

**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2019] NZIACDT 5

Reference No: IACDT 004/18

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

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

**BETWEEN** **MARCELLE FOLEY of  
Immigration New Zealand**  
Complainant

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

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**DECISION**

**Date: 5 February 2019**

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**REPRESENTATION:**

Registrar: R Denmead, counsel

Complainant: In person

Adviser: P Moses, counsel

## **PRELIMINARY**

[1] Ms Niland entered into an arrangement with a New Zealand company operating in the Philippines (the Philippines company) to bring Filipino workers into this country. That company in turn had a relationship with a company in Sri Lanka (the Sri Lankan company), whereby the Philippines company would source employment in New Zealand for Sri Lankans.

[2] The Philippines company found employment for Mr W, a Sri Lankan, to work as a tradesman. Ms Niland was named as the immigration adviser on Mr W's visa application. However, apart from an initial Skype consultation, Ms Niland had no contact with Mr W.

[3] After Mr W's visa application was approved by Immigration New Zealand, the employer withdrew the job offer. Nonetheless, the Sri Lankan company, unknown to Ms Niland, advised Mr W to travel to New Zealand. He worked unlawfully in this country.

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

[5] The essential issue to consider is whether Ms Niland was negligent or deliberately employed a business model in clear breach of her professional obligations.

## **BACKGROUND**

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

[7] In 2012, Ms Niland entered into a business relationship with Immigration Placement Services Ltd, the Philippines company. It is a New Zealand registered company operating in both New Zealand and the Philippines. None of its staff are licensed immigration advisers. It sources jobs in New Zealand for migrant workers. Once a job offer is secured, Ms Niland is supposed to be responsible for providing immigration services, including completion of the visa application. The Tribunal has

issued a separate decision upholding a complaint against Ms Niland in relation to the lack of engagement with her Filipino clients.<sup>1</sup>

[8] The Philippines company had a business relationship with a Sri Lankan employment agency, the Sri Lankan company.

[9] The Philippines company used its employer contacts in New Zealand to source a job offer for Mr W, a client of the Sri Lankan company. There was a Skype interview between Mr W and the prospective New Zealand employer. An employment agreement was signed by Mr W on 12 November 2015 and by the employer on the following day. The Employer Supplementary Form was also signed by the employer on 13 November.

[10] On 20 November 2015, there was an interview by Skype between Mr W and Ms Niland. This was to enable Ms Niland to carry out an initial assessment of Mr W's immigration prospects. He was presumably at the offices of the Sri Lankan company in the presence of a staff member of that company. There is no record of that interview.

[11] On the same day, 20 November 2015, Mr W signed a "Client Agreement" between himself and the Philippines company. It was not signed by the Philippines company. It outlined the services to be provided by that company. It would obtain a job offer with a New Zealand employer. The agreement stated that the Philippines company, in conjunction with Ms Niland, was responsible for Mr W's immigration application. He was required to pay an immigration adviser's fee.

[12] Also on 20 November 2015, Mr W signed a "Skype Interview and Declaration by IPS's client" on the letterhead of Visas NZ Ltd. It identified Ms Niland as the immigration adviser. Mr W declared having received a copy of the Code of Conduct 2014 (the Code) and complaints procedure from Ms Niland. He further declared that all immigration advice was given by her and that he could contact her by telephone or email. Her contact details were also set out there.

[13] The signed pages of the client agreement and Skype declaration were sent by the Sri Lankan company to Ms Niland on 20 November 2015. She returned the agreement, having signed it, on 23 November 2015.

[14] Mr W had no contact at any time with the Philippines company on either employment or immigration matters.

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<sup>1</sup> *Registrar of Immigration Advisers v Niland* [2018] NZIACDT 52.

[15] A work visa application for Mr W was filed with Immigration New Zealand on 3 December 2015 by the Sri Lankan company. Mr W had signed it on 24 November 2015. Ms Niland's licence number was recorded on the form identifying her as Mr W's immigration adviser. A named person from the Sri Lankan company was identified as the person who had assisted Mr W to complete the form and as the person to whom Immigration New Zealand should direct communications about the application.

