

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

Decision No: [2013] NZIACDT 1

Reference No: IACDT 032/11

IN THE MATTER

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

BY

Immigration Advisers Authority

Authority

BETWEEN

Sylvia Buarque Schiller-Cooper

Complainant

AND

Marylou (Mia) Lozano

Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 8 January 2013

DECISION

Introduction

- [1] Ms Lozano is a licensed immigration adviser. She was engaged to assist Ms Schiller-Cooper's mother, who was seeking a residence visa and, in the interim, a temporary permit to remain in New Zealand.
- [2] In the course of the engagement, there were some delays and miscommunication. The conclusion reached by the Tribunal is that they were relatively minor matters that do not justify an adverse disciplinary finding.
- [3] Ms Schiller-Cooper's mother did ultimately receive a residence visa and in that respect, the services provided were entirely satisfactory. However, towards the end of the engagement, the relationship between Ms Schiller-Cooper and Ms Lozano broke down, and Ms Schiller-Cooper lodged materials with Immigration New Zealand without Ms Lozano's assistance.
- [4] It took some time for Ms Schiller-Cooper's mother to receive the residence visa, and her entitlement to stay in New Zealand became an issue. The most satisfactory solution would have been for her to apply for a particular category of visitor's visa applicable to parents of persons living permanently in New Zealand.
- [5] Ms Lozano was not aware of this class of visa and failed to provide the appropriate advice. Ms Schiller-Cooper did her own research, ascertained this was the best solution, and completed the forms to apply for such a visa herself, on her mother's behalf. Ms Lozano still did not understand the relevant policy.
- [6] Ms Schiller-Cooper complained to Ms Lozano regarding her failure to give appropriate advice. Ms Lozano wrote a letter in response stating that the policy changed and the visa was not available at the relevant time. This letter was misleading and contained incorrect information.
- [7] The Tribunal has concluded that Ms Lozano did not understand the policy that was available for Ms Schiller-Cooper's mother. The alternative would have been to conclude that the letter was a deliberate attempt to misrepresent the position to Ms Schiller-Cooper.
- [8] Accordingly, the Tribunal finds that Ms Lozano was negligent and breached the Licensed Immigration Advisers Code of Conduct, as the options for temporary visas were elementary matters for which Ms Lozano needed to give proper and effective advice. It was something she failed to understand and address even when her client pointed it out to her.
- [9] In addition, the Tribunal upholds the complaint in relation to the letter in which Ms Lozano responded to Ms Schiller-Cooper's complaint, as it was misleading.
- [10] Another aspect of the complaint was that Ms Lozano failed to attend a meeting. The failure to attend was in itself a relatively minor matter. However, Ms Lozano misrepresented the circumstances to the Authority and/or her client. This aspect of the complaint has also been upheld.
- [11] Ms Lozano also failed to respond responsibly to the Tribunal's processes. Such conduct is not an aspect of the complaint itself. However, the Tribunal has made findings in relation to this conduct, as the findings are potentially relevant to the appropriate sanctions.
- [12] The complaint has been upheld on the basis of breaches of the Code, and misleading behaviour.

The Complaint

Preliminary

- [13] Ms Lozano is a licensed immigration adviser. Ms Schiller-Cooper engaged Ms Lozano to assist with seeking a visitor's visa and then a residence visa for her mother, who is a citizen of Brazil. An agreement for the provision of that service was entered into on 23 September 2009.

- [14] The agreed fee for the work was \$2,000, of which \$500 was paid initially, with the balance due when the residence visa was issued.
- [15] Ms Schiller-Cooper complained that:
- [15.1] There were communication and administrative failures on the part of Ms Lozano.
- [15.2] Ms Lozano did not assist with, or provide appropriate advice regarding, the option of a Parent and Grandparent Multiple Entry Visitor Visa ("Parent Visa"). That resulted in expense and delay. She also said other ongoing advice was deficient.
- [15.3] Ms Lozano finalised the residence visa application herself, as Ms Lozano failed to provide the service satisfactorily.
- [15.4] An appropriate fee for the service received was the \$500 paid initially.
- [15.5] Ms Lozano failed to deal with the complaint appropriately, including failing to attend a meeting arranged for 9 June 2011.
- [16] Ms Schiller-Cooper developed the particulars of the various grounds of complaint in some detail. The key elements follow.

Communication and administration

- [17] Ms Schiller-Cooper complained of various administrative issues, in particular an incorrect address being held for her and it not being corrected promptly when she notified Ms Lozano's office.
- [18] She also complained Ms Lozano did not respond to an email of 16 June 2010 until 30 June 2010. Ms Lozano explained the delay as due to being "on and off work" due to family reasons. Ms Schiller-Cooper was concerned, as no mobile telephone number had been supplied and the issue she was pursuing concerned the option of a Parent Visa.
- [19] In October and early November 2010, Ms Lozano was slow to respond to queries relating to whether medical examinations were satisfactory.
- [20] On 19 March 2011, Immigration New Zealand sent a letter to Ms Lozano saying that a residence visa for Ms Schiller-Cooper's mother had been approved in principle. The letter was not delivered.
- [21] On 29 March 2011, Ms Schiller-Cooper inquired regarding progress and was told by Ms Lozano that "everything was under control". Ms Schiller-Cooper was concerned that an inquiry should have been made to Immigration New Zealand and if it had, the result would have been that the approval in principle would have been discovered. Ms Schiller-Cooper contacted Immigration New Zealand herself and discovered the application had already been approved in principle.
- [22] At that point Ms Schiller-Cooper lost confidence in Ms Lozano and decided to complete the process herself, which required addressing the various administrative issues relating to the issue of the residence visa.
- [23] Ms Schiller-Cooper said increased shipping costs and additional storage due to the delay in completing the visa process amounted to \$1,080.33.

