

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2019] NZIACDT 25

Reference No: IACDT 029/17

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

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

**BETWEEN** **IMMIGRATION NEW ZEALAND  
(DARREN CALDER)**  
Complainant

**AND** **BRUCE ROBERT CLELAND**  
Adviser

**SUBJECT TO SUPPRESSION ORDER**

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**DECISION**  
**Dated 3 May 2019**

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**REPRESENTATION:**

Registrar: Self-represented

Complainant: Self-represented

Adviser: Self-represented

## **PRELIMINARY**

[1] Mr Cleland entered into an arrangement with two companies operating together in the Philippines in order to bring Filipino workers into New Zealand. The companies found employment for the clients, with Mr Cleland supposedly managing the immigration applications. However, apart from one interview early in the process, usually by Skype, Mr Cleland had no contact with his clients.

[2] The complaint by Immigration New Zealand is that Mr Cleland's business practice is contrary to both his professional obligations and New Zealand immigration legislation.

[3] The essential issue to consider is whether the level of engagement Mr Cleland has with his clients meets the professional and statutory requirements.

## **BACKGROUND**

[4] Mr Bruce Robert Cleland is a licensed immigration adviser. His company is Novo Education Consulting Ltd (NEC), trading as Choose New Zealand. He is a director.

[5] Mr Cleland's business relationship with Immigration Placement Services Ltd (IPS) started in 2016. It is a New Zealand registered company operating in both New Zealand and the Philippines. It works in conjunction with a Philippines company, BNAC. It is not known whether the companies have any staff in New Zealand. As both companies appear to have the same staff in the Philippines and to operate together, they will be referred to in this decision collectively as IPS/BNAC unless it is clear a document or reference is related specifically to only one of them.

[6] It is understood both are owned by Mr Bruce Porteous. Mr Porteous was refused a licence by the Immigration Advisers Authority (the Authority) on 26 August 2010.

[7] Mr Porteous and IPS have featured before in the discipline of immigration advisers. Mr Cleland is the third licensed adviser to face a disciplinary complaint as a result of working with Mr Porteous and IPS. The complaints always arise out of the lack of engagement of the adviser in New Zealand with the client in the Philippines. The common thread is that the immigration application is managed by the staff of IPS, not the adviser. It is a practice known as rubber stamping. It is contrary to the Immigration Advisers Licencing Act 2007 (the Act). Complaints have been upheld against Johan

Hendrik Adriaan Van Zyl and Lynn Niland in respect of their business relationships with Mr Porteous and IPS before the relationship with Mr Cleland.<sup>1</sup>

[8] As noted above, IPS/BNAC sources jobs in New Zealand for Philippine workers with the adviser, in this case Mr Cleland, supposedly then being responsible for providing immigration services. None of the staff of IPS/BNAC are licenced immigration advisers.

[9] The complaint concerns 12 clients of Mr Cleland.

[10] Each of the clients entered into a written "Client Agreement" with IPS. It was in English. The agreement was said to be between "Immigration Placement Services Ltd" and the prospective migrant as the client. The agreement recorded, immediately below the letterhead of IPS:

IMMIGRATION PLACEMENT SERVICES in conjunction with BRUCE ROBERT CLELAND, Licensed Immigration Adviser (NZ **201503606**)

[11] IPS was referred to in the agreement as "(We, Ourselves, Us, Our)". The client was referred to as "(You, Yourself, Your)".

[12] Clause 1 of the agreement set out the services provided by IPS:

**1. Our Services**

1.1 **We** will, upon instruction from **Bruce Robert Cleland, Licensed Immigration Adviser**, prepare and compile all information relating to your application for Immigration New Zealand (INZ) for a **WORK VISA**;

1.2 As part of this, **WE** will

- Provide an initial assessment on visa options which apply to your situation.
- Review all information and documents provided by YOU and You undertake not to provide any false information or documents to us.
- Advertise, promote your CV to NZ employers.
- Arrange job offer with employers that match your skills.
- Provide guidance on the necessary documents required including assistance in taking the medical examination with INZ accredited doctors.

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<sup>1</sup> *Immigration Advisers Authority v Van Zyl* [2012] NZIACDT 37, *The Registrar of Immigration Advisers v Niland* [2018] NZIACDT 52, *Immigration New Zealand (Foley) v Niland* [2019] NZIACDT 5.

- Arrange Skype interview with prospective NZ employer.
- Assist in receiving immigration advice and arrange Skype interview with the Licensed Immigration Adviser.
- Assist in recording information on the application form.
- Lodge visa applications with INZ.
- Organise travel to New Zealand.
- Assist family members (spouse and children) in their visa application (with additional fee).
- Provide settlement information, if already in New Zealand.

