IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2020] NZIACDT 21

Reference No: IACDT 001/19

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar
BETWEEN	**IMMIGRATION NEW ZEALAND (MICHAEL CARLEY)** Complainant
AND	**CAITLIN MAREE PENTY** Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 18 May 2020

REPRESENTATION:

Registrar:	Self-represented
Complainant:	Self-represented
Adviser:	Self-represented

PRELIMINARY

[1] Ms Caitlin Maree Penty, then a licensed adviser, was instructed by her employer, Mr Bruce Robert Cleland, also then a licensed adviser, to take over an arrangement he had with two companies operating in the Philippines to provide immigration services for Filipino workers to enter New Zealand. Apart from one interview with each client early in the process, usually by Skype, Ms Penty had no contact with her clients.

[2] Immigration New Zealand made a complaint to the Immigration Advisers Authority (the Authority), alleging breaches of the Immigration Advisers Licensing Act 2007 (the Act) and the Licensed Immigration Advisers Code of Conduct 2014 (the Code). The Registrar of Immigration Advisers (the Registrar), the head of the Authority, has referred the complaint to the Tribunal. The most serious allegation is that Ms Penty relied on unlicensed persons in the Philippines to perform immigration services for clients, contrary to the Act.

[3] An almost identical complaint against Mr Cleland has already been upheld by the Tribunal and he was found to have breached numerous provisions of the Code. While formally denying much of the complaint against her, Ms Penty accepts in her submissions to the Tribunal, filed before the Tribunal's decision concerning Mr Cleland, that if the complaint against him was upheld, then she too must be guilty as she took over the arrangement from him.

[4] As the complaint against Mr Cleland was indeed upheld, it remains only for the Tribunal to consider whether Ms Penty has advanced any evidence or explanation which might establish that the outcome of the complaint against her should be different.

BACKGROUND

[5] Ms Penty was at the material time provisionally licensed as an immigration adviser, having been granted such a licence on 9 May 2017. She was an employee of Novo Education Consulting Limited (Novo), trading as Choose New Zealand. She was based in Auckland. Her supervisor was her employer, Mr Cleland, then a full licence holder. He was a director of Novo. Neither Ms Penty nor Mr Cleland are currently licensed. She surrendered her licence on 13 July 2019.

[6] As noted above, a complaint against Mr Cleland based on an arrangement he had made with two companies in the Philippines, was upheld by the Tribunal on 3 May

2019.[1] Since Ms Penty took over the same arrangement, there is no need to repeat the comprehensive background set out there.

[7] In summary, Novo had started a business relationship with a New Zealand company operating in the Philippines, Immigration Placement Services Limited (IPS). That company in turn worked with a Philippines company, BNAC (BEP NZ AUST CORP). IPS and BNAC worked together, with correspondence from them being interchangeable between them. They are owned by Mr Bruce Porteous, who had been refused a licence by the Authority in 2010. Mr Cleland was the third licensed adviser to be disciplined by the Tribunal as a result of working with Mr Porteous. The complaints always arise out of the adviser's lack of engagement with the client in the Philippines, the common thread being the adviser's unlawful delegation of control of the visa application and management of the client relationship to the staff of IPS/BNAC.

[8] The standard arrangement sees IPS/BNAC source both the worker (client) and the job in New Zealand. Mr Cleland and now Ms Penty claim IPS/BNAC merely operates a recruiting or employment service since, so it is said, Novo's licensed adviser takes responsibility for providing the immigration service once the job has been secured. None of the staff of IPS/BNAC are licensed immigration advisers.

[9] Mr Cleland was disciplined in respect of 12 Filipino clients. All the immigration applications had been filed in September or October 2016, with the complaint against him to the Authority being made by Immigration New Zealand in November 2016. The complaint against Ms Penty concerns 11 Filipino clients, for whom she acted between about March 2017 and August 2018.