Lack of accurate ongoing advice

- [24] Ms Schiller-Cooper's mother had been in New Zealand for an extended period on a visitor's permit and it appeared she was unlikely to be able to remain here until she received a residence visa. The visitor's permit allowed only a limited stay in New Zealand.
- [25] Ms Lozano suggested that Ms Schiller-Cooper's mother should enrol in an English language course and seek a student visa to extend her stay. Ms Schiller-Cooper made her own

inquiries and ascertained that a Parent Visa was a better option. Ms Lozano incorrectly advised that a full medical would be required for a Parent Visa and incorrectly advised the length of time permitted on a Parent Visa.

- [26] The incorrect advice relating to the need for full medical reports for a Parent Visa resulted in expenses of \$400 to obtain the reports and \$300 for the cost of Ms Schiller-Cooper not being at work. Ms Schiller-Cooper had to attend with her mother when the medical examinations were undertaken, as she did not speak English and required assistance.

Failing to meet to deal with complaint

- [27] Ms Schiller-Cooper arranged to meet with Ms Lozano to discuss her complaint; however, Ms Lozano failed to attend the meeting.
- [28] Ms Schiller-Cooper said that her own work in undertaking research of the Parent Visa entitlement and other aspects of her mother's immigration status, in addition formulating the complaint, required some 20 hours of her time. She also had some costs for printing and photocopying. She estimated the value at \$395.

The Response

- [29] Ms Lozano responded to the complaint, initially to Ms Schiller-Cooper and later in an email dated 5 October 2011 addressed to the Authority. The key elements in her response were:
- [29.1] The application was successful and Ms Schiller-Cooper only took over her mother's immigration affairs after the approval in principle of the residence visa.
- [29.2] The Parent Visa was not within the scope of the work agreed to be provided.
- [29.3] While not complaining at the time, Ms Schiller-Cooper had added a number of trivial criticisms when she made the complaint.
- [29.4] Ms Lozano has tried to negotiate a resolution, but has found little in the way of a constructive response; she has concluded Ms Schiller-Cooper's main objective is to avoid paying the agreed fee.
- [30] On 9 June 2011 when Ms Lozano was to meet with Ms Schiller-Cooper to discuss the complaint, she was in the process of shifting offices. She was late for the meeting and accepts responsibility for that. When she arrived, she found Ms Schiller-Cooper had left. Ms Lozano offered to meet subsequently, but received no reply from Ms Schiller-Cooper.
- [31] Mr Chang from the practice where Ms Lozano works contacted Ms Schiller-Cooper regarding outstanding fees on 12 July 2011, and ascertained Ms Schiller-Cooper was dissatisfied with the service. Mr Chang drew Ms Schiller-Cooper's attention to the Authority's dispute guidelines.
- [32] When Ms Schiller-Cooper's complaint was received in writing, Mr Chang responded by reviewing the file and reporting on his conclusions. The key points he raised in response were:
- [32.1] The concerns regarding the address were a minor administrative issue, and nothing turned on it.
- [32.2] Advice regarding the possibility of Ms Schiller-Cooper's mother seeking other visas to extend the time allowed in New Zealand until the residence application was processed was outside of the scope of Ms Lozano's work. The work agreed related simply to applying for a visitor's visa, and then proceeding with the residence visa.
- [32.3] The Parent Visa regime was not in effect until November 2010, and it was not reasonable to expect Ms Lozano to advise on possible future policy. Ms Schiller-Cooper was looking at the potential policy in March 2010.

- [32.4] Ms Schiller-Cooper personally undertook the application for a Parent Visa and Immigration New Zealand would not deal with Ms Lozano in relation to that application.
- [32.5] In relation to the delays in communication, the response to emails could vary due to workload and made no difference to the processing of the application. Mr Chang suggested the level of service expected by Ms Schiller-Cooper was very high, and could be expected from a legal office or large immigration firm, whereas Ms Lozano was working in a small business.
- [32.6] In relation to notification of the approval in principle, Ms Lozano made the judgment that the processing of the visa was in the normal timeframe, so she should not contact Immigration New Zealand when Ms Schiller-Cooper enquired on the status of her visa. Mr Chang said it would have amounted to “pestering” Immigration New Zealand had Ms Lozano made inquiries in the manner Ms Schiller-Cooper appeared to expect.
- [32.7] Ms Schiller-Cooper had not told Ms Lozano that she wished to avoid her mother returning to Brazil; rather Ms Lozano was simply informed that this was to occur and had no reason to think it was a problem, although Ms Lozano had identified that she was seeking options for being able to stay in New Zealand longer under a temporary visa while the residence visa was sought.

The Tribunal’s Minutes and Responses

Tribunal’s First Minute

- [33] On 27 June 2012, the Tribunal issued a Minute. The Minute indicated that it was subject to the parties having the opportunity of responding with further material. On the material held at that point, the Tribunal:
- [33.1] would potentially find the complaint would not be upheld in relation to the provision of professional services; but
- [33.2] had concerns regarding the position of Mr Chang who had a role in responding to the complaint.
- [34] Ms Schiller-Cooper responded to the First Minute. She provided further information regarding inadequacies in communication. She also said that Mr Chang was demanding that she pay the balance of the fee and told her he would take the matter to the Disputes Tribunal rather than allow Ms Schiller-Cooper to take the matter to the Authority.
- [35] Ms Schiller-Cooper also said that Ms Lozano had a general instruction in relation to her mother’s immigration opportunities, including her status while an application for residence was pursued.
- [36] The details of Ms Schiller-Cooper’s response and the potential implications were recorded in the Tribunal’s Second Minute.
- [37] Ms Lozano did not respond to the Tribunal’s First Minute, despite being asked for information in that Minute.