[13] The agreement was usually signed by both IPS and the client. In respect of three of the 12 clients, IPS did not sign it.<sup>2</sup> Mr Cleland also signed in his capacity as the “Client’s immigration adviser” in every case.

[14] The agreement stated that the “immigration fees”, which were not specified, were for the work described in the attached “Immigration/Job Pack”. Mr Cleland confirms there was no such pack.

[15] The agreement set out a complaints procedure, which included the option of making a complaint to the adviser or to the Authority. While the bulk of the agreement concerned the obligations of IPS and the client, there are some obligations specific to Mr Cleland. In particular, he undertook to comply with the Code of Conduct 2014 (the Code) and not to disclose confidential information.

[16] In respect of each client, Mr Cleland carried out an interview early in the process to discuss matters relating to their work visa application. Most of the interviews were by Skype, but one client appears to have been interviewed by Mr Cleland in person at the Manila offices of IPS/BNAC.<sup>3</sup>

[17] Each client signed an identical “SKYPE INTERVIEW AND DECLARATION by CLIENT of IPS”, including the client who was interviewed in person.<sup>4</sup> It declared that the client had a Skype interview with Mr Cleland. The date of the interview was not usually recorded, but it is assumed to be the date the declaration was signed by the client.

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<sup>2</sup> The agreement with one client, KE, has not been provided to the Tribunal.

<sup>3</sup> KE (Registrar’s supporting documents at 106).

<sup>4</sup> The Skype declaration of one of them recorded he was a client of IPS/BNAC, not IPS.

[18] The declaration recorded that Mr Cleland was the immigration adviser and that his fees would be paid by IPS. It further recorded that IPS was present as an interpreter to make sure that the client understood what was being explained to him, as well as to assist him in recording information on the work visa application form and to lodge his application with Immigration New Zealand, including communication with Immigration New Zealand if necessary.

[19] The declaration further stated that all immigration advice would be given by Mr Cleland and if any immigration advice was not clear to the client, he could contact Mr Cleland on the landline and mobile telephone numbers given. The client declared having read through the work visa application and supporting documents. The declaration additionally stated that the client had the right to lodge a complaint with Mr Cleland or the Authority. Reference was made to the advisers' professional code. The client also authorised Mr Cleland to discuss his application with IPS and Immigration New Zealand as necessary.

[20] The Skype interview and declaration document was signed by the client and sometimes by an employee of IPS. It was not signed by Mr Cleland.

[21] Once all the necessary information and documents were obtained for each client, applications for work visas in the essential skills category were lodged with Immigration New Zealand. They appear to have all been lodged online. The applications all named Mr Cleland as the licensed adviser.

[22] The clients paid Mr Cleland's fee direct to IPS/BNAC. Those companies issued receipts in the name of Mr Porteous for "Visa and Courier Fee" and "Immigration Adviser's Fee". They were for standard combined amounts of either PHP20,000 or PHP30,000. The receipts did not identify Mr Cleland's fee.

[23] At least 11 of the 12 applications appear to have been eventually approved by Immigration New Zealand, sometimes after an initial decline. The outcome of one application is not known.<sup>5</sup>

[24] Immigration New Zealand conducted interviews with each of the clients and were advised by each of them that apart from the one interview with Mr Cleland, usually by Skype, they received ongoing guidance and information on immigration from the staff of IPS/BNAC and no communication from Mr Cleland.

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<sup>5</sup> KE.

## COMPLAINT

[25] Immigration New Zealand made a complaint against Mr Cleland to the Authority on 8 November 2016 concerning 11 Filipino clients who had made visa applications in September and October 2016.<sup>6</sup> It was alleged the clients had subsequently informed Immigration New Zealand that apart from one interview, they had received ongoing advice and information about the applications from unlicensed staff in the Philippines. Seven of them had also advised that they did not have formal service contracts with Mr Cleland.

[26] The Authority requested from Mr Cleland the full files of those 11 clients. The files were duly provided.

[27] On 13 July 2017, Immigration New Zealand subsequently referred to the Authority another client of Mr Cleland whose job offer was false.<sup>7</sup>

### *Mr Cleland's reply to the Authority of 30 December 2016*

[28] On 30 December 2016, Mr Cleland wrote to the Authority in order to provide some explanation. He advised that his clients, being tradesmen, were not well educated and while functional in English, were not articulate. Communication in Tagalog was the best option, so he discussed all issues fully with IPS and left it to IPS to discuss his advice with the clients to ensure that they understood the issues.

