

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2022] NZIACDT 17

Reference No: IACDT 011/21

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **SU**
Complainant

AND **NIRMALA KRISHNA MURTHY**
Adviser

Hearing at Auckland on 17 June 2022

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 18 July 2022

REPRESENTATION:

Registrar: L Lim, counsel
Complainant: Complainant's brother-in-law
Adviser: Self-represented

PRELIMINARY

[1] Nirmala Krishna Murthy is a licensed immigration adviser. She was engaged by SU (the complainant) and her husband, IH, for immigration matters.

[2] Ms Murthy applied for an assessment of the complainant's overseas qualification by the New Zealand Qualifications Authority (NZQA) but was late doing so. The complainant also says that Ms Murthy deliberately misrepresented to her when the assessment had been sought. It is further contended that Ms Murthy filed the application after her services had been terminated.

[3] A complaint to the Immigration Advisers Authority (the Authority) was referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal, alleging that Ms Murthy was dishonest or misleading, and/or negligent and/or breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code). These are grounds of complaint under the Immigration Advisers Licensing Act 2007 (the Act).

BACKGROUND

[4] The Tribunal records that a hearing concerning the dishonesty heads of complaint was held on 17 June 2022. The Registrar was represented by Ms Lim, counsel. Ms Wu, the Authority's investigator, was in attendance. Ms Murthy also attended and was the only person to give evidence.

[5] However, neither the complainant nor her husband attended the hearing as they are in India. The Tribunal granted leave to the complainant's brother-in-law to represent them. The Tribunal's Minute (3 May 2022) had required the attendance of both the complainant and her husband to give evidence. The Tribunal was not aware that they were in India and they did not request an adjournment, either prior to the hearing or at the hearing. Ms Lim invited the Tribunal to consider adjourning the hearing, but the Tribunal declined. The representative was invited to ask questions of Ms Murthy, but he declined to do so. He was invited to produce written closing submissions and the complainant herself produced such submissions.

[6] Ms Murthy is a director of Immigration Consultancies Ltd, of Auckland.

[7] The complainant and her husband are nationals of India. At the relevant time, they were in New Zealand on work visas, due to expire in December 2020.

[8] The husband rang Ms Murthy on 2 June 2020 and a meeting with her was arranged for the following day. He sent some documents to her. At the meeting, they discussed future visa options, including residence.

[9] Ms Murthy sent an email to the complainant's husband on 3 June 2020 asking to be advised of their decision, so a contract could be signed.

Contract signed to assist with residence

[10] There was a gap of three months before the husband contacted Ms Murthy again on 2 September 2020. She met the complainant and her husband on 12 September 2020 to discuss their visa options. Following advice from Ms Murthy, they decided to file an expression of interest for residence under the skilled migrant category. The complainant and Ms Murthy signed the latter's service contract at that meeting. It provided that Ms Murthy was to represent the complainant in the processing of a residence application under the skilled migrant category, which would also include her husband. The fee was \$5,606. They paid her \$2,803 the same day.

[11] At the time, Immigration NZ was accepting expressions of interest under the skilled migrant category, though on 8 April 2020 it had announced that effective from 2 April 2020, it had stopped selecting them out of the pool for residence applications.¹ This was due to the COVID-19 pandemic and consequential border closure. Ms Murthy, the complainant and her husband were all aware of this.

[12] It was Ms Murthy's evidence to the Tribunal that while she knew Immigration NZ was not selecting expressions at the time the complainant and the husband consulted her, she expected an updated policy to be issued on about 1 October 2020 (six months after the announcement) at which time expressions would be selected.

[13] The complainant sent information and documents to Ms Murthy on 16 and 17 September 2020.

[14] The skilled migrant residence application that would eventually be made required an assessment of the complainant's Indian qualifications by the NZQA. The husband texted Ms Murthy on 17 September to advise he had paid \$750 to her account. Ms Murthy replied by text to the husband on that day to say she would process the NZQA application "today".

¹ Immigration NZ announcement (8 April 2020) *COVID-19: Alert Level 4*.

Online NZQA assessment application created

[15] Ms Murthy duly prepared the assessment application. She asked Ms A from her staff to create the online assessment application and to pay the fee. At the time, Ms Murthy was unwell and she was only periodically attending the office. Ms A created the application on 17 September 2020 (at 3:43 pm). The "Status" of the application shown on NZQA's online record (accessible by Ms Murthy and her staff) was "Draft".² It is Ms Murthy's evidence that she was not aware that payment by Ms A had not been successful.

