, who sought to renew a visitor visa. Due to a mistake in the immigration consultancy's file records as to the expiry date of the complainant's existing visa, Ms Marica was too late making the application as the existing visa had already expired. While the complainant was eventually told by her that he would need a discretionary visa, he was not informed of the error in the file record or that his immigration status had become unlawful as a result of the expired visa. A discretionary work visa application made by Ms Marica was, however, successful about five weeks later.

[2] A complaint made by the complainant against Ms Marica to the Immigration Advisers Authority (the Authority) was referred to the Tribunal by the Registrar of Immigration Advisers (the Registrar). The Registrar alleges that Ms Marica was dishonest or misleading and/or negligent, grounds of complaint under the Immigration Advisers Licensing Act 2007 (the Act) and that she also breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] The essential issues to consider are whether Ms Marica deliberately or innocently overlooked telling the complainant about the incorrect file record, and whether she was entitled to rely on the file record without checking it herself.

BACKGROUND

[4] Ms Marica is a licensed immigration adviser and director of Bespoke Immigration, of Auckland. She was previously employed as a licensed adviser by North Shore Immigration Limited trading as North Shore Immigration Services (the immigration consultancy).

[5] Ms Marica was formerly the life partner of Mr Peter Woodberg, the director and owner of the immigration consultancy. Mr Woodberg was convicted and sentenced in July 2020 for being an unlicensed immigration adviser.[1]

[6] It is further noted that Mr Sergey Gimranov was a licensed immigration adviser working for the immigration consultancy. As a result of a complaint against him upheld by the Tribunal, Mr Gimranov's licence was cancelled.[2]

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[1] According to media reports, Mr Woodberg was sentenced in the District Court in July 2020 to six months community detention, 12 months supervision and ordered to pay reparation to the victims, following his conviction on three representative charges of providing immigration advice without being licensed.

[2] *Greyling v Gimranov* [2016] NZIACDT 22 & 55.

[7] The complainant and his family are South African nationals.

[8] On 29 April 2016, the complainant and his partner signed a written agreement with the immigration consultancy in regard to a number of visas for the family, being work visas for the complainant and his partner, visitor or student visas for their dependent children and later a residence visa in the skilled migrant category for the family. The signatories on behalf of the immigration consultancy were Mr Gimranov, who was then licensed, and an unknown person.

Visa granted with expiry date of 3 September 2016

[9] Mr Gimranov filed a visitor visa application with Immigration New Zealand for the complainant on 1 June 2016. Two days later, on 3 June, the government agency approved his visitor visa, with an expiry date of 3 September 2016.

File entry states expiry date of 6 September 2016

[10] Mr Gimranov sent an email to the complainant on 3 June 2016 confirming that the visitor visa had been approved, valid until 6 September 2016. The same erroneous expiry date was then entered in the immigration consultancy's client records management system.

[11] Immigration New Zealand sent an automated email to the complainant on 11 August 2016 reminding him that his visa would expire on 3 September 2016. He forwarded this to Ms Marica on 24 August 2016 seeking her assistance with an extension.

[12] Ms Marica sent an email to the immigration consultancy's office manager (copied to the complainant) on 24 August 2016 concerning an attempted phone call with the complainant's employer.

[13] Ms Marica then met with the complainant and his wife on the following day, 25 August 2016, in the absence of Mr Gimranov who was on leave. It was decided that the complainant would apply for another visitor visa before later applying for a work visa. Ms Marica completed a standard Immigration New Zealand declaration form that day, stating that she had authority to act for the complainant.

[14] On the same day, 25 August 2016, Ms Marica commenced an online visitor visa application for the complainant.

[15] Ms Marica subsequently travelled to South Africa for work purposes.

Ms Marica informed complainant's status unlawful

[16] On 4 September 2016, while still in South Africa, Ms Marica telephoned Immigration New Zealand's contact centre to say that she had a problem with the complainant's online application as she was being asked to contact the agency. The centre's caller replied that the complainant's immigration status was unlawful, so he could not submit a visa application. His visa had expired on 3 September 2016.

[17] On the same day, 4 September 2016 at 10:49 pm, Ms Marica sent an email marked "URGENT!" to Mr Gimranov and the office manager. She stated that Immigration New Zealand had advised that the visitor visa had expired on 3 September, but their record showed it was due to expire on 6 September.