[29] In respect of several of them to be employed by a particular employer, their applications were declined within one week because of technical requirements. He discussed this with IPS and it was agreed it would be best if IPS discussed it with the clients.

[30] Following an investigation, the Authority wrote to Mr Cleland on 18 July 2017 formally advising him of the complaint concerning all 12 clients, setting out the details and inviting his response.

### *Mr Cleland's reply to the Authority of 20 August 2017*

[31] Mr Cleland replied to the Authority in a lengthy letter on 20 August 2017. He contended that the complainant, Immigration New Zealand, lacked credibility and had a

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<sup>6</sup> SO, KO, FH, FH, FN, XI, EC, BB, BN, FN and ED.

<sup>7</sup> KE.

poor understanding of the realities of the job application and visa submission processes. He noted that none of his clients had instigated a complaint. So far as the interviews conducted by Immigration New Zealand were concerned, the clients were unsophisticated young men who were highly suggestible and would not do anything to put at risk the approval of their visas. This made them willing to say anything they perceived would please the interviewer. The interviews were not credible evidence of any wrongdoing on his part.

[32] According to Mr Cleland, the essential skills work visa was one of the simplest types of visa available. Immigration New Zealand was overcomplicating the issue.

[33] Mr Cleland also considered that Immigration New Zealand and the clients had confused the job application and placement service undertaken by the recruiter (IPS/BNAC) with the immigration process undertaken by him. The documents submitted in support of the visa application were the same for both, with the exception of the medical reports and police clearance certificate. The clients were seeing the entire process, from recruitment through to getting the visa, as part of the immigration process. They would not know the statutory definition of immigration advice.

[34] It was accepted by Mr Cleland that the applications had been lodged physically by IPS/BNAC in Manila, but this was done on his behalf. The clients saw it as lodgement by IPS/BNAC, but that was only because it was physically done in Manila. This meant it was necessary for the recruiter to compile the application and physically lodge it. That did not mean that the application was submitted by anyone other than him. Since early 2016, all applications had been lodged online.

[35] Furthermore, the clients already had considerable experience of immigration processes, as most Philippine workers that he dealt with had previously worked in one or more countries. He acknowledged that the application process was more thorough in New Zealand but nonetheless the fundamentals were the same. Additionally, publicly available information identified all the documents required to support a visa application.

[36] Mr Cleland advised that he conducted a Skype interview with each applicant at which he discussed their visa options and the required documents. He also had a checklist for work visas and personally checked that he had every document and that it complied with Immigration New Zealand's criteria.

[37] Once there had been a Skype interview, no further immigration advice needed to be given until such time as Immigration New Zealand issued a letter expressing any concerns with the application (known as a PPI – Potentially Prejudicial Information letter),

if at all. No such letters were issued to these clients. While his responsibilities did not end with the Skype interview, he was adamant that no client needed to receive, nor were they given, any immigration advice.

[38] If any client asked any material question, Mr Cleland himself would always reply by email. He accepted, however, that it was perfectly natural that the clients would find it easier to speak in Tagalog with people they knew in the Philippines, but he could not be blamed if they chose not to contact him directly with any questions.

[39] While the clients had stated that they did not have written agreements with him, in fact every one of the 11 clients did have a written agreement. Mr Cleland acknowledged that the outdated agreement mentioned an attached immigration/job pack, which was not in fact attached. As for his fees, they all paid him PHP10,000 (about NZD850) to cover his fee and disbursements.

[40] In his letter to the Authority, Mr Cleland advised that he inherited the documentation, including the written agreement, from another licensed adviser who was assisting IPS/BNAC. He believed it complied with the Authority's requirements. He accepted that it did not and he had now updated the documentation.

[41] Mr Cleland acknowledged that he had not complied with the Code obligations in relation to the written agreement, as to providing a full description of his services and specifying the fees to be charged. However, he did explain all significant aspects of the written agreement to his clients in the Skype interview. He accepted that he had failed to confirm to the clients when the application was lodged. He denied having relied on unlicensed individuals to provide immigration advice and denied having failed to perform his services with due care and diligence.

[42] According to Mr Cleland, he had already admitted his shortcomings in his relicensing application and had received a warning concerning this. The complaint provided further evidence of the same shortcomings which could only be described as minor negligence. He acknowledged that he may have misunderstood the part of the process requiring more direct contact with his clients, but this was due to his previous inexperience and not because of deliberate negligence on his part.