[16] From time to time, according to Ms Murthy, she followed up with the staff checking on progress of the assessment application and was always told it was under processing. As the processing of such an application (leading to the issue of a certificate from NZQA) would take one to two months at that time, Ms Murthy was not concerned about the delay.

[17] On the following day, 18 September 2020, the complainant provided further information to Ms Murthy. She added that her employer had refused to re-advertise her job, so she wanted to know what options she had.

[18] On 22 September 2020, the complainant personally filed with Immigration NZ a work visa application in the essential skills category. An offer of employment from a polytechnic (4 May 2020) was provided in support.

[19] Immigration NZ wrote to the complainant directly on 29 September 2020 identifying issues which might have a negative impact on the application for a work visa, including the absence of a genuine attempt at recruiting New Zealanders by the employer. Further evidence was required.

Ms Murthy takes over work visa application

[20] The complainant and her husband had a meeting with Ms Murthy on 3 October 2020. The complainant said her employer had agreed to advertise her position. She wanted Ms Murthy to take over the work visa application. Immigration NZ's "Immigration Adviser Details" form was signed by the complainant and Ms Murthy at the meeting. It recorded that Ms Murthy represented the complainant on the work visa application.

[21] The complainant sent an email to Ms Murthy on 4 October 2020 stating that her employer required more time to undertake the recruitment process for her position, but was offering no guarantee she would be the preferred candidate. The employer wanted

² Bundle at 21-23.

an extension until 30 October 2020 to provide the required information to Immigration NZ.

[22] Ms Murthy informed Immigration NZ by email on 5 October 2020 that she had been asked to represent the complainant on the work visa application. She sought an extension until 30 October to provide documents regarding recruitment. The completed immigration adviser form was attached.

[23] On 19 October 2020, Immigration NZ announced the further deferral of selections from the expressions pool for six months, effective from 2 October 2020.

[24] On the same day (at 10:59 am), the husband asked Ms Murthy by text whether there was any update on when Immigration NZ would accept expressions. She replied (also at 10:59 am) advising they could be submitted “now”, adding that she would send them an information request and once completed, the expression would be commenced and filed that week.³ Ms Murthy said to the Tribunal that she was not then aware of Immigration NZ’s announcement that day further deferring selections.

[25] The husband sent Immigration NZ’s deferral announcement by text to Ms Murthy on 20 October 2020. She discussed this with them by telephone that day.⁴

[26] The complainant’s husband asked Ms Murthy by text on 27 October 2020 to send the NZQA assessment if it had been received.⁵ Ms Murthy promptly replied that it had not been received.

[27] There was a meeting on 15 November 2020 between the complainant, her husband and Ms Murthy. Ms Murthy says that the complainant wanted advice on future visa options as her employer would not support her work visa.⁶ They discussed the extra points she would get from a Master’s degree.

[28] On 17 November 2020 (at 11:31 am), the complainant’s husband texted Ms Murthy seeking an update. She replied (at 3:40 pm) concerning an education provider.⁷ The husband responded (at 4:40 pm) asking if the NZQA assessment could be cancelled.⁸ Ms Murthy answered immediately (at 4:42 pm) to say it could not be cancelled.

³ Bundle at 32.

⁴ Ms Murthy’s supplementary statement (13 August 2021) at [7].

⁵ Bundle at 30.

⁶ Above n 4, at [11].

⁷ Bundle at 31.

⁸ Bundle at 31.

[29] On the same day, 17 November 2020 (at 9:00 pm), the complainant sent an email to Ms Murthy advising she would withdraw the work visa application.⁹

Complainant seeks refund from Ms Murthy

[30] The complainant and/or her husband met Ms Murthy on about 18 November 2020 to discuss study options. At this meeting, the complainant asked for a refund.

[31] The complainant followed the meeting up with an email to Ms Murthy on 20 November 2020 summarising the meeting.¹⁰ She referred back to the earlier meeting on 12 September. Given that the complainant's employer was reluctant to support the work visa, Ms Murthy had advised then that the only option was to file an expression in order to obtain an invitation, which would lead to a one-year extension of her work visa. Ms Murthy had assured them that expressions would open in November after the election. This had not happened, so they wanted a refund of \$2,803.

Complainant terminates Ms Murthy's services on work visa

[32] On 24 November 2020, the complainant sent an email to Ms Murthy advising her she would handle the work visa application on her own. Ms Murthy told the Tribunal that this was a termination of her services in relation to the work visa application only, not the assessment application.

[33] NZQA sent an email to the complainant on 26 November 2020 (at 4:43 pm) stating that the assessment application had not been submitted and had "Draft Status". It had not been paid for and was "going to be cancelled".¹¹ The complainant immediately replied (at 4:48 pm) cancelling the assessment application. She asked NZQA not to accept any correspondence from Ms Murthy.