[10] Ms Penty's mode of practice was identical to that of Mr Cleland. IPS/BNAC presented the client to Ms Penty, having already found a New Zealand employer. The client entered into an agreement with IPS/BNAC "in conjunction with" Novo. IPS/BNAC agreed to provide the immigration services (a work visa application) "upon instruction from **Caitlin Penty, Licensed Immigration Adviser**". The fee was payable to IPS/BNAC. The agreements were signed by IPS/BNAC and the client. There was a place for Ms Penty to sign, but she did not sign any of them seen by the Tribunal.[2]

[11] The clients paid a fee of PHP 30,000 (NZD 825 at the time) to IPS/BNAC, not Novo. According to Ms Penty, Novo was paid NZD 250 by IPS/BNAC for each client.

---

[1] *Immigration New Zealand (Calder) v Cleland* [2019] NZIACDT 25, *Immigration New Zealand (Calder) v Cleland* [2019] NZIACDT 38.

[2] The Registrar provided the Tribunal with agreements with 10 of the 11 clients.

[12] The only contact Ms Penty had with each client was one Skype interview. A template "SKYPE INTERVIEW AND DECLARATION by CLIENT of IPS" was signed by the client, but not Ms Penty.[3]

[13] The work visa applications, with the supporting documents, were prepared by the staff of IPS/BNAC. Those staff advised the clients of the information and documents required, received from the clients their information and documents, assessed them and then compiled the applications. It is Ms Penty's evidence that Mr Cleland had previously issued IPS/BNAC with a checklist identifying the documentation required by Immigration New Zealand which the IPS/BNAC staff "likely" gave each client.[4]

[14] Furthermore, Ms Penty allowed the staff access to an online account used to lodge the applications, so they could scan and upload the documents. She appears to have usually checked the documents herself before uploading.[5]

[15] The limited documentation sent to the Tribunal concerning the 11 clients of Ms Penty is set out below to the extent relevant.

(Mr AB)

[16] Mr AB entered into a written client agreement with IPS/BNAC on 15 October 2017. It was not signed by Ms Penty.

[17] Mr AB was interviewed by an immigration officer on 3 January 2018. He said he was assisted in his visa application by Mr S of BNAC. He was not given a checklist. He spoke to Ms Penty once by Skype about the requirements. If he had any questions, he contacted Mr S. It was Mr S who reviewed the documents. Much of the information on the application form was filled out by the staff at BNAC. His application was lodged by an employee of BNAC.

(Mr CD)

[18] Mr CD entered into a written client agreement with IPS/BNAC purportedly on 20 July 2018 (this date is well after Ms Penty's work for Mr CD). It was not signed by Ms Penty.

[19] On 16 October 2017, the prospective employer of Mr CD sent an email to Mr S of BNAC asking whether a letter signed by her would be acceptable for Immigration New

[3] The Registrar provided the Tribunal with the template interview declarations of all 11 clients, but Ms Penty had no record of the interview with any of them.
[4] Ms Penty's letter to the Authority (20 November 2018) at 2.
[5] Ms Penty's email to Ms E (1 June 2018); Registrar's supporting documents at 53.

Zealand. The agency appears to have requested a higher pay rate. Mr S replied on 17 October, with a copy to Ms Penty, advising that it would not be acceptable since Mr CD would also have to sign it. Mr S said he would arrange it.

[20] Mr CD was interviewed by an immigration officer on 20 December 2017. He said he was aware of Ms Penty as the adviser and knew he could ask her questions, but it was Mr S and some of Mr CD's former colleagues who assisted him with the visa application. BNAC staff reviewed his documents. He confirmed receiving a checklist from BNAC.

(Mr EF)

[21] Mr EF entered into a written client agreement with IPS/BNAC on 22 September 2017. It was not signed by Ms Penty.

[22] Ms Penty sent by email to Mr EF on 21 November 2017 a letter from Immigration New Zealand (unseen by the Tribunal). She pointed out that the agency believed that he had submitted fraudulent documents. He responded to her on the same day advising that he had replied to Ms E of IPS and would submit his supporting documents to IPS. Then on 24 November, Ms E advised Ms Penty by email that Mr S had spoken with Mr EF and found his employment documents were fraudulent. It was "suggested" he withdraw his application. Mr EF would send a separate email requesting a withdrawal.

[23] On 1 December 2017, Mr EF was interviewed by an immigration officer. He confirmed having a Skype interview with Ms Penty and receiving a checklist. He was assisted in filling in the visa application form by the staff of IPS. He obtained clarification from those staff. Furthermore, said Mr EF, he gave the supporting documents to the same staff who reviewed them.