[43] Mr Cleland concluded by expressing pride at the excellent and cost-effective service he had given to his clients without a single complaint from them. However, he had decided to discontinue offering this service and would cease it at the end of June. He had not taken any new visa clients from the Philippines since July.

*Complaint referred to the Tribunal*

[44] The Registrar of Immigration Advisers (the Registrar), the head of the Authority, filed a complaint (6 September 2017) with the Tribunal. He referred to the Tribunal the following alleged breaches of the Code by Mr Cleland:

- (1) failing to provide his services directly and instead relying on unlicensed staff to perform key parts of the process, thereby failing to conduct himself with due care and professionalism, in breach of cl 1;
- (2) failing to personally obtain and carry out the informed, lawful instructions of the clients, in breach of cl 2(e);
- (3) maintaining business practices under which he relied on unlicensed individuals to perform services which should have been personally carried out by a licensed immigration adviser, thereby failing to act in accordance with the licensing legislation, in breach of cl 3(c);
- (4) failing to ensure that before the written agreement was accepted, all significant matters in the written agreement were explained to the clients, in breach of cl 18(b);
- (5) failing to ensure that the written agreement contained a full description of the services to be provided and the fees to be charged, tailored to the individual client, in breach of cl 19(e) and (f); and
- (6) failing to confirm to the clients in writing when the applications had been lodged and failing to make any ongoing timely updates, in breach of cl 26(b).

**JURISDICTION AND PROCEDURE**

[45] 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.

[46] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.<sup>8</sup>

[47] The Tribunal must hear complaints on the papers but may in its discretion request further information or any person to appear before the Tribunal.<sup>9</sup> It has been established to deal relatively summarily with complaints referred to it.<sup>10</sup>

[48] After hearing a complaint, the Tribunal may dismiss it, uphold it but take no further action or uphold it and impose one or more sanctions.<sup>11</sup>

[49] The sanctions that may be imposed by the Tribunal are set out in the Act.<sup>12</sup> It may also suspend a licence pending the outcome of a complaint.<sup>13</sup>

[50] It is the civil standard of proof, the balance of probabilities, that is applicable in professional disciplinary proceedings. However, the quality of the evidence required to meet that standard may differ in cogency, depending on the gravity of the charges.<sup>14</sup>

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

[52] Mr Cleland provided a statement of reply (2 September 2017) with submissions and supporting documents, including a letter from Mr Bruce Porteous of IPS (22 September 2017). Mr Cleland does not request an oral hearing.

## **ASSESSMENT**

[53] 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.

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<sup>8</sup> Immigration Advisers Licensing Act 2007, s 45(2) & (3).

<sup>9</sup> Section 49(3) & (4).

<sup>10</sup> *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

<sup>11</sup> Immigration Advisers Licensing Act 2007, s 50.

<sup>12</sup> Section 51(1).

<sup>13</sup> Section 53(1).

<sup>14</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [101]–[102] & [112].

**Client Care**

2. A licensed immigration adviser must:

...

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

...

**Legislative requirements**

3. A licensed immigration adviser must:

...

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

**Written agreements**

18. A licensed immigration adviser must ensure that:

...

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

...

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

...

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

f. where fees are to be charged, the fees for the services to be provided by the adviser, including either the hourly rate and the estimate of the time it will take to perform the services, or the fixed fee for the services, and any New Zealand Goods and Services Tax (GST) or overseas tax or levy to be charged

...

**File management**

26. A licensed immigration adviser must:

...

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

...

[54] The first three heads of complaint are interconnected.

- (1) *Failing to provide his services directly and instead relying on unlicensed staff to perform key parts of the process, thereby failing to conduct himself with due care and professionalism, in breach of cl 1*
- (2) *Failing to personally obtain and carry out the informed, lawful instructions of the clients, in breach of cl 2(e)*
- (3) *Maintaining business practices under which he relied on unlicensed individuals to perform services which should have been personally carried out by a licensed immigration adviser, thereby failing to act in accordance with the licensing legislation, in breach of cl 3(c)*

[55] In essence, the allegation is that Mr Cleland failed to personally engage with his clients, leaving that to the unlicensed staff of IPS/BNAC. In communicating with the clients, the staff would have given information amounting to “immigration advice”, as defined under the Act. This is information which only a licensed adviser is permitted to give.

[56] The principal issue for the Tribunal is therefore whether the staff of IPS/BNAC provided immigration advice.

[57] The Tribunal has adversely commented in previous decisions on the practice which developed in the immigration advisory industry of what is known as “rubber stamping”.<sup>15</sup> This occurs where the licensed adviser becomes the ostensibly legitimate front for unlicensed individuals who provide the bulk of the immigration services.