[16] Immigration New Zealand wrote to Ms Niland and Mr W on 19 January 2016 advising that the application may not meet the relevant immigration instructions, since the Ministry of Social Development had stated that suitable New Zealanders may be available to take up the job.

[17] Mr W's work visa was, however, approved by Immigration New Zealand on 22 February 2016.

[18] On that day, the employer advised the Philippines company that Mr W was no longer required.

[19] Notwithstanding the advice from the employer, the Sri Lankan company advised Mr W that he could travel to New Zealand and transfer to another named employer. He arrived on 14 March 2016 and undertook work for a number of employers, including the original employer for whom his visa had been approved. His work for the other employers was unlawful. Mr W's eventual immigration status and fate are unknown.

## **COMPLAINT**

[20] On 17 October 2017, Immigration New Zealand made a formal complaint about Ms Niland to the Immigration Advisers Authority (Authority), headed by the Registrar.

[21] The Authority wrote to Ms Niland on 24 October 2017 advising her of the complaint and requiring her to produce Mr W's file for inspection. Some documents were produced by her.

[22] The Authority again wrote to Ms Niland on 23 November 2017 formally setting out details of the complaint. It was contended that she had not personally met or communicated with Mr W and that communication with him on immigration matters had been by unlicensed individuals employed by the Sri Lankan company. She was advised that the Registrar had determined that a number of grounds of complaint had been disclosed, including breaches of the Code in relation to taking instructions, facilitating unlicensed immigration advice, the requirements for written agreements and file management. She had the opportunity to provide a written explanation.

[23] Ms Niland's counsel, Mr Moses, replied with submissions on 11 December 2017, enclosing a statement from Ms Niland of the same date.

[24] In her statement, Ms Niland explained her business relationship with the Philippines company, which in turn had a relationship with the Sri Lankan company. The staff of the Philippines and Sri Lankan companies were not licensed to provide New Zealand immigration advice. The Sri Lankan company requested her services as a licensed adviser to obtain a work visa for their client, Mr W.

[25] According to Ms Niland, she undertook a Skype interview with Mr W but otherwise had no direct contact with him.

[26] Ms Niland accepted that the multi-party arrangement with the Philippine and Sri Lankan companies was ill conceived. The agreement was poorly worded. It was not tailored to Mr W's circumstances. It did not adequately protect her or Mr W. She acknowledged not maintaining an adequate relationship with Mr W as required by the Code. Ms Niland had believed that if she had a contractual relationship with Mr W and provided him with an agreement and a copy of the Code, she was permitted to represent him. She had not intended merely to create an impression of compliance, but had thought she was fully compliant.

[27] Ms Niland advised that she was not informed that Mr W's job offer was cancelled and did not know that he had been advised to travel to New Zealand. She recognised that the arrangement created a risk that the Sri Lankan company would provide unlicensed advice to Mr W, who was her client. Ms Niland stated that she had ceased co-operating with the Sri Lankan company in July 2016 and with the Philippines company in late 2016.

[28] Ms Niland accepted that she had breached cls 2(e), 3(c), 18(a), 18(b), 19(e), 26(b) and 26(e) of the Code.

[29] The Registrar filed a statement of complaint (dated 1 February 2018) with the Tribunal, together with supporting evidence. It alleges Ms Niland breached the Code in the following respects:

- (1) Failed to obtain informed lawful instructions, in breach of cl 2(e).
- (2) Facilitated unlicensed individuals to provide immigration advice and thereby failed to act in accordance with New Zealand immigration legislation, in breach of cl 3(c).
- (3) Failed to provide a written agreement, in breach of cl 18(a).

- (4) Failed to explain significant matters in the agreement to the client, in breach of cl 18(b).
- (5) Failed to provide a full description of the services to be provided tailored to the individual client, in breach of cl 19(e).
- (6) Failed to advise the client when the application had been lodged or of updates regarding the processing of the application, in breach of cl 26(b).
- (7) Failed to maintain the client file or to make it available on inspection to the Authority, in breach of cl 26(e).