[34] NZQA advised the complainant by email on 27 November 2020 that the draft application was never submitted. The fee was unpaid.

[35] On 28 November 2020, the complainant's husband sent a text to Ms Murthy asking for the receipt of \$750 paid for the NZQA assessment.

[36] On 30 November 2020 (at 10:54 am), the complainant's husband sent a text to Ms Murthy again asking for the acknowledgment from NZQA for payment of its fees.¹²

⁹ Bundle at 46.

¹⁰ Bundle at 36.

¹¹ Bundle at 20.

¹² Bundle at 29.

[37] As Ms Murthy did not reply, the husband sent a text to her on 1 December 2020 (at 10:17 am) saying he had tried to call her several times and asking her to call back urgently. Ms Murthy replied by text (at 3:29 pm) to say she was not well and was not taking business calls. She would talk to him the next day.

[38] On the same day, 1 December 2020 (at 4:26 pm), NZQA wrote to Ms Murthy confirming it had received the international qualification assessment application. A receipt for payment of the fee of \$445 was issued on the same day.¹³

[39] The complainant sent an email to Ms Murthy on 4 December 2020 stating they had been seeking a refund for two months. Before signing the contract, Ms Murthy had been notified that her employer was not ready to support her, but Ms Murthy had assured them of getting an invitation to apply by November. However, Immigration NZ had postponed the acceptance of expressions for another six months. They had no time to apply for an extension of their work visas, so they would have to leave New Zealand. They wanted a refund of \$2,803, as well as the \$750 paid for immigration and NZQA fees.

[40] Ms Murthy replied on the same day denying what they had written. She said she had evidence of the service given.

[41] The complainant sent an email to NZQA on 7 December 2020 stating that Ms Murthy might try to create a new application in her name and not to accept it. NZQA replied to say that an application had been submitted on 1 December. It would be put on hold.

[42] On 7 December 2020 (at 9:12 am), the complainant sent an email to Ms Murthy requesting the refund by midday. They had proof from NZQA that the application had not been filed or the fee paid. Nor had anything been done on the skilled migrant category application. No advice had been provided by her.

[43] Ms Murthy sent an email to the complainant on 7 December 2020 (at 9:59 am) offering a refund of \$1,500. She said that considerable time had been spent on advice and five in-person consultations. The application file was commenced after the service contract was signed. The complainant had known that expressions were not being selected at that time.

[44] The complainant replied to Ms Murthy by email the same day (at 10:03 pm). She accused Ms Murthy of misleading them. Ms Murthy had informed her the NZQA application could not be cancelled, but NZQA had told them it was not filed. They went

¹³ Bundle at 69.

ahead with the service contract as they had been assured by her that expressions would open in November 2020 and it would be filed then. Ms Murthy had not given any advice concerning the application. They had paid \$3,553 (\$2,803 + \$750) and a refund of only \$1,500 was totally unacceptable. Ms Murthy could not keep \$2,053 for doing nothing. They sought a full refund by the following day or they would take legal action.

[45] On 23 December 2020, Immigration NZ confirmed the withdrawal of the work visa application at the complainant's request.

COMPLAINT

[46] On 8 December 2020, the complainant made a complaint to the Authority against Ms Murthy (form dated 7 December 2020). The allegations against her included:

- (1) Dishonestly trying to file an application with NZQA on 1 December without the complainant's consent and after she was no longer representing the complainant.
- (2) Charging a huge amount for an expression which was not initiated.
- (3) Hiding information on 19 October 2020 about expressions being deferred by Immigration NZ, instead telling them they could file an expression.
- (4) Informing them on 17 November 2020 that the assessment application had been filed with NZQA and could not be cancelled, but NZQA told them it had not been filed and they would be able to cancel it.

[47] The complainant said that at the meeting with Ms Murthy on 12 September 2020, she told Ms Murthy that her employer was reluctant to support an essential skills work visa. Ms Murthy advised that the only option was to file an expression of interest for residence and get an invitation to apply, which would lead to a one-year extension of her work visa. Accordingly, they decided to file an expression under the skilled migrant category. They paid her \$2,803. They were misled into signing the contract, as Immigration NZ was not then accepting expressions. Ms Murthy knew that expressions would not be opened before their visas expired. The application could not even be initiated.

[48] They informed Ms Murthy on 16 September 2020 that expressions were not being accepted until 2021 and her employer refused to support a new work visa. Ms Murthy assured them expressions should open in November. They paid her another \$750.