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

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<sup>15</sup> *Stanimirovic v Levarko* [2018] NZIACDT 3 at [4], [36]–[38]; *Immigration New Zealand (Calder) v Soni* [2018] NZIACDT 6 at [4], [50]–[61]; *The Registrar of Immigration Advisers v Niland* [2018] NZIACDT 52 at [72]–[79].

[59] The practice is plainly unlawful. A person commits an offence under the Act if he or she provides “immigration advice” without being licensed or exempt from licensing.<sup>16</sup> A person employing as an immigration adviser another person who is neither licensed nor exempt also commits an offence.<sup>17</sup> A person may be charged with such an offence even where part or all of the conduct occurred outside New Zealand.<sup>18</sup>

[60] The statutory scope of “immigration advice” is very broad:<sup>19</sup>

## 7 What constitutes immigration advice

- (1) In this Act, **immigration advice**—
- (a) means using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward; but
  - (b) does not include—
    - (i) providing information that is publicly available, or that is prepared or made available by the Department; or
    - (ii) directing a person to the Minister or the Department, or to an immigration officer or a refugee and protection officer (within the meaning of the Immigration Act 2009), or to a list of licensed immigration advisers; or
    - (iii) carrying out clerical work, translation or interpreting services, or settlement services.
- (2) To avoid doubt, a person is not considered to be providing immigration advice within the meaning of this Act if the person provides the advice in the course of acting under or pursuant to—
- (a) the Ombudsmen Act 1975; or
  - (b) any other enactment by which functions are conferred on Ombudsmen holding office under that Act.

[61] The exclusion from the scope of “immigration advice” relevant here is subs (1)(b)(iii) concerning clerical work, translation or interpretation services. The staff of IPS/BNAC are only permitted to perform clerical work or translation/interpretation services.

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<sup>16</sup> Immigration Advisers Licensing Act 2007, ss 6 & 63.

<sup>17</sup> Section 68(1).

<sup>18</sup> Sections 8 & 73.

<sup>19</sup> Immigration Advisers Licensing Act 2007, s 7.

[62] “Clerical work” is narrowly defined in the Act:<sup>20</sup>

**Clerical work** means the provision of services in relation to an immigration matter, or to matters concerning sponsors, employers, and education providers, in which the main tasks involve all or any combination of the following:

- (a) the recording, organising, storing, or retrieving of information:
- (b) computing or data entry:
- (c) recording information on any form, application, request, or claim on behalf and under the direction of another person

[63] Mr Cleland is the only person who can provide immigration advice. In other words, he is the only person who can use any knowledge or experience in immigration to advise, assist or represent the clients, whether directly or indirectly. The staff are confined to merely retrieving, organising and recording information, in addition to data entry. If they are recording the information on a visa application form, it must be done under the direction of Mr Cleland or the client.

[64] In order to comply with this statutory requirement, the Code imposes an obligation on the adviser to obtain and carry out the client’s instructions, and also an obligation to act in accordance with New Zealand immigration legislation. These are cls 2(e) and 3(c) respectively. These obligations are personal to the licensed immigration adviser and cannot be delegated.<sup>21</sup>

[65] It is self-evident that Mr Cleland did not take charge of the engagement with the client on immigration matters, as he is required to do under both the Act and the Code. It was therefore inevitable that the staff of IPS/BNAC would step into the void and in doing so, go beyond the narrow permissible category of clerical and interpretation work and provide immigration advice.

[66] The client agreements confirm this is what was expected to occur. They state that IPS will perform the immigration services. The expressed instruction of the staff by Mr Cleland is illusory. There is no evidence of communications by him with IPS/BNAC, except for one client after Immigration New Zealand had raised concerns about the application.<sup>22</sup>

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<sup>20</sup> Section 5, “clerical work”.

<sup>21</sup> *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [29], [34] & [47].

<sup>22</sup> KE.

[67] Mr Cleland's sole communication with his clients was one interview, usually by Skype. This was confirmed by his clients in their interviews with Immigration New Zealand. They all advised they dealt with IPS/BNAC for their visa/immigration matters. One client said he did deal with both BNAC and Mr Cleland on documentation and did speak to Mr Cleland by telephone, but otherwise immigration related questions were dealt with by BNAC.<sup>23</sup> Three others said Mr Cleland told them what documents to provide or gave them a list of documents, but they otherwise dealt with IPS/BNAC when they had immigration questions.