Tribunal’s Second Minute

Failure to answer the Tribunal’s question

- [38] The Tribunal issued a Second Minute that addressed Ms Lozano’s failure to respond to the questions asked of her. This Minute (issued on 15 August 2012) pointed out that Ms Lozano had not answered the question asked of her.
- [39] This minute observed that the issue was potentially a serious matter, as Mr Chang’s role, to which the question was directed, potentially raised serious issues of professional misconduct.

- [40] Ms Lozano was put on notice that if she did not answer the question, she potentially faced a finding that she was responsible for Mr Chang's conduct, and that involved not dealing appropriately or adequately with the complaint and would amount to a breach of the Code and the Immigration Advisers Licensing Act.

The issues raised by Ms Schiller-Cooper in her response to the First Minute

- [41] The Second Minute also identified the material that Ms Schiller-Cooper had raised in her response to the first Minute, and put Ms Lozano on notice of the following:

- [41.1] The written record was not clear in respect of Ms Lozano's role concerning temporary permits for Ms Schiller-Cooper's mother. Ms Schiller-Cooper contended it was understood between her and Ms Lozano that Ms Lozano had agreed to provide full professional support in respect of temporary permits. Ms Lozano was invited to comment on:

[41.1.1] the adequacy and accuracy of the written agreement (including the requirements of the Code); and

[41.1.2] what the arrangements were in relation to temporary permits, and her scope of responsibility as the instruction developed.

- [41.2] Assuming temporary permits were within the scope of her professional engagement, Ms Lozano then potentially failed to give accurate advice in respect of medical requirements and the entitlement to a Parent Visa. Whether or not she contests the scope of her professional engagement, Ms Lozano was invited to comment on:

[41.2.1] what advice she gave and whether it was accurate; and

[41.2.2] if not accurate, how that arose, and any extenuating circumstances.

- [41.3] Ms Schiller-Cooper pointed to administrative failures. From the perspective of the consequences she had observed, these were:

[41.3.1] Ms Lozano failed to provide services in a timely manner, having regard to Ms Schiller-Cooper's mother having been in New Zealand for 12 months on a visitor's permit. She ought to have taken the necessary steps to ensure she was reasonably available given the need to take action in such circumstances, and that the scope of her engagement covered all work relating to temporary permits.

[41.3.2] Ms Lozano failed to have adequate administrative systems in place to manage correspondence, including the transmission of personal documents.

Ms Lozano was provided the opportunity of identifying whether she accepted the claims, and if so, how they occurred.

- [41.4] Ms Schiller-Cooper addressed the question of whether on 29 March 2011 Ms Lozano should have approached Immigration New Zealand. Ms Schiller-Cooper says this was in a context where she should have expected a decision soon after 24 February 2011, the date at which Immigration New Zealand told her it was being finalised. Accordingly, inquiries should have been made at this point. Ms Lozano was given the opportunity to comment on the circumstances from her perspective.

- [41.5] Ms Schiller-Cooper had also raised a serious and concerning issue in relation to how Ms Lozano addressed her complaint that included inconsistent explanations regarding the meeting of 9 June 2011, which Ms Lozano failed to attend. The Minute addressed the inconsistent explanations in detail.

- [42] Ms Lozano responded to the Second Minute and the Tribunal issued a Third Minute recording the circumstances as they stood at that point.

The Tribunal's Third Minute

[43] Ms Lozano's response to the Second Minute was contained in an email of 20 August 2012. It was not satisfactory. The response failed to engage with the details of the issues raised. Instead, responses inappropriate in relation to the issues raised permeated the email, such as:

[43.1] "I will be prone to the occasional human error";

[43.2] unsubstantiated criticism of Ms Schiller-Cooper such as: "some people just can't be satisfied"; and

[43.3] the inconsistent explanations for the 9 June 2011 meeting were "an unintentional error".

[44] The Third Minute of 28 September 2012 accordingly put Ms Lozano on notice of the gravity of the situation as it had developed.

Failure to answer the question in the First Minute

[45] Ms Lozano said in her response to the Second Minute:

"Although I had reviewed the original minute in detail, I did not realise at the time that questions were addressed to me. For some reason, at the time of viewing, I got it in my mind that minutes are often informational so it didn't register that I had to respond to the questions."

[46] The relevant text and formatting of the first Minute was:

"Question for Ms Lozano

[62] The Tribunal seeks the following information from Ms Lozano pursuant to section 49(4)(a) of the Act:

[62.1] Was Mr Chang a licensed immigration adviser at the time he was involved in dealing with Ms Schiller-Cooper's complaint?

[62.2] If not, why was he involved in dealing with the complaint? And, why was Mr Chang qualified or entitled to engage himself with the complaint?

[62.3] What role did she have in the report Mr Chang prepared as a response to Ms Schiller-Cooper's complaint?

[62.4] Does she agree with that report, and if not in what respects?

[62.5] How did she ensure she took professional responsibility for dealing with Ms Schiller-Cooper's complaint?"

[47] The Third Minute put to Ms Lozano that it was beyond belief her statement to this Tribunal was true. It appeared either she had dishonestly claimed she reviewed the Tribunal's Minute in detail, or dishonestly said she did not think she was expected to answer the question.

[48] Ms Lozano was reminded she is a licensed professional and should appreciate the importance of her communications with this Tribunal. She was expected, and required, to present the whole truth; nothing less would be accepted.

[49] Ms Lozano also indicated in her email that Mr Chang was "referencing policy completely under my direction". Accordingly, it appeared that with her consent and direction an unlicensed person was potentially giving immigration advice as defined in the Act. That advice was not correct, and it bore on an important aspect of the complaint.

[50] In addition, the explanations regarding Ms Lozano's reasons for not attending a meeting on 9 June 2011 did not satisfactorily explain inconsistent claims regarding that event. The

inconsistent statements were not obviously reconcilable without Ms Lozano or Mr Chang making false statements.