(Mr GH)

[24] Mr GH entered into a written client agreement with IPS/BNAC on 21 June 2017. It was not signed by Ms Penty.

[25] Mr GH was interviewed by an immigration officer on 24 November 2017. He advised that he had an interview with Ms Penty and was also able to email her for assistance with the visa application. She seldom emailed him. He made the choice to contact Mr S by telephone for assistance because it was more convenient. According to Mr GH, he received a checklist from Mr S and was told by him what documents were needed. His supporting documents were reviewed by Mr S.

(Mr IJ)

[26] Mr IJ entered into a written client agreement with IPS/BNAC on 4 July 2017. It was not signed by Ms Penty.

(Mr KL)

[27] Mr KL entered into a written client agreement with IPS/BNAC on 10 March 2017. It was not signed by Ms Penty.

[28] On 7 December 2017, Mr KL was interviewed by an immigration officer. He said he spoke once by Skype to Ms Penty, who assisted him with his visa application. By then he had given almost all of the documents to the staff of BNAC. If he had any questions about the application or its progress, he asked the staff.

[29] Mr S of BNAC sent an email to Ms Penty on 15 December 2017, attaching a "PPI" letter from Immigration New Zealand (letter setting out adverse factors seeking an explanation, unseen by the Tribunal). He stated that "we" had responded to the first PPI letter.

(Mr MN)

[30] Mr MN entered into a written agreement with IPS/BNAC on 25 October 2017. It was not signed by Ms Penty.

[31] On 9 May 2018, an immigration officer interviewed Mr MN. He said he was assisted in preparing the visa application by Mr S. He was advised of the requirements by Mr S. The documents were given to Mr S. He spoke once by Skype with Ms Penty, though she also sent him about three emails with questions.

[32] Ms E of BNAC sent an email to Ms Penty on 23 May 2018 informing her that Mr MN's medical tests had been uploaded by the panel physician. Ms Penty was asked to advise the immigration officer that there had been full compliance with the additional medical requirements.

(Mr OP)

[33] Mr OP entered into a written client agreement with IPS/BNAC on 18 January 2018. It was not signed by Ms Penty.

(Mr QR)

[34] Mr QR entered into a written client agreement with IPS/BNAC on 3 February 2018. It was not signed by Ms Penty.

[35] On 1 June 2018, Ms Penty advised Ms E that she had no record of having been asked to check Mr QR's application before it was lodged.

[36] Ms Penty acknowledges that the application was lodged by the staff of IPS/BNAC without her knowledge.[6] She says this was an error and the only time it occurred.

(Mr ST)

[37] The Tribunal has seen no written client agreement with Mr ST.

[38] Ms Penty advised Ms E by email on 16 August 2018 that Immigration New Zealand required certain information about the employer of Mr ST. Mr Porteous of IPS replied on 17 August stating that there had been no response from the employer so "we wish to withdraw the application". Ms Penty advised him the same day that Mr ST would have to consent, so she would send him an email.

(Mr UV)

[39] Mr UV entered into a written client agreement with IPS/BNAC on 3 June 2018. It was not signed by Ms Penty.

[40] On 5 April 2018, an issue was raised with Ms Penty by Immigration New Zealand concerning Mr UV's work experience given discrepancies in the supporting documents. She asked Mr UV by email to explain it, copying this communication to Mr S. Mr UV sent his explanation to Mr S who then sent it to Ms Penty. The explanation was expanded by Mr S in an email to Ms Penty on 12 April.

Warning letter from Immigration New Zealand

[41] On 18 January 2018, Immigration New Zealand wrote to Ms Penty informing her that visa applicants had advised the agency that unlicensed staff from IPS/BNAC were assisting them with their applications. Furthermore, she had not provided them with a written agreement, a requirement of the Code. In addition, three of her clients had presented false documents. It appeared she was not meeting her professional responsibilities under the Code. Her comments were invited.

---

[6] Ms Penty's letter to the Authority (20 November 2018) at [1d].