[68] That is wholly inadequate. Mr Cleland must take charge of the relationship from the beginning until the end. The obligation to take instructions and then to carry them out cannot be delegated to staff beyond the narrow confines of clerical or interpretation work. The taking and carrying out of instructions cannot be delegated to his own staff, let alone the staff of a company in another country over which he has control.

[69] One of the tasks undertaken by the staff was collecting together all the supporting documents. The staff, not Mr Cleland, obtained them from the clients and compiled them to support the immigration application. One client even informed Immigration New Zealand that Mr Cleland told him a person from BNAC would help him with his work visa.<sup>24</sup>

[70] It is not clear what role, if any, Mr Cleland had in vetting the support documents and producing them to Immigration New Zealand, or in entering the client's information into the online form.

[71] Mr Cleland says that compiling the applications had to be physically done in Manila because that is where they were lodged. That seems to have been Mr Cleland's practice under the old paper-based lodging process. It is plainly contrary to his obligation to carry out the client's instructions.

[72] However, they are now lodged online. So far as I can tell, all 12 applications at issue here were lodged online. Mr Porteous says in his statement to the Tribunal that since moving to online in 2016, all the documents were scanned and sent to Mr Cleland. He does not say who actually lodged the applications. Nor does Mr Cleland though he implies he does it, or is at least responsible for lodgement in the sense that others do it on his behalf. The recorded timing of the receipt of the applications appears to show they were lodged online from Manila. Most were not filed within New Zealand business hours, with many being filed late at night or in the early hours of the morning (New

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<sup>23</sup> FH, Registrar's supporting documents at 31.

<sup>24</sup> FH, Registrar's supporting documents at 49.

Zealand time). All but one of the clients told Immigration New Zealand they were lodged by IPS/BNAC.<sup>25</sup>

[73] As I cannot definitely determine who actually filed the applications, I make no finding as to who did so. Nor do I make a finding as to who entered the information onto the form, or sent the scanned documents with the application to Immigration New Zealand.

[74] What is clear, however, is that Mr Cleland did not engage with the clients in obtaining from them the required information or documents. That was left solely to the staff of IPS/BNAC.

[75] In explanation, Mr Cleland says the collection of supporting documents is done for the recruitment process, since it is those same documents that are required for the immigration application. In other words, he contends that working with the client to compile the supporting documents does not amount to giving immigration advice as it was done for the recruiting process, which he says happens first.

[76] However, the compiling of largely the same documents for a recruiting process does not mean that attributing them to an immigration application does not amount to using immigration knowledge or experience to assist a person.

[77] First, there are those documents required for the immigration application, but which are not usually obtained for recruiting purposes. Mr Cleland himself acknowledges that the medical and character (police) documents fall into this category. This means that staff will have to advise and liaise with the clients concerning such additional documentation.

[78] Second, while the collection of documents solely for recruiting purposes would not be part of immigration advice, that is not what happened here. IPS/BNAC is not solely a recruiter. The documents collected by IPS/BNAC were for dual purposes, both recruiting and immigration. The same staff were responsible for documentation for both purposes at essentially the same time. Clients engaged IPS in one agreement to find jobs and to obtain immigration approval for them. A job in New Zealand was of no value to the client without the attendant visa. The exercise of obtaining supporting documents does not lose the function of providing immigration advice because it has another unrelated purpose.

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<sup>25</sup> The exception was FN, Registrar's supporting documents at 69.

[79] So, even for documents relevant to both recruiting and immigration, the specific task that amounts to giving immigration advice is either the collection for a dual purpose, or specifically attributing or attaching them to the immigration application. After all, identifying those documents needed for the immigration application required immigration knowledge and/or experience.

[80] Mr Cleland also seems to say that the identification of supporting documents is apparent from publicly available information on Immigration New Zealand's website, which is excluded from the definition of immigration advice.

[81] The collection of documents for a visa application involves much more than just providing a list of documents to the client, which may well come from Immigration New Zealand's publicly available information, and then ticking off the documents received against that list.

[82] The staff will have to use their knowledge and experience of Immigration New Zealand's criteria and practice to assess whether what has been provided by the client will be acceptable to Immigration New Zealand. For example, whether a personal relationship amounts to a life partnership which should be declared, how information as to character can be provided when a police certificate is not available, what work history is relevant to Immigration New Zealand, whether qualifications and previous employment matches Immigration New Zealand's criteria for a particular position (even if they match the employer's requirements), what documents are needed to establish a qualification (such as an academic transcript), and the like.