The Gravity of Ms Lozano's Situation

[51] The Tribunal informed Ms Lozano that she had put herself in a situation where the Tribunal had concerns regarding her integrity. Further, her response to this complaint had been unsatisfactory and had raised new concerns regarding her conduct.

[52] Ms Lozano was told of the gravity of the situation, and invited to reflect on the observations of the High Court in *ZW v Immigration Advisers Authority* [2012] NZHC 1069 at [41]:

“I consider it would be foolish for any immigration adviser who contests serious aspects of a complaint not to seek some form of legal advice. The consequences of complaints being upheld may well be severe. In passing the Act, Parliament has clearly intended to provide a system of competency, standards, and a Code of Conduct to clean up an industry which hitherto had been subject to much justified criticism. The Registrar and Tribunal have a Parliamentary mandate to enforce standards.”

Ms Lozano's Response to the Third Minute

[53] Ms Lozano claimed that her assertion that she had carefully read the First Minute and not believed she was required to respond (refer para [46] above) was true. It was the result of work pressure and it should be accepted as she had no motive to provide a false explanation.

[54] She provided suggestions to the effect that the Tribunal ought to change its procedures and actively solicit responses after issuing a Minute.

[55] She appeared to accept there were inconsistent explanations for her failure to attend the 9 June 2011 meeting, and some deficiency in not responding to the Tribunal's question. However, both were “human errors, nothing more”.

[56] Ms Lozano expressed her: “absolute conviction that I have done nothing wrong and that **we are the ones who have been wronged**”.

[57] Ms Lozano reiterated that the complaint is motivated by Ms Schiller-Cooper seeking to evade payment of the fees she is required to pay.

[58] Ms Lozano had not previously been subject to a complaint; she was a “completely honest adviser with the high standards of integrity.”

[59] Mr Chang did not provide any immigration advice; he wrote to Ms Schiller-Cooper under Ms Lozano's direction and he copied and pasted material supplied by Ms Lozano.

[60] The Authority undertakes “an annual audit of my entire business”.

The Issues

[61] The issues to resolve are:

[61.1] Did Ms Lozano communicate and deal with administrative matters professionally and appropriately? It is necessary to consider the factual issues in context and then measure them against the professional standards required.

[61.2] Did Ms Lozano provide appropriate advice and professional services relating to the potential for Ms Schiller-Cooper's mother to seek a Parent Visa? At issue are the services Ms Lozano was required to provide. Ms Schiller-Cooper complains that the Parent Visa was an option she should have been told of, and Ms Lozano says she did not receive instructions that would lead to that advice.

- [61.3] Has Ms Lozano set or charged fair and reasonable fees, having regard to the services delivered and the claimed shortcomings in the delivery of professional services?
- [61.4] Was Ms Lozano was a party to Mr Chang unlawfully giving immigration advice?
- [61.5] Has Ms Lozano addressed the complaint professionally? In particular:
- [61.5.1] Did Ms Lozano dishonestly misrepresent that she did not appreciate she was required to answer questions by this Tribunal?
- [61.5.2] Did Ms Lozano deal appropriately and professionally with Ms Schiller-Cooper when she made a complaint? That includes her use of Mr Chang to write a letter, and its contents.
- [61.5.3] Has Ms Lozano honestly accounted for her failure to attend a meeting arranged for 9 June 2011?

Decision

Administrative errors and inadequate communication

- [62] Ms Lozano appears to accept there were failures to keep her client informed, partly through administrative errors. Overall, there is a clear picture of Ms Schiller-Cooper demanding high standards and Ms Lozano excusing herself from high standards, as she practices in a small practice.
- [63] There is no merit in Ms Lozano's explanation of practising in a small practice. Licensed immigration advisers are individually licensed and it is their responsibility to work in an environment that meets minimum professional services. I am satisfied that some of the lapses failed to meet the standards expected of a licensed immigration adviser. The circumstances are outlined above at paras [17]–[23]. They involved incorrectly addressed correspondence, failure to respond to emails promptly, slowness to respond to inquiries regarding the need for medical examinations, and Ms Lozano failing to keep herself informed of progress with Immigration New Zealand and reporting to Ms Schiller-Cooper. I accept the facts are established; however, it is necessary to weigh the gravity.
- [64] To establish a complaint of negligence under section 44(2)(a), or the correlative duties of care, diligence and professionalism under clause 1.1 of the Code, it is necessary to consider the threshold required to uphold a professional disciplinary complaint under the Act.

Threshold

- [65] The jurisprudence from various authorities dealing with other professional disciplinary contexts is appropriately applied to understand the threshold, while being mindful that it is necessary to consider the statutory context in the respective situations. They can be quite different.
- [66] In a decision of the Health Practitioners Disciplinary Tribunal (HPDT), *Re Tolland* (Decision No 325/Mid10/146P, 9 September 2010) at para [39], the HPDT observed:
- “Negligence, in the professional disciplinary context, does not require the prosecution to prove that there has been a breach of a duty of care and damage arising out of this as would be required in a civil claim. Rather, it requires an analysis as to whether the conduct complained of amount to a breach of duty in a professional setting by the practitioner. The test is whether or not the acts or omissions complained of fall short of the conduct to be expected of a [practitioner] in the same circumstances[.] This is a question of analysis of an objective standard measured against the standards of the responsible body of a practitioner's peers.”
- [67] The professional setting is varied, but duties of competence, application of skill, honesty, disclosure and propriety are shared by a wide range of professionals. Immigration advisers have much in common with other professionals. Section 3 of the Act affirms it is intended to protect the interests of consumers receiving immigration advice, which corresponds to the

duties other professionals have to the public engaging their services. The issue is properly understood under the Act as whether there has been a breach of duty in a professional setting.