[18] According to Ms Marica's email, it was imperative that Mr Gimranov lodge a s 61 request.[3] The family already had pending visitor visa applications. She said that the complainant's employer was very keen to employ him and went on to discuss issues in relation to advertising his position. She would deal with this when she returned, but in the meantime it was important to get the complainant reinstated on a visitor visa by way of a s 61 request as soon as possible. Mr Gimranov could mention that the reason why the visa had expired was because of an error in their system. Her online account with Immigration New Zealand regarding the application showed that they had started the visitor visa application on 25 August and they had planned to lodge the application that day (4 September), totally unaware that the complainant's visa had already expired the day before.

[19] On 15 September 2016, the Authority cancelled Mr Gimranov's licence.

[20] The complainant sent an email on 16 September 2016 to Ms Marica, Mr Gimranov and other staff at the immigration consultancy. He asked for a progress report regarding his visa extension.

[21] One of the employees replied to the complainant by email on the same day notifying him that Ms Marica was away and would be back the following week. However, Mr Gimranov was aware of his email and would be in touch that day.

[22] As nobody gave the complainant further information, on 19 September 2016, he again sent an email to Ms Marica, Mr Gimranov and other staff asking for an update. He sent a further email to them that day attaching his employment contract.

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[3] A discretionary visa under s 61 of the Immigration Act 2009.

[23] Mr Gimranov immediately replied to the complainant by email on the same day concerning a signature on the contract, but said nothing about progress on the visa application.

[24] Ms Marica returned to New Zealand on about 19 September 2016.

[25] Between 20 and 27 September 2016, Ms Marica, Mr Gimranov, the staff and the complainant exchanged emails concerning work visa forms, supporting documents and other information required for the visa applications of family members.

[26] On 28 September 2016, the complainant sent another email to Ms Marica, Mr Gimranov and other staff expressing himself to be anxious and seeking a progress report on "the application for a Work Visa".

Ms Marica's emails to Immigration New Zealand and the complainant on 30 September 2016

[27] On 30 September 2016 at 12:36 am, Ms Marica sent an email to Immigration New Zealand requesting consideration of a s 61 work visa for the complainant. She had started an online visitor visa application on 25 August. However, she was under the impression that his visitor visa would expire on 6 September due to an error in their file records. She had later become unwell. Ms Marica said she took full responsibility for not contacting the immigration officer sooner and apologised. The complainant had since received an offer of employment, so he now sought the discretionary grant (under s 61) of a work visa in the work-to-residence category.

[28] Ms Marica sent an email to the complainant on 30 September 2016 at 1:33 am. This was the first communication to him about the fate of the visa application he thought was being made. She told him that she had started his visitor visa application online on 25 August, but the following day had left New Zealand. Upon arrival at the overseas destination, she encountered difficulties accessing the online application which led to her inability to file it before 3 September, the expiry date of his visa. The procedure in such a case was then to request a visa under s 61. This "turned out to be in our advantage" as she had asked for a work visa, instead of a visitor visa first before later seeking a work visa. She was still waiting for the government agency to confirm receipt of the request.

[29] Mr Gimranov sent an email to the complainant on 3 October 2016 seeking further information and payment of a fee.

[30] On 12 October 2016, Immigration New Zealand granted the complainant a work visa pursuant to s 61. It was valid until 12 April 2019.

[31] On the same day, 12 October 2016, Ms Marica met with the complainant and his partner. She recorded in the immigration consultancy's internal notes of the meeting that it concerned the work visa under s 61. She apologised for the delay in getting back to them and explained why. Ms Marica added that because the complainant was 56 years old, the work-to-residence work visa had been approved by waiving the age requirement.

COMPLAINT

[32] On about 19 August 2019, the complainant made a complaint against Ms Marica to the Authority. He alleged dishonest or misleading behaviour, negligence and a breach of the Code.

[33] The complainant alleged that there was no explanation from Ms Marica concerning the s 61 visa. He thought it was a talent visa and had been done that way as he needed an age waiver. Ms Marica had made it sound as if it was to his advantage, despite that not being the case. She was making an excuse for missing the date. Ms Marica did not tell him the true facts of what had happened or what that meant for him. She said she could not access her "RealMe" account, but she could have asked Mr Gimranov to make the application.

[34] The complainant considered that he had been deliberately misled. Ms Marica had been dishonest. She had also been negligent about the expiry date and did not keep him informed when she filed the application. He had just come to know that the request was to enable him to return to a legal status.

[35] The complainant further advised that he and his children had become unlawful in New Zealand again. According to Ms Alexander, his new licensed adviser, this was due to the mismanagement of their recent applications by another licensed adviser. As a result of the ongoing incompetence and dishonesty, the complainant said he was having to make a further s 61 application and one of the considerations would be how many times he had been illegal in New Zealand.