[83] The point is that the staff will have to exercise judgement in compiling the supporting documents. That judgement will involve the use of immigration knowledge and experience. Mr Cleland states that he was involved in ensuring the necessary documents were all obtained and that they met Immigration New Zealand's criteria. Yet he presents no evidence of any communication with IPS/BNAC showing his engagement in the collection of documents or vetting them. Moreover, he accepts he did not communicate with the clients concerning documents or information to be recorded on the application form.

[84] In respect of every client, the staff will have provided assistance to them and answered their queries about documentation and information required by Immigration New Zealand. The clients may have undergone migration processes before to other countries, but each of them would have had many questions concerning this particular application and Immigration New Zealand's specific requirements.

[85] It is apparent that immigration advice will therefore have been provided to all 12 clients, given Mr Cleland's sole contact with the client being the interview. It defies common sense to contemplate this did not happen in respect of every client.

[86] Mr Cleland says the client interviews with Immigration New Zealand cannot be relied on as the clients are unsophisticated and highly suggestible young men, who would say anything to please Immigration New Zealand. I reject this. They were asked simple questions. For example, they were asked, "Who do you ask if you have visa/immigration related questions?" The answer was always IPS/BNAC. Nor would they have known what, if anything, would have pleased Immigration New Zealand.

[87] Mr Cleland has provided to the Tribunal some short template statements from some of the clients stating that the term "immigration advice" had been explained to them and asserting that only Mr Cleland gave such advice. These statements carry no weight. Mr Cleland does not understand the statutory definition, let alone the clients. It is likely that they have signed this statement to merely please Mr Cleland.

[88] It is not just biodata, relevant employment history and other such information required for every visa application which necessarily involved the staff in providing immigration advice to the client. In respect of some of these 12 clients, there were specific matters where such advice must have been given.

[89] In particular, there were the five clients whose applications were initially declined.<sup>26</sup> Mr Cleland considered it best that IPS staff dealt with them directly in Tagalog. Furthermore, according to him, it was only a technical recruitment matter which IPS was responsible for resolving.

[90] Whether or not it was also a recruiting matter, it was clearly an immigration matter since it was the basis for the decline by Immigration New Zealand. While it may have been appropriate for IPS to deal directly with the employer to resolve the employment issue, it was Mr Cleland's responsibility to deal with the client (in order to obtain instructions) and Immigration New Zealand (in order to carry out the instructions). He did not deal at all with the client and there is no evidence he communicated with Immigration New Zealand on the issue.

[91] A problem arose with the application of another client.<sup>27</sup> Immigration New Zealand discovered the employment contract was false and wrote to Mr Cleland on 4 July 2017. As he did not respond to Immigration New Zealand, the application was

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<sup>26</sup> KN, FH, BB, FN and ED.

<sup>27</sup> KE.

declined.<sup>28</sup> According to Mr Cleland, he engaged with both the recruiter (IPS) and the employer, though the emails show that it was Mr Porteous who engaged with the employer. However, Mr Cleland had no contact with the client.<sup>29</sup> He left that to IPS/BNAC. He did not therefore obtain the client's instructions.

[92] It is not enough that it is more convenient or practical for him or even the client if the staff of IPS/BNAC deal with the client in his own language, the staff also having the advantage of being in the client's time zone. Nor is it enough that Mr Cleland's contact details were made available to the client. It is Mr Cleland's duty to deal directly with his client. He must be active and not merely passive in performing this duty. If necessary, he must arrange for an interpreter or translator, which could be a staff member.

[93] These are specific examples where it was the staff who dealt with the client on the issues that arose.

[94] I will turn now to the three heads of complaint being considered.

[95] In respect of the first head of complaint, relying on unlicensed staff, I find that Mr Cleland failed to personally or directly provide his services. Instead Mr Cleland relied on the unlicensed staff of IPS/BNAC to perform key parts of the process, in particular engaging with the client when an application was being compiled or a problem arose.

[96] This is not merely a case of Mr Cleland permitting staff to deal with the clients and documentation on isolated occasions. In respect of all 12 clients, there has been a wholesale offloading of client engagement and document gathering. This is a breach of the obligation in cl 1 of the Code to conduct himself with both professionalism and due care. He cannot delegate any part of his services, beyond clerical work, to the staff of IPS/BNAC.

[97] Mr Cleland also failed to both obtain and to carry out the informed instructions of the client, in breach of cl 2(e). This is the second head of complaint. The bulk of these duties was undertaken by the staff of IPS/BNAC. It is not enough that the clients had only one interview and were given Mr Cleland's contact details. The Code imposes the obligation on Mr Cleland to proactively engage the client, not the other way around.