- [68] I find it is a necessary element of the test to determine whether any lapse is sufficiently serious to warrant the complaint being upheld as a professional disciplinary matter.
- [69] Section 50 contemplates a complaint being upheld without necessarily imposing a sanction. It follows that it is not necessary to find that a disciplinary sanction should be imposed to uphold a complaint. It is important to recognise that not every lapse or manifestation of human frailty should result in an adverse professional disciplinary finding. There will be occasions when advisers are responsible for a lapse from acceptable standards, but that still does not justify upholding a disciplinary complaint.
- [70] It is a reality that many errors and mistakes are too trivial to warrant an adverse disciplinary finding, and the Act recognises that. Section 45(1) of the Act provides that the Authority may treat a complaint as trivial or inconsequential and need not be pursued, or treated as a matter that is best settled between the parties.
- [71] It is necessary and appropriate for this Tribunal to be mindful that there is a threshold before a complaint of negligence or want of care and diligence is established. Though the statutory context is quite different, there is a discussion of the underlying policy issues in *Orlov v New Zealand Law Society (No 8)* [2012] NZHC 2154.
- [72] The Act does not attempt to further prescribe where the boundary lies, and any attempt by this Tribunal to do so is unlikely to be successful. It is necessary to consider the facts of each complaint.
- [73] I now apply those principles to the present facts.

Finding

- [74] Ms Lozano did not take the care, or impose the disciplines on herself, that the offer of professional services to the public demands. She excuses herself by pointing to other demands upon her time, saying she offers the service expected in a small business, there was human error, and the like.
- [75] The excuses are unimpressive and Ms Lozano points out that she promoted herself as providing services at the highest level.
- [76] However, I am satisfied the error does not reach the professional disciplinary threshold. This is very much a matter of judgement on the individual facts.
- [77] The facts which influence that view are:
- [77.1] Individually, the various errors were within the range that can occur in the best-regulated professional environment on occasion. Instances of delay, errors with correspondence and the judgement as to when to make contact with Immigration New Zealand come into that category.
- [77.2] Ms Lozano completed the central element of the instruction successfully.
- [77.3] Ms Lozano did have some personal issues that may have impacted on her performance, though they appear to be little more than competing demands on her time.
- [77.4] Matters reached the point where there was a strained relationship between Ms Schiller-Cooper and Ms Lozano; although that is largely a matter for Ms Lozano to manage as a professional.
- [77.5] I have considered the potential view that the accumulation of deficiencies may amount to systematic failure, which does reach the disciplinary threshold. However, I am not satisfied that there is sufficient consistency to reach that view. Ms Schiller-Cooper has

been very vigilant to identify each lapse and I cannot be satisfied that I would be justified in taking that view.

[78] I have also taken account of the fact that Ms Schiller-Cooper completed the process for issuing the visa. There is no evidence Ms Lozano failed to perform her obligations; rather Ms Schiller-Cooper had reached the point where she had lost confidence and was not satisfied with Ms Lozano's performance and decided to deal with matters herself.

[79] Accordingly, this aspect of the complaint is dismissed.

Advice relating to the potential for a parent visa

[80] It is evident Ms Lozano did not understand the immigration law and policy relating to a parent and grandparent multiple entry visitor visa.

[81] Ms Lozano has said she was the true author of an undated letter sent to Ms Schiller-Cooper in Mr Chang's name after she lodged a complaint. This letter said:

"[The relevant] policy was not officially valid until 20 November 2010. At the time that you were looking into it on 30 March 2010, [Ms Lozano] was working within current policy at the time."

[82] In the Tribunal's First Minute, it was noted that information was wrong. On 24 March 2010, Ms Schiller-Cooper inquired about the options her mother had to remain in New Zealand while her residence application was processed. There was a parent and grandparent multiple entry visitor's visa policy in place at the time and it was modified on 29 November 2010.

[83] Ms Lozano has not challenged that; accordingly it is evident that Ms Lozano did not understand the policy, and still failed to understand it when responding to the complaint.

[84] This policy was directly relevant to the instructions she was dealing with. Ms Lozano ought to have been aware of this policy when dealing with these instructions. Being aware of options for temporary visas while applying for a residence visa is an elementary requirement of competent professional practice in the area of immigration.

[85] However, Ms Lozano says that this was not part of her instructions. In the letter she authored and Mr Chang signed, she said Ms Schiller-Cooper's mother's temporary visa issue was not part of the instructions. She said in that letter:

"If you refer back to the contract, you will see the following items are covered:

Service Coverage:

- *Preparation and submission of [your mother's] visitor and residence applications.*
- *Ongoing communications with Immigration New Zealand in relation to **temporary** and **residence** permits.*

[86] The difficulty with that claim is that Ms Lozano had an obligation as a professional adviser to inform Ms Schiller-Cooper of what options her mother had. It is no answer to the complaint to simply say that a client agreed to some inappropriate application; Ms Lozano had a professional obligation to advise Ms Schiller-Cooper of the range of options. Furthermore, the relevant visa is simply a type of visitor visa, there is nothing in the agreement that can limit Ms Lozano's obligation to advise on, and then apply for, the optimum visa.

[87] As the papers originally before the Tribunal stood, the view appeared to be open that the issues relating to the type of visitor's permit arose as something of a side issue when Ms Schiller-Cooper's mother was returning to Brazil for her own purposes. Ms Schiller-Cooper then resolved the problem herself before Ms Lozano had an opportunity to address the issue.

[88] However, in response to the Tribunal's First Minute Ms Schiller-Cooper said that she specifically raised the issue, and Ms Lozano had failed to address it.

[89] Accordingly the Tribunal's Second Minute specifically put Ms Lozano on notice that Ms Schiller-Cooper claimed that she agreed to provide full support in relation to temporary permits (which is consistent with the agreement). She was invited to comment on:

[89.1] the agreement and her obligations under the Code; and

[89.2] what the arrangements were in relation to temporary permits, and her scope of responsibility as her instructions developed.