[36] The Authority wrote to Ms Marica on 6 December 2019, formally notifying her of the details of the complaint and inviting her explanation.

Explanation from Ms Marica

[37] Mr Moses, counsel for Ms Marica, replied to the Authority on 13 February 2020. According to counsel, Ms Marica acknowledged that she had not communicated to the complainant the reasons his visitor visa application was not filed on time. However, she had not intended to mislead him. There was no dishonest or misleading conduct.

Furthermore, she was entitled to rely on the entry in the immigration consultancy's client records relating to the visa expiry date. Her failure to double-check the date did not amount to a lack of due care.

[38] Counsel advised that Ms Marica accepted there were delays in filing the s 61 request. These were largely out of her control, as explained in her affirmation. It was acknowledged that Ms Marica had failed to obtain the complainant's informed instructions in relation to the s 61 request, as she did not inform him of his unlawful status and its significance.

[39] It was appreciated that when contrasting Ms Marica's communications with Immigration New Zealand and those with the complainant, it appeared as if she was telling two different stories. However, both explanations were correct.

[40] Ms Marica had tried to file the online application prior to the 3 September deadline but had not succeeded due to difficulties with the online portal. The initial difficulties with the portal had played a role and it turned out when she made further enquiries that the visa application was out of time. The differing accounts given to the government agency and to the complainant were the result of muddled communications and unclear writing and thinking, not an example of deliberately misleading or dishonest conduct. Ideally, Ms Marica ought to have explained the several factors that led to the missed deadline to both Immigration New Zealand and to the complainant. She had tried to overtly simplify things.

[41] Ms Marica was at the time, from August to October 2016, under huge personal and professional pressure. She had stopped work earlier due to the diagnosis of a serious illness. However, her now estranged husband, Mr Woodberg, had asked her to return temporarily as cover while the other licensed adviser, Mr Gimranov, was on leave. That was when she met the complainant and accepted his instructions to act on the visitor visa application in August 2016. She then joined Mr Woodberg on a marketing trip to South Africa. Once Mr Gimranov had lost his licence in September 2016, Ms Marica was the only person able to carry all of the immigration consultancy's case load. She did so having barely recovered from her earlier treatment, but had fallen ill with an unrelated condition in South Africa.[4]

[42] At the time of writing to both Immigration New Zealand and to the complainant, Ms Marica faced great stress. In this context, it could be accepted that her communications, while incomplete, were not intended to mislead or be dishonest.

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[4] A letter from Ms Marica's general practitioner (11 February 2020) provided to the Authority stated this was an upper respiratory infection with diarrhoea.

[43] As for the allegation of a breach of the obligation of due care in relation to the missed deadline, Ms Marica was relying on the immigration consultancy's record specifically created, likely by a fellow licensed adviser, for such visa processing purposes. While she now wished she had double-checked the entry at the time, it was neither possible nor required by the Code to cross-check all information all the time. Advisers must be able to rely on certain records, especially if there was nothing alerting them to their potential unreliability. There was nothing that should have alerted Ms Marica to the incorrect date.

[44] In terms of the failure to advise the complainant of his unlawful status, Ms Marica sent an email on 5 September 2016 asking Mr Gimranov to attend to the s 61 request with urgency.[5] She anticipated he would advise the complainant. She was then busy meeting potential clients and giving presentations in South Africa. Mr Gimranov did not, however, attend to the matter and in fact lost his ability to represent the complainant on 16 (actually 15) September 2016. Ms Marica subsequently returned to New Zealand on 19 September, unwell and needing medical attention. She partially attended to the matter by asking her assistant to request further information and documents from the complainant.

[45] It was accepted that Ms Marica had a professional obligation to tell the complainant about his unlawful status, to explain its significance, to provide the reasons for the visitor visa not having been lodged in time and to explain the proposed resolution (the s 61 request). Her failure to do so amounted to breaches of cls 1 and 2(e) of the Code. The situation Ms Marica found herself in, both during the trip to South Africa and following her return to New Zealand, provided several mitigating factors but not a full defence to the alleged breaches. Mr Moses would not though categorise her conduct as negligent, given the circumstances she found herself in.

[46] Counsel accepted that the complainant was entitled to have a visitor visa lodged in time and to have been given full information about his status, and what errors had caused it. Ms Marica felt she had managed to resolve the complainant's predicament and in fact she had achieved an extremely positive outcome for him. Instead of merely being granted a visitor visa, he was issued with a work visa valid for 30 months.