Despite asking her several times for the NZQA assessment, they were never provided with an update.

[49] The complainant sought a refund of \$3,553 and compensation for mental harassment.

Explanation from Ms Murthy

[50] Ms Murthy became aware of the complaint and provided her comments to the Authority on 9 March 2021.

[51] According to Ms Murthy, the complainant's husband rang her on 2 June 2020 to discuss their requirements. He wanted an evaluation of a residence visa in the skilled migrant category and her advice as to who should be the principal applicant. She then met him on 3 June. The husband said the complainant's employer was not willing to support her work visa application. Both of their visas were due to expire in December 2020. He wanted advice on their future options.

[52] Ms Murthy stated that the husband rang again on 2 September 2020. He explained that the delay was due to the complainant's employer taking time to respond. He wanted to know the options if her employer did not support her work visa application. Ms Murthy then saw them both on 12 September. The complainant told Ms Murthy that her employer had tentatively agreed to support the work visa application. She was asked to advise on residence under the skilled migrant category. She calculated their points and confirmed they were eligible. This would require an assessment by NZQA. Both of them were aware that expressions were suspended, but the complainant wanted Ms Murthy to file the expression so it could be selected when the process commenced.

[53] Ms Murthy said that the complainant filed her own work visa application, but later needed assistance responding to concerns raised by Immigration NZ. On 3 October 2020, Ms Murthy met the complainant and her husband again. They signed the adviser details form later sent to Immigration NZ.

[54] In her letter to the Authority, Ms Murthy said she met the complainant and her husband on 15 November 2020. By then, the employer was not supporting her work visa. The complainant wanted to know whether completing a Master's degree in New Zealand would assist with residence. Ms Murthy researched the options and advised her. This involved researching different course options and communicating with different colleges.

[55] There was another consultation with the complainant and her husband on 18 November 2020. Ms Murthy was asked again about the options for seeking residence in the future. The complainant said she had decided to study and wanted a refund of all the money paid for residence. Ms Murthy replied that she would check how much work had been done.

[56] Finally, they both came to her office on 2 December 2020 and demanded a full refund. Ms Murthy said she would work out the amount of the refund. She wrote to them on 7 December 2020 offering a refund of \$1,500.

[57] On 25 May 2021, the Authority formally wrote to Ms Murthy setting out the grounds of complaint resulting from the Authority's analysis and seeking an explanation.

[58] Ms Murthy replied to the Authority on 23 June 2021. She denied dishonesty. She said that she had filed the assessment application on 17 September 2020 (noting that NZQA's screenshot gives this as the creation date), but there was a technical error and the payment did not go through, so the application remained in "draft". She made the payment with a different bank card on 1 December 2020. Due to health issues at the time (briefly identified), she had not regularly followed up with NZQA, for which she apologised.

[59] At the hearing, Ms Murthy modified this explanation. She said that it was Ms A who made the payment on 1 December 2020, not Ms Murthy personally. She had not mentioned Ms A to the Authority, as Ms A was not answering her calls and was avoiding Ms Murthy. Ms A had since left Ms Murthy's employment.

[60] Furthermore, contended Ms Murthy in her reply to the Authority, the provision of services in connection with an NZQA process was not "immigration advice" as defined in s 7 of the Act.

[61] Ms Murthy did not accept that residence had been discussed on 12 September 2020. This had been discussed by telephone with the husband on 2 June and then in a meeting on 3 June. At the 3 June meeting, they discussed an essential skills work visa for the complainant, a partnership visa for her husband and residence for both of them. The husband knew that expressions had been suspended by Immigration NZ. They had met again on 18 November, as her employer did not support her work visa application.

[62] According to Ms Murthy, she could not complete and file the expression, as the complainant asked her to wait until the work visa application was completed.

[63] Ms Murthy said she had offered a refund of \$1,500. The complainant was unreasonable in seeking a full refund.

Referral to Tribunal

[64] The Registrar referred the complaint to the Tribunal on 30 June 2021, alleging the following:

Dishonest or misleading conduct, or alternatively breaches of the specified provisions of the Code

- (1) Advising the complainant and her husband that she would file the assessment application with NZQA on the same day she texted the husband, but not filing it until 1 December 2020, in breach of cl 1.
- (2) Advising the complainant and her husband that she would file the expression with Immigration NZ in the same week but not doing so, in breach of cls 1 and 29(f).
- (3) Advising the complainant and her husband that she had not received NZQA's outcome, when she had not lodged the application, in breach of cl 1.
- (4) Advising the complainant and her husband that the assessment application could not be cancelled when she had not filed it, in breach of cl 1.
- (5) Continuing to file the assessment application despite being advised by the complainant of termination of her service, in breach of cl 1.