[90] Ms Schiller-Cooper elaborated on this aspect of her complaint in response to the Second Minute:

"The Service Coverage in the contract includes the preparation and submission of [my mother's] visitor and residency applications. I enquired about visa options on my first appointment with Ms Lozano as it was my wish to keep my mother in New Zealand as long as possible while waiting for an outcome on the residency visa, at this period ... it was important for me to have my mother's support.

When I first enquired about visa options that would be suitable for my mother Ms Lozano said she would deal with that if there was a need (as the residency visa could be issued before the time she was entitled to stay as a tourist ran out) and suggested that enrolling in an English language course was a viable option as she states in the correspondence received on 21st of October 2010.

On the 24th of March 2010 I also sent a message to Ms Lozano enquiring about visa options for my mother in order to have her in New Zealand with me while waiting for a decision on the Residency Visa. On the 1st of April 2010, after I approached Ms Lozano one more time by phone she suggested that my mother should enrol in an English Course if that was the case. There was no mention of the multiple entry Parents Visitors Visa which would be much more suitable for a 70 year old lady and also more economical than paying for English classes.

On the 13th of April 2010 I sent Ms Lozano a message saying that my mother was going to Brazil on the 29th of June and enquiring how it would affect her visa I also mentioned the Multiple Entry Visitors Visa on this message, Ms Lozano replied on the same day saying she would need to submit the application in Brazil and provide full medicals but a visitor could just stay in New Zealand for a maximum period of 12 months out of 18 months period.

I knew my mother was entitled to apply for the Multiple Entry Visitors Visa even though she had stayed the maximum visitors' period as I had researched the Immigration New Zealand website, I filled out the papers and put the documentation together and contacted Ms Lozano to check it on the 16th of June 2010. Ms Lozano did not reply to my message and I was also unsuccessfully trying to contact her by phone.

On the day after my mother left New Zealand Ms Lozano replied saying she was on an off work due to family reasons ..."

[91] Ms Lozano has provided no explanation that provides a substantive response either to the Tribunal's Second Minute, or to Ms Schiller-Cooper's account in relation to this issue.

[92] The Tribunal will accordingly accept Ms Schiller-Cooper's description, as it is uncontested and consistent with the material she has provided in support of it.

[93] Accordingly, I am satisfied that:

[93.1] Ms Lozano had contracted to provide full support for the preparation and submission of applications for visitors permits.

[93.2] Ms Schiller-Cooper's mother should have been informed of the relevant options for temporary permits while her application for residence was considered, and Ms Lozano failed to do so.

[93.3] The optimal permit was under the parent and grandparent multiple entry visitor visa policy, either initially or as matters developed.

[93.4] Ms Lozano failed to apply for a permit under that policy.

[93.5] Ms Lozano was not aware of that policy, and she should have been aware of it and also discussed it with Ms Schiller-Cooper.

[93.6] Ms Lozano gave incorrect advice regarding the policy. That was so even after Ms Schiller-Cooper informed Ms Lozano of the policy and had successfully applied for a visa herself. Ms Lozano did not understand the policy, and accordingly wrote in response to Ms Schiller-Cooper's complaint (via Mr Chang) with an incorrect claim that the policy was not in place at the relevant time.

[94] This failure amounted to a breach of clause 1 of the Code. Ms Lozano's failure to provide the necessary advice resulted from a lack of due care and diligence, and she was also negligent.

[95] Accordingly this aspect of the complaint will be upheld under section 44(2)(a) and (e) of the Act.

Fees

[96] Ms Schiller-Cooper has claimed that the fees charged by Ms Lozano are excessive having regard to her performance of her professional duties.

[97] There can be no complaint regarding the original fee if the work was performed properly. I do not understand that Ms Schiller-Cooper took issue with that fee.

[98] The less than optimal service delivery in relation to communication and delay may well lead to the view that Ms Lozano ought to have discounted the fee; however, that aspect of the complaint has not been upheld as a professional disciplinary offence.

[99] The failure to provide appropriate and adequate advice regarding Ms Schiller-Cooper's opportunities for a temporary visa has two potential consequences in the disciplinary context in relation to financial consequences:

[99.1] the fee for the service may not have been fair and reasonable, and the attempt to recover excessive fees a breach of Clause 8 of the Code; and

[99.2] carelessness or negligence may entitle Ms Schiller-Cooper's mother to compensation, or the refund of fees pursuant to section 51 of the Act.

[100] I am not satisfied that it is appropriate to uphold the attempt to recover fees as a separate ground of complaint. To do so it would be necessary to find that there was a breach of clauses 3 and 8 of the Code. Fees charged must be fair and reasonable in the circumstances, and any excessive fees paid must be refunded pursuant to those provisions. However, for the reasons previously discussed, the threshold for a disciplinary finding requires more than simply finding there is room for a difference of view regarding the correct fee.

[101] Accordingly, when dealing with sanctions the Tribunal will determine whether any fees should be refunded and any compensation awarded.

Party to Mr Chang unlawfully giving immigration advice

[102] I am satisfied that Mr Chang did not provide immigration advice as defined in the Act and accordingly Ms Lozano cannot have been a party to him doing so.

[103] The following section of this decision addresses the inappropriateness of using Mr Chang to deal with the complaint, and the false information supplied. That is a different issue.

[104] Ms Schiller-Cooper's mother's immigration issues were resolved by the time Mr Chang wrote a letter responding to the complaint. "Immigration advice" is defined in section 7 of the Act and includes the definition of "immigration matter" in section 2. The definition of "immigration matter" is "any matter arising under or concerning the application of the Immigration Act".