[42] Ms Penty replied to Immigration New Zealand on 22 January 2018. She advised that the clients were made aware of the requirement that all immigration advice came from her. The staff merely helped with administrative tasks, such as collecting documents, most of which was also required for the employment process. The only information they provided was publicly available. She was the person who told the clients what documents were required. Moreover, all the applications and supporting documents were checked by her before the applications were lodged. As for client agreements, Ms Penty said all the clients were issued with one.

[43] According to Ms Penty, she had never knowingly filed false documents with Immigration New Zealand. In many cases, the clients were not even aware themselves that fraudulent documents had been produced, examples of which she gave.

COMPLAINT

[44] On 15 June 2018, Immigration New Zealand (Michael Carley) made a complaint to the Authority concerning Ms Penty in relation to seven clients. It was alleged that she had subcontracted her responsibilities as a licensed adviser to IPS/BNAC. She had relied on this unlicensed agency in the Philippines to provide immigration advice to her clients. Nor did she have signed contracts in place.

[45] Following a request for her files from the Authority, Ms Penty sent the files on 4 July 2018. She advised in her letter that IPS/BNAC provided clerical and administrative help. Unfortunately, she had no control over whether the clients responded to her communications or with whom they discussed their cases. The staff passed on to her documents received from the clients. It was not an ideal system as there was often miscommunication between herself and the staff. As a result, Novo had ended the relationship with IPS/BNAC and had taken on no new clients from 1 April 2018.

[46] The Authority wrote to Ms Penty on 2 November 2018 formally notifying her of the details of the complaint and inviting her explanation. As a result of the Authority's investigation of her practice, it now concerned 11 clients.

Explanation from Ms Penty

[47] On 20 November 2018, Ms Penty responded to the Authority. As for the allegation that she was facilitating the provision of unlicensed advice, she stated that the clients were made aware of her role as the immigration adviser and that they could contact her at any time. She told them she was responsible for handling the immigration matters, while the staff of IPS/BNAC managed the employment matters. Ms Penty said she confirmed with each of them at the Skype interview that they understood this

distinction, but it was evident from the interviews with Immigration New Zealand that not all of them had understood.

[48] As for the allegation that the staff of IPS/BNAC were requesting documents from the clients, it was important to note that Mr Cleland had issued them with a checklist of documents required for the applications. It was likely that the staff were using the checklist. Furthermore, the documentary requirements were publicly available. She also advised them during the Skype interview what documents were needed. Additionally, much of the information required from the clients was needed for the employment process, so the staff already had much of the information.

[49] Ms Penty said in her letter to the Authority that many clients did not contact her directly for updates of their applications and her attempts to communicate with them rarely elicited a direct response. They preferred to communicate with the staff in their own native language. The letters sent by Immigration New Zealand were long and written in dense English. The clients needed assistance with printing and translating the documents. IPS/BNAC staff were intermediaries only. This ensured the clients had a thorough understanding of the requirements. This practice was in complete compliance with the Code. It was difficult to avoid using an intermediary when dealing with offshore clients who did not respond to attempts to communicate with them.

[50] In her explanation, Ms Penty said that some of the examples relied on by the Authority were of communications between the staff and employers. IPS/BNAC was a recruitment agency which placed Filipino workers with New Zealand employers. It had already gone through the process of arranging employment. IPS/BNAC preferred to be the point of contact for the employer. She therefore allowed IPS/BNAC to relay relevant information to the employer. On one occasion, she contacted the employer directly due to the time constraints. The only other situation where she contacted the employer directly concerned two clients where the letters from Immigration New Zealand seeking information were complicated.

[51] According to Ms Penty, she allowed the staff access to the online account set up for the purpose of lodging the applications so they could scan and upload documents. This avoided double handling, since otherwise the documents would be emailed to her and she would then upload them. In the case of Mr QR, the application was lodged in error by the staff. They did not send Mr QR's documents to her for approval first. This was the only occasion that this happened.

[52] Ms Penty admitted negligence in failing to check that the client agreements had been signed by all the parties prior to her starting any work. She was a party to the tri-partite arrangement. When she took over the arrangement from Mr Cleland, she sent a

signed copy of the contract to the staff. The contracts were to be signed by the clients and returned to her. She had been negligent in not checking the contracts to ensure she signed them.