## **JURISDICTION AND PROCEDURE**

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

- (a) negligence;
- (b) incompetence;
- (c) incapacity;
- (d) dishonest or misleading behaviour; and
- (e) a breach of the Code of Conduct.

[31] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.<sup>2</sup>

[32] 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>3</sup>

[33] 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>4</sup>

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

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

<sup>4</sup> Section 50.

[34] The sanctions that may be imposed by the Tribunal are set out in the Act.<sup>5</sup> It may also suspend a licence pending the outcome of a complaint.<sup>6</sup>

[35] 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>7</sup>

[36] The Tribunal has received the statement of complaint and supporting documents from the Registrar. It has received from counsel for Ms Niland a memorandum (13 February 2018) and a statement of Ms Niland (12 February 2018).

[37] A Minute was issued by the Tribunal on 8 January 2019. The Tribunal decided to hear and determine the complaint on the papers.

## **ASSESSMENT**

[38] The individual heads of complaint all arise from one underlying and fundamental mistake by Ms Niland. She did not treat Mr W as her client to whom she personally owed her professional obligations under the Code. Her engagement with him comprised one Skype consultation. The reality here is that Mr W was advised on immigration matters by the Sri Lankan company. This model of business practice is alleged by the Registrar to be a breach by Ms Niland of her professional obligations.

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

### **Client Care**

2. A licensed immigration adviser must:

...

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

### **Legislative requirements**

3. A licensed immigration adviser must:

...

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

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<sup>5</sup> Section 51(1).

<sup>6</sup> Section 53(1).

<sup>7</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [101]–[102] & [112].

### Written Agreements

18. A licensed immigration adviser must ensure that:
- a. when they and the client decide to proceed, they provide the client with a written agreement
  - b. before any written agreement is accepted, they explain all significant matters in the written agreement to the client
19. A licensed immigration adviser must ensure that a written agreement contains:
- ...
- e. a full description of the services to be provided by the adviser, which must be tailored to the individual client

### File Management

26. A licensed immigration adviser must:
- ...
- b. confirm in writing to the client when applications have been lodged, and make on-going timely updates
- ...
- e. maintain each client file for a period of no less than 7 years from closing the file, and make those records available for inspection on request by the Immigration Advisers Authority

[40] The obligations set out in the Code are personal to the licensed immigration adviser and cannot be delegated.<sup>8</sup>

[41] 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>9</sup> This occurs where the licensed adviser becomes the ostensibly legitimate front for unlicensed individuals who provide the bulk of the immigration services.

[42] Typically, this occurs where a licensed immigration adviser works with offshore agents who recruit the clients, prepare the immigration applications and send them to the adviser to sign off and file with Immigration New Zealand. There is little, if any, direct contact between the licensed adviser and the client.

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<sup>8</sup> *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [29], [34] & [47].

<sup>9</sup> *Stanimirovic v Levarko* [2018] NZIACDT 3 at [4], [36]–[38]; *Immigration New Zealand (Calder) v Soni* [2018] NZIACDT 6 at [4], [50]–[61].

[43] 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>10</sup> A person may be charged with such an offence even where part or all of the conduct occurred outside New Zealand.<sup>11</sup>

[44] The statutory scope of “immigration advice” is very broad:<sup>12</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.

[45] The exclusion from the scope of “immigration advice” relevant here is subs (1)(b)(iii) concerning clerical work, translation or interpretation services. The question that arises is whether the staff of the Sri Lankan company who dealt with Mr W have performed such permitted work only.

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<sup>10</sup> Immigration Advisers Licensing Act 2007, s 63.

<sup>11</sup> Sections 8 & 73.

<sup>12</sup> Section 7.

[46] “Clerical work” is narrowly defined in the Act:<sup>13</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

[47] It is self-evident that Ms Niland did not take charge of the engagement with Mr W on immigration matters, as she is required to do under the Code. It was therefore inevitable that the staff of the Sri Lankan company, who were dealing directly with Mr W, would step into that void. In doing so, they moved beyond permissible clerical and interpretation work into the prohibited area of providing services amounting to immigration advice. Somebody was advising Mr W of the criteria for a visa application and the voluminous information and documentation required by Immigration New Zealand. It was not Ms Niland, so must have been the staff.