[105] I am satisfied that there was no process under the Immigration Act 2009 at the material time. It follows that Mr Chang did not give immigration advice unlawfully.

Unprofessional response to the Complaint

[106] There are three aspects where Ms Lozano's response to the complain has raised the possibility of adverse disciplinary findings:

[106.1] Whether Ms Lozano dishonestly misrepresented that she did not appreciate she was required to answer questions by this Tribunal.

[106.2] Ms Lozano's response to Ms Schiller-Cooper.

[106.3] Whether Ms Lozano honestly accounted for her failure to attend a meeting arranged for 9 June 2011.

Conduct before the Tribunal – failure to answer questions

[107] Paragraphs [45]–[47] above set out the Tribunal's concern that Ms Lozano attempted to mislead the Tribunal by claiming she carefully read the Tribunal's original minute and failed to see that she was asked a question of significant concern.

[108] I am satisfied that Ms Lozano cannot have read the minute carefully as she claims and failed to appreciate she was required to respond. Ms Lozano is a professional who is required to be able to read and understand technical material.

[109] However there are two matters to consider. The first is that this issue is not an aspect of the original complaint, though it could be addressed as a further complaint. The Tribunal does not initiate complaints. Accordingly, any finding would only be relevant to sanctions, as a licensed immigration adviser's response to a complaint may well have a bearing on the appropriate sanctions.

[110] The second factor is that the Tribunal is required to determine facts on the balance of probabilities; however the test must be applied with regard to the gravity of the finding (*Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1). I am mindful that a finding of attempting to mislead the Tribunal would be at the highest end of the scale, and I must be sure the evidence requires such a finding.

[111] I am left in no doubt that Ms Lozano has failed to deal with this complaint professionally. Ms Lozano has persistently passed off the issues raised as being of little importance. In some respects, the Tribunal has accepted the view that the errors did not reach the disciplinary threshold. However, there was a serious deficiency in the advice Ms Lozano provided in the course of the instruction, and she has provided incorrect information in response to the complaint.

[112] I am satisfied Ms Lozano has responded to the Tribunal's processes with a cavalier disregard for the professional obligations the Code and the Act place upon her.

[113] She has provided false and misleading information in the course of addressing the complaint; she rejects any professional responsibility, instead she maintains she is a victim and says the complainant is seeking an unfair financial advantage.

[114] The most favourable construction of Ms Lozano's response to the complaint and conduct before the Tribunal is incomprehension of professional obligations; the alternative is that she has provided false information dishonestly.

[115] The Tribunal invites Ms Lozano to reflect on these observations and address them in relation to sanctions.

Ms Lozano's response to Ms Schiller-Cooper

[116] Ms Lozano has accepted she is responsible for Mr Chang's undated letter to Ms Schiller-Cooper in response to the complaint.

[117] The letter reflects badly on Ms Lozano, and is a wholly unprofessional response to the complaint.

[118] The letter is in Mr Chang's name and he presents himself as a person with knowledge of immigration matters who has taken an independent view of the issues. In fact, he was not licensed and could not lawfully provide immigration advice; he was only putting his name to Ms Lozano's response. In these circumstances the opening to the letter was misleading and deceptive, as it said:

"I have read through your letter of dispute and this is my formal response. Fortunately, I have not been involved in your application, so I have been able to view the entire case from a relatively objective standpoint.

Apart from your dispute letter, I have also considered my phone conversation with yourself, your husband Charles, and an interview with [Ms Lozano] on this matter. I believe that I have come up with a fair and just solution for us all."

[119] Ms Lozano should have personally responded to the complaint and not represented she was responding as someone else, both because it was a misrepresentation and because as the professional who undertook the work, she should have addressed the complaint.

[120] It was misleading for an unlicensed person to speak as though they were aware of immigration law and policy; in reality providing a "front" for the licensed immigration adviser.

[121] Second, the letter said that a multiple entry parent's visa was not available until 20 November 2010. That was wrong, for the reasons discussed.

[122] Accordingly, I am satisfied that this letter, which appeared originally not to be written by Ms Lozano, is a ground on which the complaint must be upheld.

[123] The pretence that the response was from Mr Chang, the incorrect information regarding the availability of a visa and the failure of Ms Lozano to personally deal with her client was unprofessional and a breach of clause 1 of the Code. The letter amounted to misleading behaviour.

[124] I am satisfied this aspect of the complaint must be upheld pursuant to section 44(2)(d) and (e) of the Act.

Conflicting explanations for the failure to attend the 9 June 2011 meeting

[125] The Tribunal's Second Minute also addressed concerns regarding conflicting explanations concerning Ms Lozano's failure to attend the 9 June 2011 meeting with Ms Schiller-Cooper.

[126] Ms Lozano had written to the Authority (email of 5 October 2011) when dealing with this aspect of the complaint. She stated:

"Failure to Attend Meeting on 9th June 2011

Due to the fact that I was busy moving office I inadvertently missed the meeting, which was not at all intentional. I tried to re-schedule a new meeting with [Ms Schiller-Cooper], but she did not respond, until Joe Chang contacted her again in May to remind her of her outstanding debt."

[127] In addition, the file before the Tribunal contained a Disputes Tribunal claim that included a statement from Mr Chang:

"Unfortunately due to unforeseen circumstances, [Ms Lozano] did not make it in time and missed [Ms Schiller-Cooper] for that meeting."

[128] In its First Minute of 27 June 2012, the Tribunal had explained its understanding of this explanation and its evaluation, accepting the explanation was true (allowing for further submissions), namely:

[51] Ms Lozano missed a meeting to address the complaint, she has explained it was the day the office she works in was shifting to new premises, and she was late.

[52] That cannot in itself justify an adverse professional disciplinary finding, it is a minor example of human frailty.”