[53] As a new adviser in her first year of practice, Ms Penty said she did her best to make the arrangement work when it was assigned to her from Mr Cleland. After about nine months, the managing partners decided to end the relationship with IPS/BNAC.

Complaint referred to Tribunal

[54] The Registrar referred the complaint to the Tribunal on 8 January 2019. It is alleged that Ms Penty breached the Act and the Code in the following respects:

(1) Being negligent by relying on unlicensed persons to–

1.1 request and collect documents without her direction;

1.2 make enquiries of clients and employers concerning visa matters and then informing her;

1.3 direct her on how to proceed with the applications;

1.4 be the main point of contact for clients and answer their queries; and

1.5 ensure the written agreements were signed by all the parties.

(2) Alternatively–

2.1 undertaking work in an unprofessional manner and failing to exercise due care and diligence, in breach of cl 1;

2.2 enabling the provision of immigration advice by unlicensed persons, in breach of cl 3(c);

2.3 failing to ensure all the parties signed or confirmed in writing a written agreement, in breach of cl 18(c).

JURISDICTION AND PROCEDURE

[55] 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.

[56] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.[7]

[57] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.[8] It has been established to deal relatively summarily with complaints referred to it.[9]

[58] 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.[10]

[59] The sanctions that may be imposed by the Tribunal are set out in the Act.[11] The focus of professional disciplinary proceedings is not punishment but the protection of the public.[12]

[60] 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.[13]

[61] The Registrar has produced a statement of complaint (8 January 2019), with paginated supporting documents.

[62] There are no submissions from the complainant.

[63] Ms Penty wrote to the Tribunal on 7 February 2019 advising that she had addressed the issues in her response of 20 November 2018 to the Authority. She repeated that her employer no longer had any dealings with IPS/BNAC. Steps had already been taken to avoid a similar situation occurring with offshore agents. A contract

---

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

and other documents had been developed for use with them. The contracts were also now issued in a way which significantly reduced the risk of a missing signature.

[64] Ms Penty also sent to the Tribunal a statement of reply (7 February 2019), together with a statement from her employer, Mr Cleland (also 7 February 2019). In the statement of reply, Ms Penty concedes that if Mr Cleland was to be found guilty of allowing unlicensed persons to give immigration advice, then she too would be guilty as she took over the same arrangement.

[65] No party requests an oral hearing.

ASSESSMENT

[66] 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.
>
> **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:
>
> …
>
> c. all parties to a written agreement sign it, or confirm in writing that they accept it,
>
> …

(1) Being negligent by relying on unlicensed persons to–

1.1 request and collect documents without her direction;

1.2 make enquiries of clients and employers concerning visa matters and then informing her;

1.3 direct her on how to proceed with the applications;

1.4 be the main point of contact for clients and answer their queries; and

1.5 ensure the written agreements were signed by all the parties

(2) Alternatively–

2.1 undertaking work in an unprofessional manner and failing to exercise due care and diligence, in breach of cl 1;

2.2 enabling the provision of immigration advice by unlicensed persons, in breach of cl 3(c);

2.3 failing to ensure all the parties signed or confirmed in writing a written agreement, in breach of cl 18(c)

[67] I will deal first with the heads of complaint relating to the use of the unlicensed staff of IPS/BNAC, being 1.1 to 1.4 and 2.1 to 2.2, and later with the allegation regarding the lack of a written agreement, items 1.5 and 2.3.

[68] In order to understand the seriousness of the allegation regarding unlicensed staff, it is necessary set out the statutory law governing the work of advisers.

Immigration advice, the exclusive work of licensed advisers

[69] 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".[14] This occurs where the licensed adviser becomes the ostensibly legitimate front for unlicensed individuals who provide the bulk of the immigration services.

[70] 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.

[71] 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.[15] A person employing as an immigration adviser another person who is neither licensed

[14] *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].

[15] Immigration Advisers Licensing Act 2007, ss 6 & 63.

nor exempt also commits an offence.[16] A person may be charged with such an offence even where part or all of the conduct occurred outside New Zealand.[17]

[72] The statutory scope of "immigration advice" is very broad:[18]

> **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.

[73] 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.