[47] The complainant did not know he was unlawfully in New Zealand for about five weeks in 2016. It would seem that he had become unlawful again, but any additional prejudice arose because of that and not because of the original unlawful status in 2016. It would be harsh to hold Ms Marica liable for the complainant's unlawful status in 2019.

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[5] The copy of the email sent to the Tribunal is dated 4 September 2016.

Affirmation of Ms Marica

[48] There is an affirmation in support from Ms Marica, affirmed on 28 February 2020. Ms Marica accepted that her communications with both the complainant and with Immigration New Zealand in September and October 2016 were not as clear as she thought at the time. While she apparently gave the complainant a different explanation as to why his visa had not been lodged in time, compared to that given to the immigration officer, she did not intend to mislead any of them.

[49] Ms Marica said in her affirmation that she had the complainant's best interests at heart when making the request for a s 61 visa, but accepted there was a delay in making that request. That was due to her absence overseas, to her illness and the result of the situation at the immigration consultancy with Mr Gimranov losing his licence. Ms Marica noted, however, that she achieved a very positive outcome for the complainant as he was granted a work visa akin to residence which was valid for 30 months, instead of the visitor visa that they had initially hoped to obtain. However, in achieving that result for the complainant, she did not follow a process compliant with her obligations under the Code.

[50] Ms Marica affirms that she obtained a certificate of proficiency in immigration law and practice from Massey University. She commenced work as a consultant at the immigration consultancy in January 2005, becoming a licensed immigration adviser on 26 February 2009. She did not control the immigration consultancy despite its owner being her now estranged husband, Mr Woodberg. Throughout her time there, she was only an employee, finally leaving in early 2017. She did not facilitate or condone his conduct.

[51] In March 2015, Ms Marica was diagnosed with a serious illness. During the following two years, she had treatment and major surgery. She was still being actively monitored for a return of the disease. She gradually ceased working, stopping in August 2015. Mr Gimranov, then a licensed adviser, took over her clients. However, as a result of a complaint against him, he lost his licence in September 2016. This required her to step in because she was the only person able to pick up the pieces.

[52] According to Ms Marica's affirmation, the allegation against her is that in an email sent to the complainant on 30 September 2016, she wrongly blamed difficulties with Immigration New Zealand's online portal for missing the filing deadline for his visa application. Conversely, in an email sent to Immigration New Zealand on the same day, she confirmed that an incorrect entry on the immigration consultancy's management system had led to the filing deadline being missed.

[53] In fact, said Ms Marica, both explanations were correct. She had attempted to file the application before the expiry date of 3 September 2016, but this was not possible because of difficulties with the portal. These were not uncommon at the time. She accepted that she did not mention to the complainant that the file date was wrong and that this contributed to the filing deadline being missed. Equally, she did not specifically state to Immigration New Zealand that she had problems with the online portal. Ms Marica acknowledged that she did not explain the entire context as well as she would have wished.

[54] The Authority had also alleged a lack of due care in not checking the date. Ms Marica did not believe that a busy immigration adviser could not rely on information about a visa expiry date placed on a file by a colleague. There was some information an adviser must be able to rely on, as a person could not check every piece of information.

[55] Ms Marica accepted that the complainant was not immediately told he had become unlawful in New Zealand and also that there was a delay in filing his s 61 request. She did, however, try to attend to it with some urgency. On 5 September 2016, she asked Mr Gimranov to attend to the s 61 request urgently. She had anticipated that he would inform the complainant of the situation. Her sentence in the email to him – "[Mr Gimranov] can mention that the reason why his visa expired is because of an error on our system…" – was possibly ambiguous. It could refer to what he would say in the s 61 request, whereas she expected him to explain that to the complainant. Some 11 days later, on 16 September 2016, he lost his licence. He had not attended to the matter before that.

[56] In the meantime, according to Ms Marica, she faced a heavy workload of meetings and presentations in South Africa and had fallen ill there with a separate illness. She returned on about 19 September and was slow to recover. Given her already compromised health, this had a significant impact on her ability to work. This led to further delays in filing the complainant's s 61 request. She realised that she should have checked that Mr Gimranov had informed the complainant about his unlawful status. Due to her health and pressure of work, she was not able to.