[48] Ms Niland says she expected the Sri Lankan staff and Mr W to contact her if any immigration advice was required.<sup>14</sup> That expectation is somewhat unreal. Given the language barrier and time zone difference, Mr W would be expected to deal with the local staff whom he had met. The Sri Lankan company specialises in New Zealand work opportunities, so will naturally deal with immigration queries itself.

[49] The Tribunal’s earlier decision concerning Ms Niland’s Filipino clients assessed the template client agreement of the Philippines company and Ms Niland’s standard Skype declaration. I found that the unlicensed staff of the Philippines company were providing immigration advice and therefore committing offences under the Act. Ms Niland was found to be in breach of cl 3(c) of the Code by facilitating their provision of such advice.<sup>15</sup>

[50] Turning now to the specific allegations concerning the treatment of Mr W, I will deal first with the second head of complaint.

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<sup>13</sup> Section 5, “clerical work”.

<sup>14</sup> Counsel’s memorandum, 13 February 2018 at [26]–[27].

<sup>15</sup> *Registrar of Immigration Advisers v Niland* [2018] NZIACDT 52 at [90]–[92].

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

[51] The arrangement with Mr W is as unlawful as the one Ms Niland had with her Filipino clients. She has facilitated the provision of immigration advice by unlicensed individuals. While Ms Niland must have known that the Sri Lankan staff were assisting and advising Mr W on immigration matters, I accept that she did not appreciate that their work went beyond permitted clerical work into the prohibited area of providing immigration advice.

[52] The staff in Sri Lanka could not have assisted Mr W with his immigration application without Ms Niland's name on the visa form. Immigration New Zealand would have rejected such an application.

[53] Indeed, Mr W is even more remote from Ms Niland than her Filipino clients as he was dealing with the Sri Lankan company with whom she appears to have had no written contract. Mr W was left in a legal or contractual limbo in respect of immigration services. He signed an agreement with the Philippines company, but the agreement was not signed by that company. Ms Niland countersigned it, but it is not clear whether that was effective since the immigration services are expressed to be those of the Philippines company, which was not a party. Hence the scope of Ms Niland's obligations, if any, under the agreement are not at all clear.

[54] Furthermore, Ms Niland left most of the immigration work to the Sri Lankan company which was no more a party to that agreement than the Philippines company. I note also that the template client agreement and Skype declaration signed by Mr W were written for the Filipino clients of Ms Niland working with staff of the Philippines company in Manila.

[55] Ms Niland has adopted a casual, if not cavalier, approach to Mr W. He was left contractually unprotected and in the hands of unlicensed individuals for the bulk of the immigration services provided.

[56] Ms Niland is in breach of cl 3(c) of the Code in failing to act in accordance with the Act, as she facilitated the unlawful conduct of others. The breach is admitted by her.

*First head of complaint – failure to obtain instructions*

[57] As for the first head of complaint, Ms Niland left it to the Sri Lankan company to directly engage with Mr W, so she failed to obtain his instructions. This breach of cl 2(e) of the Code is admitted by her.

*Third head of complaint – no written agreement*

[58] The next head of complaint alleges that Ms Niland failed to provide a written agreement. Ms Niland and Mr W both signed a client agreement, but it is written on the letterhead of the Philippines company and primarily sets out the immigration services to be provided by that company (“in conjunction with” and “upon instruction from” Ms Niland). Yet the company did not sign the agreement and did not provide any immigration services. It is not at all clear that Ms Niland had any valid agreement with Mr W as to the provision of immigration services.

[59] That document could not be accepted as the agreement contemplated by the Code. Ms Niland recognises this as she admits a breach of cl 18(a) of the Code.<sup>16</sup> I find a breach of cl 18(a).