[74] "Clerical work" is narrowly defined in the Act:[19]

> **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:

---

[16] Section 68(1).
[17] Sections 8 & 73.
[18] Immigration Advisers Licensing Act 2007, s 7.
[19] Section 5, definition of "clerical work".

(b) computing or data entry:

(c) recording information on any form, application, request, or claim on behalf and under the direction of another person

[75] Ms Penty is the only person who can provide immigration advice. In other words, she 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 Ms Penty or the client.

[76] In order to comply with this statutory requirement, the Code imposes an obligation on the adviser to act in accordance with New Zealand immigration legislation, cl 3(c). This obligation is personal to the licensed immigration adviser and cannot be delegated.[20]

Application of law to Ms Penty

[77] It is observed that Ms Penty was provisionally licensed in May 2017 and by then had already taken over from her employer and supervisor, Mr Cleland, the arrangement in place to represent the clients introduced by IPS/BNAC.[21] That arrangement was reviewed in the almost identical complaint against Mr Cleland upheld on 3 May 2019.

[78] The Tribunal found that Mr Cleland's sole engagement with the clients was one Skype interview. He left it to the staff of IPS/BNAC to advise the clients on Immigration New Zealand's requirements and work with them to collect the documents and other information needed for their applications. While the client agreements stated that this was done on the instruction of Mr Cleland, that was illusory.

[79] Mr Cleland was found to have failed to personally provide his services, instead relying on unlicensed persons. This had not merely been done on isolated occasions. There had been a wholesale offloading of client engagement and document gathering. He had allowed the staff to provide immigration advice. This was determined to be a breach of the cl 1 obligation to conduct himself with professionalism and due care, as well as the cl 3(c) obligation to conduct himself in accordance with the Act.

[80] I have reviewed Ms Penty's explanation to the Authority and Mr Cleland's statement to the Tribunal in support of her. They raise the same explanations that were

[20] *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [29], [34] & [47].
[21] See client agreement of Mr KL dated 10 March 2017; Registrar's supporting documents at 96–100.

advanced in the complaint against Mr Cleland. It has already been noted in this decision that those responses were sent before the Tribunal determined the complaint against Mr Cleland. I do not intend to duplicate here the assessment set out in the earlier decision, since Ms Penty took over an identical arrangement. Furthermore, she has already conceded that if the Tribunal was to find against Mr Cleland, then she too must be guilty.

[81] There is no new evidence or explanation from Ms Penty casting doubt on the findings made in relation to Mr Cleland. While I note that she did try to engage with some of the clients by email, she says they did not respond to her.[22] That does not excuse her failure. She was operating a system which encouraged the clients to deal with unlicensed persons. It is self-evident that Ms Penty knew that the clients were seeking assistance from the staff. After all, she knew they were not obtaining advice on their applications and supporting documents from her.

[82] Ms Penty points out that the clients were all made aware of the requirement that it was her role to provide the immigration advice and that she made herself available by Skype and email to do so. She claimed to have no control over whether they contacted her, all of them preferring to deal with the local staff who spoke their native language.

[83] It is not sufficient for an adviser merely to inform clients of his or her role and professional obligations. The adviser must actually fulfil them. It was Ms Penty's responsibility, not that of the clients, to establish a process which met the legal requirements. She is wrong to say she had no control over who the clients communicated with. It was her process they were operating under. They should have been directed to deal with her directly by removing the choice of using the staff. The clients no doubt preferred to communicate in Tagalog, but it needs to be borne in mind that they had to have a reasonable level of English to obtain a visa. In the event that she occasionally needed an interpreter or translator, it would have been acceptable for her to have used the staff in that role only.

[84] The work of the staff of IPS/BNAC, in compiling the visa applications and supporting documents and in communicating with the clients about the visa criteria and necessary documents, amounted to immigration advice. There is evidence before the Tribunal of this occurring in respect of seven of her clients, being Messrs AB, CD, EF, GH, KL, MN and QR.

[22] Messrs EF, GH, IJ, MN and UV.