[57] As for the allegation that she breached cl 2(e) of the Code, Ms Marica accepted making a mistake in not obtaining the complainant's informed instructions. He would have been aware from the document requests that she was working on the matter, but she ought to have explained to him in writing the full context. She wrote to him advising that she had filed a s 61 request but did not explain what that meant. Ms Marica realised there existed a clear obligation under the Code to explain unlawful status and what a s 61 request entailed.

[58] Ms Marica believed that in substance she did a competent job for the complainant and his family in resolving their predicament, given the extremely positive outcome for him. She cared about her work as an immigration adviser and realised the importance of maintaining current knowledge and having good processes. She had for that reason enrolled in Toi-Ohomai's diploma course starting in February 2020.

[59] Exhibited to the affirmation was a letter from Ms Marica's general practitioner (11 February 2020). It set out details of Ms Marica's serious condition diagnosed in March 2015, the treatment and her illness in South Africa. Her last operation or treatment for the serious illness was in April 2016. She was treated for the respiratory illness in September 2016 with antibiotics, but continued to feel tired and weak.

Complaint referred to the Tribunal

[60] The Registrar referred the complaint to the Tribunal on 21 May 2020, alleging that:

(1) Ms Marica's conduct satisfies the statutory ground of dishonest or misleading behaviour, by stating to the complainant that the renewal application had missed the expiry date of his visitor visa due to difficulties with the online application, when actually it appears to have been due to an error in the immigration consultancy's file record; and

(2) Ms Marica's conduct satisfies the statutory ground of negligence, or alternatively she failed to conduct herself with due care and in a timely manner in breach of cl 1 of the Code and failed to obtain the complainant's informed instructions in breach of cl 2(e) of the Code, by:

(i) failing to recognise that the visa expiry date was incorrect on the file;

(ii) failing to file the visitor visa application before the expiry of the preceding visa, which resulted in the complainant becoming unlawful;

(iii) failing to inform the complainant that he was unlawfully in New Zealand for a significant period of time;

(iv) failing to obtain the complainant's informed lawful instructions to lodge the s 61 request and failing to explain the implications of such a request;

(v) failing to lodge the s 61 request in a timely manner; and

(vi) failing to make other arrangements for the complainant to be properly represented when Ms Marica had a heavy workload and was suffering ill health.

JURISDICTION AND PROCEDURE

[61] 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.

[62] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.[6]

[63] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.[7] It has been established to deal relatively summarily with complaints referred to it.[8]

[64] 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.[9]

[65] The sanctions that may be imposed by the Tribunal are set out in the Act.[10] The focus of professional disciplinary proceedings is not punishment but the protection of the public.[11]

[66] 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.[12]

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[6] Immigration Advisers Licensing Act 2007, s 45(2) & (3).
[7] Section 49(3) & (4).
[8] *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].
[9] Section 50.
[10] Section 51(1).
[11] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).
[12] *Z v Dental Complaints Assessment Committee*, above n 11, at [97], [101]–[102] & [112].

[67] The Tribunal has received from the Registrar the statement of complaint (21 May 2020), with a file of paginated supporting documents.

[68] There is a statement of reply (31 July 2020) filed by Ms Toni Alexander, a licensed immigration adviser, representing the complainant.

[69] Mr Moses, on behalf of Ms Marica, has filed a statement of reply (9 July 2020).

[70] No party requests an oral hearing.

ASSESSMENT

[71] The Registrar relies on the following provisions 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.
>
> **Client Care**
>
> 2. A licensed immigration adviser must:
>
> …
>
> e. obtain and carry out the informed lawful instructions of the client, and
>
> …

(1) Ms Marica's conduct satisfies the statutory ground of dishonest or misleading behaviour, by stating to the complainant that the renewal application had missed the expiry date of his visitor visa due to difficulties with the online application, when actually it appears to have been due to an error in the immigration consultancy's file record; and

[72] The Registrar alleges that Ms Marica may have been dishonest or misleading in her explanation to the complainant for failing to file a visitor visa application on time (by 3 September 2016) and hence the need for a discretionary s 61 application.

[73] Ms Marica told the complainant on 30 September 2016 that she had encountered difficulties with accessing the online application (commenced on 25 August) which led to an inability to file the application before 3 September. In such a case, according to her email to the complainant, a request had to be made under s 61.

[74] However, notes the Registrar, Ms Marica had a different explanation for the failure to make a timely application in her email to Immigration New Zealand about one hour earlier. She told the government agency that, although starting the online application on 25 August, she was under the impression that the complainant's visa would expire on 6 September, due to an error in their internal records. She made no mention of any difficulty with the online portal.