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<sup>28</sup> Mr Cleland's letter 20 August 2017, 1<sup>st</sup> appendix; decline letter 12 July 2017 (Registrar's supporting documents at 586).

<sup>29</sup> See Immigration New Zealand interview with the client (Registrar's supporting documents at 107).

[98] As for the third head of complaint, Mr Cleland maintained business practices under which he relied on the unlicensed staff of IPS/BNAC to provide immigration advice. The staff were therefore conducting themselves contrary to the Act.

[99] IPS/BNAC could not have held itself out as a company providing immigration services without the licence of an immigration adviser. Immigration New Zealand would not have accepted an application from IPS/BNAC. All of the immigration work done by IPS/BNAC was done in Mr Cleland's name. Mr Cleland knew what the staff were doing and permitted them to work with the clients. He is responsible for this unlawful work. He has thereby failed to act in accordance with the legislation, in breach of cl 3(c) of the Code.

(4) *Failing to ensure that before the written agreement was accepted, all significant matters in the written agreement were explained to the clients, in breach of cl 18(b)*

[100] Mr Cleland says that all significant matters in the written agreements were explained to the clients at the Skype interview.

[101] Mr Cleland has no record of the Skype interview discussion, as he is required to have.<sup>30</sup> The standard form declaration does not establish what was discussed and certainly does not establish that all significant matters were discussed.

[102] I do not accept Mr Cleland's statement that all significant matters in the agreement were explained to his clients. Only one of them knew that his fee was PHP10,000. A number of them did not even know he was being paid (I assume they thought he was part of IPS/BNAC). When asked by Immigration New Zealand what was discussed at the Skype interview, not one of them referred to the client agreement, the existence of the Code or the complaints procedure.

[103] A number of the clients did not even know they had an agreement with Mr Cleland. Of course, he had signed an agreement, but it would have appeared to the clients to be an agreement each had with IPS. They were wrong about having no agreement with him, but it is clear Mr Cleland did not spell out to them at the Skype interview that he was a party to that agreement and bound by it.

[104] I find that Mr Cleland did not discuss all significant matters in the written agreements with his clients, in breach of cl 18(b) of the Code.

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<sup>30</sup> Code of Conduct 2014, cl 26(a)(iii).

- (5) *Failing to ensure that the written agreement contained a full description of the services to be provided and the fees to be charged, tailored to the individual client, in breach of cl 19(e) and (f)*

[105] The written agreements did not specify the services to be provided by Mr Cleland, tailored to the individual client. They are template agreements and do not even state the type of visa being sought. Nor do they record Mr Cleland's obligation to the client to provide immigration services, as the services in cl 1.2 of the agreement are expressed to be provided by IPS. It is not "**WE**"(IPS) which should be promising to provide those services, whether under instruction or not, but Mr Cleland personally.

[106] They are particularly unsuitable as they are agreements between IPS and the client. Mr Cleland attached himself to the agreement, though only with limited obligations specific to him. In respect of a number of clients, IPS did not sign the agreement, so its legal status is uncertain. It is not the agreement envisaged by the Code. This is a breach of cl 19(e) of the Code.

[107] Nor did the agreements specify his fees. This is a breach of cl 19(f).

- (6) *Failing to confirm to the clients in writing when the applications had been lodged and failing to make any ongoing timely updates, in breach of cl 26(b)*

[108] Mr Cleland did not advise 11 of the 12 clients when the applications were lodged, or when the applications were declined or approved.<sup>31</sup> This is a breach of cl 26(b) of the Code.

## **OUTCOME**

[109] I uphold the complaint. Mr Cleland is in breach of cls 1, 2(e), 3(c), 18(b), 19(e) and (f), and 26(b) of the Code.

## **SUBMISSIONS ON SANCTIONS**

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

[111] In determining the appropriate sanctions, the Tribunal will be mindful of the overlap between the first three heads of complaint.

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<sup>31</sup> SO told Immigration New Zealand that Mr Cleland advised him of the "status" of his visa application, Registrar's supporting documents at 61.

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

*Timetable*

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

- (1) The Registrar, Immigration New Zealand and Mr Cleland are to make submissions by **24 May 2019**.
- (2) The Registrar, Immigration New Zealand and Mr Cleland may reply to any submissions by another party by **7 June 2019**.

**ORDER FOR SUPPRESSION**

[114] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.<sup>32</sup>

[115] There is no public interest in knowing the names of Mr Cleland's clients.

[116] The Tribunal orders that no information identifying the clients is to be published other than to the parties.

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D J Plunkett  
Chair

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<sup>32</sup> Immigration Advisers Licensing Act 2007, s 50A.