[129] In response, Ms Schiller-Cooper referred to an email that suggested that it was not true that Ms Lozano inadvertently missed the meeting due to being preoccupied with shifting offices. In an email dated 13 June 2011, Ms Lozano said she had mistaken the day of the meeting, and she said in the email:

“Sorry I misunderstood the day you wanted to meet up. I went to [the meeting place] two weeks ago [ie 30 May 2011] and you went last Thursday [ie 9 June 2011]. Sorry I was occupied relocating to our new office.”

[130] Ms Lozano had arranged the meeting in an email of 31 May 2011, which said:

“See you on Thursday the 9th of June 2011 at 5:30 pm.”

[131] Accordingly, as matters stood at that point it appeared the explanation in Ms Lozano’s email of 13 June 2011 to her client was false, as she claimed to have mistakenly gone to the meeting about the time it was arranged. If that happened, she had ample time to follow up what had gone wrong.

[132] It appears that Mr Chang’s explanation to the Disputes Tribunal was also wrong, or at least not consistent with what Ms Lozano had previously said.

[133] Further, Ms Lozano’s explanation to the Authority was not the same as what she told her client.

[134] The Tribunal’s Second Minute recorded that Ms Lozano’s explanation to the Authority now appeared to be wrong or inconsistent with what she told her client.

[135] Ms Lozano was asked to explain the circumstances, and was put on notice that failure to do so would potentially lead to an adverse conclusion regarding her conduct. She was reminded that her professional responsibilities place obligations of good faith and integrity on her in her dealings with her client, the Authority and this Tribunal.

[136] Ms Lozano’s response was contained in her email of 9 October 2012 to the Tribunal. She said:

“The meeting arranged on 9 June 2011 in the entire context of things, was a regrettable mistake on my part, which I have already apologised for repeatedly. As mentioned before, the fact that in Mr Chang’s response it said it was due to ‘unforeseen circumstances’ when in fact it was because I was busy with an office move was an administrative error on Mr Chang’s part and not a deliberate ‘act of dishonesty’. Please contact my office building manager ... for confirmation of the date I initially moved into the building. It was around the same date of my meeting with Sylvia that I unintentionally missed.

Once again, I struggle to see what possible advantage that would give me. The fact is that I missed the meeting due to an oversight on my part, whether it be due to ‘unforeseen circumstances’ or the office move – it has the same effect: i.e. I missed the meeting, which I have taken full responsibility for.”

[137] The Tribunal has made it very clear to Ms Lozano that missing a meeting is not a disciplinary matter, however intentionally misleading her client or the Authority is a very serious matter. It is evident Ms Lozano does not accept that.

[138] I am satisfied that:

[138.1] Ms Lozano told the Authority she inadvertently missed a meeting as she was shifting office and tried to reschedule the meeting.

[138.2] The Tribunal indicated (on the basis of the information Ms Lozano provided to the Authority) it believed Ms Lozano had been late to the meeting and the issue was no more than a minor example of human frailty.

[138.3] Ms Lozano then remained silent and expected the Tribunal to act on the information she had supplied to the Authority.

[138.4] Ms Lozano knew when she supplied the information to the Authority that it was misleading. She knew that materially:

[138.4.1] She had previously told her client she had mixed up the date and attended the meeting two weeks early (on 30 May 2011).

[138.4.2] The explanation she provided to her client was false, as she had not arranged the meeting until 31 May 2011, and the written arrangement was "Thursday the 9th of June 2011".

[139] I am satisfied that this aspect of the complaint must be upheld, as Ms Lozano's explanation to her client was misleading behaviour; and this was compounded by a different explanation given to the Authority without referring to the previous incorrect explanation given to her client. The explanation given to the Authority was also misleading behaviour.

[140] It follows that Ms Lozano breached clause 1 of the Code, as her conduct was unprofessional, and constituted misleading behaviour. This aspect of the complaint is upheld pursuant to section 44(2)(d) and (e) of the Act.

[141] Ms Lozano's failure to address the Tribunal's misunderstanding expressed in the First Minute, and her apparent unwillingness to accept that honest and accurate explanations are required when a client lodges a complaint, reflect on her attitude to her professional responsibilities. However, I do not regard them as an element of the original complaint. It is a matter to be considered in relation to Ms Lozano's willingness to take responsibility, and respect for the standards required of her profession.

Submissions on Sanctions

[142] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions. The section provides:

"Disciplinary sanctions

- (1) The sanctions that the Tribunal may impose are —
 - (a) caution or censure:
 - (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
 - (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
 - (d) cancellation of licence:
 - (e) an order preventing the person from reapplying for a licence for a period not exceeding two years or until the person meets specified conditions:
 - (f) an order for the payment of a penalty not exceeding \$10,000:
 - (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
 - (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the

licensed immigration adviser or former licensed immigration adviser:

- (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.”

[143] The Authority and Ms Schiller-Cooper have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, Ms Lozano is entitled to make submissions and respond to any submissions from the other parties.

[144] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.

[145] If Ms Schiller-Cooper seeks compensation she should clearly identify:

[145.1] The causal connection between a matter in respect of which the complaint has been upheld, and a consequential loss.

[145.2] The amount of the loss.

[145.3] The Tribunal will expect to see this analysis on an item by item basis, and the amounts of the loss substantiated.

[146] The Tribunal will make any decision on the refund of fees based on the amount of fees paid, being \$500.

Timetable

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

[147.1] The Authority and Ms Schiller-Cooper are to make any submissions by 5:00 pm on 25 January 2013.

[147.2] Ms Lozano is to make any further submissions (whether or not the Authority or Ms Schiller-Cooper make submissions) by 5:00 pm on 1 February 2013.

[148] The parties are notified that this decision will be published with the names of the parties after five working days, unless any party applies for orders not to publish any aspect.

DATED at WELLINGTON this 8th day of January 2013.

G D Pearson
Chair