[75] In her affirmation produced to the Authority, Ms Marica says both explanations are correct. She did encounter difficulties with the online portal in lodging the visa application and there was a wrong entry in their internal records. She says she merely tried to oversimplify things in her emails to the complainant and Immigration New Zealand. She acknowledges both should have been given a complete explanation.

[76] As the Registrar points out, Ms Marica has not provided any corroborative evidence of difficulties with the online portal. Furthermore, not only did she not mention such difficulties in her emails with Immigration New Zealand, she made no reference to them in her emails with the immigration consultancy's staff, such as that on 4 (or 5) September 2016. Ms Marica informed the staff in the email that the online application had been started on 25 August and she had planned to lodge it on 4 September, but their record was wrong. She made no mention of any attempt to complete it before the expiry date of 3 September.

[77] Nonetheless, I will take Ms Marica at her word that the dual reasons given in her affirmation are true. She will be given the benefit of the doubt. I accept therefore that she tried to lodge it before 3 September but encountered difficulties with the online portal, and that their internal records wrongly showed 6 September as the expiry date.

[78] That does not though dispose of the allegation that Ms Marica misled the complainant by omitting to inform him of the incorrect file entry. That was plainly the primary reason for the failure to lodge the application on time.

[79] Not only was it the only reason she gave Immigration New Zealand, but the online difficulties could have been overcome in any number of ways. For example, she could have contacted Immigration New Zealand's contact centre, or asked Mr Gimranov or another staff member (under her supervision) to file the application perhaps in hard copy. Of course, the reason she did not do so was because she did not regard the online problem as urgent due to her misapprehension as to the visa expiry date. In other words, the overriding reason for failing to lodge the application on time was the mistaken file record, but Ms Marica never told the complainant about this.

[80] Ms Marica had a number of opportunities to advise the complainant of the true reason. The email of 30 September (which appears to be the first time he was told of the s 61 request) was not her only opportunity to communicate with him at this time. She failed to provide a full explanation to him on her return to New Zealand on 19 September, despite his earlier emails seeking an update and her communications with him as soon as she got back about various family visas.

[81] Nor did Ms Marica tell the complainant about the error when they met on 12 October 2016. The reason for the s 61 request for a discretionary visa must have been canvassed. Ms Marica should have been candid at that meeting and given a truthful explanation and not pretended to the complainant, as he says in his complaint, that he was led to believe a discretionary visa was needed due to his age.

[82] I will give Ms Marica the benefit of the doubt as to the claimed context for the sentence in the 4 September email to the staff ("[Mr Gimranov] can mention … an error in our system"). She says she expected Mr Gimranov to tell this to the complainant. The email does not actually deal with communicating with the complainant at all. It is about making an urgent s 61 request to Immigration New Zealand.

[83] While Ms Marica may have originally intended that the complainant be told about the error and that Mr Gimranov would have done so, it will have been clear to her from the complainant's multiple emails seeking information (which do not mention the error) and particularly from the meeting on 12 October 2016, that he had not been informed of the error in their records. Yet she failed to tell him.

[84] I accept Mr Moses' submission that cogent evidence is needed to make a finding of dishonest or misleading conduct. I find that Ms Marica cannot have innocently overlooked, on all of these multiple occasions interacting with the complainant, of informing him as to the error in their records. It is not explained by pressure of work or an initial belief that Mr Gimranov should have told him.

[85] I acknowledge that Ms Marica was diagnosed with a serious illness in early 2015 and was still being treated in April 2016, some five to six months before these events. As she was slowly regaining her strength, she suffered a respiratory illness and diarrhoea. Understandably, her health affected her energy levels and perhaps even her focus (to some extent). However, in the circumstances here with the multiple interactions with the complainant, her health is not an adequate explanation for omitting to disclose the error in their record.

[86] The concealment of the error was deliberate. That is the only plausible explanation. There was an element of deception. I find Ms Marica's behaviour to be misleading. The first head of complaint is upheld.

(*2*) *Ms Marica's conduct satisfies the statutory ground of negligence, or alternatively she failed to conduct herself with due care and in a timely manner in breach of cl 1 of the Code and failed to obtain the complainant's informed instructions in breach of cl 2(e) of the Code, by:*

(i) failing to recognise that the visa expiry date was incorrect on the file;

(ii) failing to file the visitor visa application before the expiry of the preceding visa, which resulted in the complainant becoming unlawful;

(iii) failing to inform the complainant that he was unlawfully in New Zealand for a significant period of time;

(iv) failing to obtain the complainant's informed lawful instructions to lodge the s 61 request and failing to explain the implications of such a request;

(v) failing to lodge the s 61 request in a timely manner; and

(vi) failing to make other arrangements for the complainant to be properly represented when Ms Marica had a heavy workload and was suffering ill health

[87] I will assess the second head of complaint in terms of the alleged Code breaches first.