*Fourth head of complaint – significant matters in agreement not explained*

[60] The fourth head of complaint alleges a failure to explain to Mr W significant matters in the written agreement. This must occur before the written agreement is accepted. Ms Niland accepts she did not do this. She has therefore breached cl 18(b) of the Code.

*Fifth head of complaint – full description of tailored services not provided*

[61] The fifth head of complaint concerns Ms Niland’s alleged failure to ensure that the written agreement contained a full description of the services to be provided by her, which had to be tailored to the circumstances of Mr W. I have already found that there was no valid agreement. Even if the agreement does bind Ms Niland, it attributed the immigration services to the Philippines company (which had no relationship with Mr W) and was expressly written for clients from the Philippines. It takes no consideration of Mr W’s circumstances. Ms Niland admits a breach of cl 19(e) of the Code.

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<sup>16</sup> Statement of Ms Niland, 11 December 2017 at [37].

*Sixth head of complaint – failed to advise client*

[62] The sixth head of complaint alleges a failure to notify Mr W when the application was lodged and to update him of its progress. As Ms Niland had no communication with Mr W after the Skype consultation, it is plain that she did not comply with this obligation. Ms Niland admits a breach of cl 26(b) of the Code.

*Seventh head of complaint – failed to maintain and make available the file*

[63] The final head of complaint alleges a failure by Ms Niland to maintain a proper file for Mr W and to make it available for inspection by the Authority. Ms Niland had some documents relating to Mr W but they were not an adequate file. For example, there is no record of the Skype interview or of any communications with Mr W. The file relating to immigration matters was presumably largely held by the Sri Lankan company.

[64] Ms Niland, whose file was inadequate in any event, had some difficulty complying with the Authority's request that a copy be made available for inspection. She has explained this by reference to her personal circumstances in her statement of 12 February 2018. I accept her explanation, but nonetheless she is in breach of cl 26(e) of the Code, as she accepts. The explanation will be relevant to sanctions at the next stage of this disciplinary process.

## **OUTCOME**

[65] I uphold all heads of complaint. Ms Niland is in breach of cls 2(e), 3(c), 18(a), 18(b), 19(e), 26(b) and 26(e) of the Code in relation to her representation of Mr W.

[66] The complaint here is very similar to the one already decided by the Tribunal concerning Ms Niland's Filipino clients. I agree with the submission Mr Moses made there that there is considerable overlap in the various heads of complaint and that to a large extent they arise from the flawed multi-party arrangement with the Philippines and Sri Lankan companies. In respect of Mr W, the contractual arrangement was very loose indeed. But Ms Niland's flawed practice goes beyond that. In addition to the muddled arrangement, there was a failure of the critical obligation of an adviser to engage with the client.

[67] Mr Moses described Ms Niland's conduct in the other complaint as negligent, rather than deliberately employing a business model in clear and flagrant breach of her professional obligations. It was submitted that she was careless as to the contractual arrangements and did not understand the limits of the clerical work exclusion to the

statutory definition of immigration advice. She had overlooked that the template contract of engagement with the Philippines company was entirely unsuited to her needs and those of the client. All the resulting Code breaches were incidents of that negligence. While I found the fundamental failure to personally engage with her Filipino clients was more than just a muddled multi-party relationship, I accepted Mr Moses' description of Ms Niland's conduct.

[68] I have precisely the same view of Ms Niland's conduct in relation to Mr W, though I have already noted Ms Niland's particularly casual approach to having even the semblance of a professional and legal relationship with Mr W.

### **SUBMISSIONS ON SANCTIONS**

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

[70] Given the overlap between the heads of complaints, I will be mindful in determining the sanction that there should be no double punishment of essentially the same conduct. Furthermore, since the nature of this complaint is very similar to that of the earlier complaint upheld against Ms Niland, one sanctions decision will be issued in respect of both complaints. I will take into account the joint memorandum of 9 January 2019 made in the earlier complaint.

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

#### *Timetable*

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

- (1) The Registrar, the complainant and Ms Niland are to make submissions by **28 February 2019**.
- (2) The Registrar, the complainant and Ms Niland may reply to the submissions of any other party by **14 March 2019**.