[85] There is also evidence of other conduct by the staff concerning seven of her clients amounting to immigration advice:

(1) Mr CD – dealing with the employer regarding Immigration New Zealand's requirements. Indeed, Ms Penty confirms that it was her practice to contact the employer only where there were severe time constraints or Immigration New Zealand's PPI letters were complicated.[23] A recruitment agency can deal with an employer on an employment matter, but not any question raised by Immigration New Zealand;

(2) Mr EF – discussion with the client regarding a character issue and the withdrawal of his application;

(3) Mr KL – responding to Immigration New Zealand's first PPI letter;

(4) Mr MN – assessing medical results to determine that there had been full compliance with the requirements;

(5) Mr QR – not just compiling the application, but then filing it without review by Ms Penty. Her mode of operation permitting the staff to upload information and documents to the online application gave rise to the risk of this occurring;

(6) Mr ST – communicating with the client regarding withdrawal of the application; and

(7) Mr UV – communicating with the client regarding an issue raised by Immigration New Zealand concerning his work experience.

Conclusion on use of unlicensed staff

[86] I find that Ms Penty unlawfully used unlicensed persons to undertake work regarded as immigration advice under the Act. This is contrary to the Act and therefore a breach of cl 3(c) of the Code. The specific allegation at 2.2 of the complaint is upheld in respect of nine clients.[24]

[87] Having upheld item 2.2 of the complaint, there is no need to assess the alternative particulars at 1.1 to 1.4.

---

[23] Ms Penty's letter to the Authority (20 November 2018) at [1c].
[24] Messrs AB, CD, EF, GH, KL, MN, QR, ST and UV.

[88] As for item 2.1 of the complaint, while I accept Ms Penty's use of unlicensed staff was unprofessional, that adds little to the more serious breach of conducting herself contrary to the Act. It will be upheld, but it will not be material to the sanctions.

[89] This brings me to items 1.5 and 2.3 of the complaint.

Written client agreements

[90] Unlike Mr Cleland, Ms Penty did not sign any of the client agreements. They were agreements between IPS/BNAC and the clients only. She claims she signed an agreement (presumably an electronic template) when she took over the arrangement, but it was not used by IPS/BNAC for some reason unknown to her. Whatever she signed, she was responsible for ensuring that the agreements signed by the clients were signed by her. In any event, the template agreement signed by each client does not comply with the Code, so even if she had signed each agreement, she would still be in breach of various Code obligations as to what must be included in the client agreements, as was Mr Cleland.

[91] It is a serious breach of an adviser's professional obligations to undertake work without a written agreement. An agreement is an important protection for both the client and the adviser.

Conclusion on client agreements

[92] Ms Penty did not ensure that she signed or confirmed in writing the written client agreements. This can also be seen as a failure to ensure that the clients entered into a written client agreement with her or Novo, or confirmed the acceptance of any such agreement in writing. This was the case for all 11 clients. Ms Penty breached cl 18(c) of the Code. Item 2.3 of the complaint is upheld.

[93] Ms Penty has admitted negligence in failing to ensure that she signed the written agreements, so I uphold item 1.5 of the complaint. As it is an alternative charge, it will add nothing to any sanction for the breach of cl 18(c).

OUTCOME

[94] Ms Penty has relied on unlicensed persons to perform immigration work, in breach of cls 1 and 3(c) of the Code. She also failed to ensure that all parties signed an agreement or confirmed it in writing, in breach of cl 18(c). The latter also amounts to negligence, a statutory ground of complaint.

SUBMISSIONS ON SANCTIONS

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

[96] A timetable is set out below. Any requests that Ms Penty 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.

[97] An aggravating feature of Ms Penty's conduct is that she filed five of the visa applications for these 11 clients after Immigration New Zealand had formally drawn to her attention that she might not have been meeting her professional responsibilities regarding the very matters upheld by the Tribunal, being the use of unlicensed persons and the failure to have client agreements in place.[25]

Timetable

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

(1) The Registrar, the complainant and Ms Penty are to make submissions by **15 June 2020**.

(2) The Registrar, the complainant and Ms Penty may reply to submissions of any other party by **29 June 2020.**

ORDER FOR SUPPRESSION

[99] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.[26]

[100] There is no public interest in knowing the name of Ms Penty's clients.

[101] The Tribunal orders that no information identifying the clients is to be published.

D J Plunkett
Chair

[25] Messrs MN, OP, QR, ST and UV.
[26] Immigration Advisers Licensing Act 2007, s 50A.