Particulars (i) and (ii)

[88] Starting with cl 1 of the Code, it is alleged by the Registrar that Ms Marica failed to conduct herself with due care and in a timely manner in a number of respects.

[89] The first alleged instance of such a failure is that Ms Marica did not recognise that the complainant's visa expiry date of 6 September on the file was incorrect, since his visa was due to expire on 3 September. The second alleged instance of a failure by her is that she did not file the visitor visa application by the visa expiry date. They are really just different ways of describing the same conduct, or perhaps that the first failure is subsumed by the second.

[90] Ms Marica acknowledges that their file record was incorrect but says she must be entitled to rely on a record created by a staff member, which may have been another licensed adviser, Mr Gimranov. Her counsel says that there was nothing to alert her to an error in the record.

[91] I accept that a licensed adviser is entitled to rely on certain records created by staff, such as most biographical details (but not necessarily the date of birth or full passport name) or an employment history. However, some records are so critical they must be checked if that is practical, including the expiry date of a visa. The immigration consultancy's file should have contained a copy of Immigration New Zealand's letter of 3 June 2016 notifying the expiry date of 3 September 2016. She could have checked this when she commenced the online application on 25 August 2016. She had ample time to do so.

[92] Moreover, contrary to Mr Moses' contention otherwise, Ms Marica was alerted to the possibly incorrect file record as the complainant sent her Immigration New Zealand's email of 11 August 2016 advising the correct visa expiry date of 3 September. Indeed, it would appear to have been that communication to her by the complainant which led to the meeting on 25 August and immediately commencing the online application.

[93] In failing to recognise that the visa expiry date on the record was incorrect and therefore not filing the renewal application on time (leading to the complainant becoming unlawful), Ms Marica failed to conduct herself with due care and in a timely manner. This is a breach of cl 1 of the Code.

Particulars (iii) and (iv)

[94] The third and fourth instances of alleged failure on Ms Marica's part are also really just different ways of describing the same conduct. At the very least, they overlap.

[95] It is alleged in the fourth particular that Ms Marica failed to obtain the complainant's *informed* instructions to lodge the s 61 request. Indeed, she did not even inform him that the application would be made under s 61 which provides only for a discretionary grant, until about one hour after actually making the request (email sent to the complainant at 1:33 pm on 30 September 2016). As no objection was made by the complainant to this course of action, I will treat this email as a retrospective obtaining of instructions to file the s 61 request.[13]

[13] Ms Marica should have obtained a written agreement from the complainant to file this request – see cls 18(a), (c) & 19(e) of the Code.

[96] However, those retrospective instructions were not *informed*. Ms Marica had not told the complainant that such a request was necessary because the expiry of his visa meant he was unlawfully in New Zealand and could not therefore make a standard visa application. That was the real reason for the s 61 request, not his age.

[97] Ms Marica accepts that she did not inform the complainant at any material time that as a result of missing the deadline, his immigration status had become unlawful on 4 September 2016 or of the consequences of such a status. The Tribunal has previously found that an adviser has a "strong duty" to inform a client of unlawful status and of its consequences.[14] The complainant's (deemed) instructions to file the s 61 request were not therefore informed instructions. The failure to obtain such instructions is a breach of cl 2(e) of the Code.

Particular (v)

[98] The fifth instance alleged is the failure to lodge the s 61 request in a timely manner.

[99] Ms Marica became aware of the complainant's unlawful status on 4 September 2016, but did not lodge the s 61 request until 30 September 2016. A period of almost four weeks to lodge the request, including a lengthy 11 days after she had returned to New Zealand, was too long, given the complainant's unlawful status. Time is of the essence when the client is unlawful. The longer the person remains in this country unlawfully, the graver the prejudice to future immigration prospects, affecting both the complainant and his family.

[100] Ms Marica was in South Africa on 4 September when she learned of the complainant's unlawful status. Recognising the urgency, she immediately asked Mr Gimranov and the staff to attend to a s 61 request. This was a reasonable step, noting that Mr Gimranov was then licensed, at least until 15 September.

[101] However, Ms Marica does not appear to have followed up with Mr Gimranov or the staff as to progress before returning to New Zealand on 19 September. She says she was busy in South Africa with other matters and had become unwell.

[102] While it was reasonable to ask another licensed adviser to attend to the request, it is to be remembered that Ms Marica had become the complainant's adviser from about 25 August. She was responsible to him, having accepted the authority to act that day. Notwithstanding the client agreement and whatever were the contractual obligations

[14] *Sharma v Manchanda* [2018] NZIACDT 2 at [50] & [52].

owed by the immigration consultancy (or by Mr Gimranov as the licensed adviser who signed the agreement), Ms Marica assumed full professional obligations to the complainant on 25 August. They were owed personally by her to the complainant.[15] They were not the collective obligations of the immigration consultancy.

[103] Following her return, Ms Marica was active in the period from 20 September as information was gathered and the supporting documents collated, though there is no indication from the emails that the matter was being treated with any urgency.

[104] It is contended that Ms Marica was under great stress as a result of work pressures (Mr Gimranov had by then become unlicensed), the respiratory infection she was then suffering, as well as lingering tiredness and weakness from her various illnesses.

[105] I have already accepted that these reasons are genuine, but some 26 days for a s 61 request is far too long, given the complainant's unlawful status. The complainant would have known nothing of her workload or personal circumstances. They are matters for her to manage while discharging her professional responsibilities.[16] They do not reduce her responsibilities to the complainant.

[106] I find that Ms Marica did not attend to the s 61 request in a timely manner. This is a breach of cl 1 of the Code. However, the reasons for the delay will be relevant to the sanctions stage of this process.

Particular (vi)

[107] The final professional breach was Ms Marica's alleged failure to make other arrangements for the complainant to be properly represented given her heavy workload and ill-health.

[108] This is really an alternative to the fifth instance of wrongdoing, the failure to lodge the request in a timely manner. Ms Marica rightly took responsibility for fixing the complainant's predicament, but has been found to be wanting in her execution of that responsibility. It would not be appropriate at the same time to find that she should have sent the complainant to another adviser.

[109] In any event, there was the risk that it would take time to find an adviser who was prepared to act on the instructions urgently (bearing in mind that she was then in South Africa, so it would have been difficult for her to have personally found another adviser).

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[15] *Sparks*, above n 8, at [22], [26] & [34].
[16] *TI(G)M v Hanning* [2020] NZIACDT 1 at [71]–[72].

Furthermore, the complainant would have had to explain his circumstances and provide all the same documents and information again to another adviser. It is to Ms Marica's credit that she took responsibility for fixing a problem created by her (failing to file the application on time). It would be somewhat harsh in the circumstances to find that she additionally misconducted herself in failing to send the complainant elsewhere.

[110] The sixth instance of alleged misconduct is dismissed.

Negligence

[111] Having found various breaches of cls 1 and 2(e) of the Code, I agree with Mr Moses that the alternative complaint of negligence can be dismissed.

OUTCOME

[112] I uphold the complaint. Ms Marica was misleading in concealing from the complainant the error in the file record. Additionally, she also breached cls 1 and 2(e) of the Code.

SUBMISSIONS ON SANCTIONS

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

[114] In the complaint made to the Authority, Ms Alexander states that the complainant had become unlawful again in New Zealand due to mismanagement of the visa process by another licensed adviser. She was making a further s 61 request, but pointed out that his earlier unlawful status (the fault of Ms Marica) would impact on the current request.

[115] It is very unfortunate that a succession of licensed advisers have poorly served the complainant, but I agree with Mr Moses that any consequences for him and his family of the more recent unlawful status have nothing to do with Ms Marica. The earlier period of unlawful status was "waived" by Immigration New Zealand when Ms Marica successfully obtained the s 61 work visa. She cannot be blamed if the agency now looks at the cumulative effect of multiple periods of unlawfulness.

[116] I will also take into account in assessing sanctions that to some extent Ms Marica is correct in contending that the eventual outcome of her service was positive in the sense that the complainant obtained a work visa for 30 months, rather than just another visitor visa.

[117] A timetable is set out below. Any request that Ms Marica 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.

Timetable

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

(1) The Registrar, the complainant and Ms Marica are to make submissions by **26 February 2021**.

(2) The Registrar, the complainant and Ms Marica may reply to submissions of any other party by **12 March 2021.**

ORDER FOR SUPPRESSION

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

[120] There is no public interest in knowing the name of Ms Marica's client.

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

D J Plunkett
Chair

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