Negligence, or alternatively breaches of the specified provisions of the Code

- (6) Failing to have a written agreement for the work visa application, in breach of cl 18(a).
- (7) Failing to inform or explain to the complainant and her husband Immigration NZ's decision to defer the expression selection for a further six months, in breach of cl 1.
- (8) Failing to confirm in writing to the complainant termination of her service, in breach of cl 28(a).

- (9) Failing to confirm in writing to the complainant and her husband the details of material discussions, in breach of cl 26(c).

JURISDICTION AND PROCEDURE

[65] 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.

[66] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.¹⁴

[67] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.¹⁵ It has been established to deal relatively summarily with complaints referred to it.¹⁶

[68] 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.¹⁷

[69] The sanctions that may be imposed by the Tribunal are set out in the Act.¹⁸ The focus of professional disciplinary proceedings is not punishment but the protection of the public.¹⁹

[70] 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.²⁰

¹⁴ Immigration Advisers Licensing Act 2007, s 45(2) & (3).

¹⁵ Section 49(3) & (4).

¹⁶ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

¹⁷ Section 50.

¹⁸ Section 51(1).

¹⁹ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

²⁰ *Z v Dental Complaints Assessment Committee*, above n 19, at [97], [101]–[102] & [112].

Statement and bundle from the Registrar

[71] The Tribunal has received the statement of complaint (30 June 2021) and a bundle of supporting documents from the Registrar. At the Tribunal's request, the Registrar provided a schedule and further documents from Immigration NZ on 14 June 2022. An announcement from Immigration NZ (8 April 2020) was produced to the Tribunal on 23 June 2022.

Submissions from the complainant

[72] The complainant advised the Tribunal on 30 August 2021 that she was satisfied with the way the Registrar had represented their case.

[73] The complainant filed an undated statement of reply to Ms Murthy's supplementary statement. She says she did not ask Ms Murthy to put the expression on hold. After they had informed her of the deferral of expressions, there was no communication from her. They had to chase her. According to the complainant, when they confronted Ms Murthy about her misleading behaviour and terminated her contract, she tried to file another application.

[74] In her closing submissions (sent 29 June 2022), the complainant states that Ms Murthy has very conveniently used her medical condition to justify all of her faults.

[75] Despite telling Ms Murthy to cancel the NZQA application, she tried to refile it on 1 December 2020, when she knew their visa would be expiring in a few days.

[76] The work visa application was filed by them. Ms Murthy took the application voluntarily, so any work should "not be accountable at all".

[77] As for the skilled migrant residence application, the first step is the expression. Ms Murthy kept assuring them they could file the expression, even after it was further deferred in October 2020. They never filed an expression and so no tangible work was done by her. Hence, they claim a full refund.

[78] The complainant says in her submissions that their first option was to secure permanent residence and if that did not work out, they intended to opt for further education or other alternatives. Because they could not progress their application nor obtain a refund, Ms Murthy was responsible for putting them in such a financial and mental position that they had to leave New Zealand abruptly. She was also responsible for them missing a one-time residency option provided by Immigration NZ in 2021, for which they would have been eligible.

[79] It is contended by the complainant that she and her husband had been left with a huge loss arising from Ms Murthy's dishonest behaviour. They had lost their careers and the life they had planned to build.

Submissions from Ms Murthy

[80] Ms Murthy provided the Tribunal with very similar supplementary statements on 1 August 2021 (dated 1 August) and on 17 August 2021 (dated 13 August).

[81] In her statement of 13 August 2021, Ms Murthy repeats that the assessment application was created on 17 September 2020, but it remained in draft form as the bank card payment had issues. She was not dishonest in her responses to the husband on 27 October and 17 November 2020, because she believed the application was filed and under process. Ms Murthy accepts she did not follow up with NZQA. Accordingly, she was not aware that the payment had failed and the assessment was not therefore under process.

[82] For the failure to follow up with NZQA, Ms Murthy apologises. It was due to her health issues (health condition disclosed). This had been exacerbated by news as to how COVID-19 had affected her business and her family in India. She realises this is not an excuse, but it provides context. Additionally, she lacked staff. Two of her four staff had left. She was not regularly attending work and there was a failure of supervision on her part, due to her medical condition.

[83] It is acknowledged by Ms Murthy that she informed the husband on 17 November 2020 that the assessment could not be cancelled, as she was not happy to cancel an application which was under process.

[84] Ms Murthy says she contacted NZQA on 29 or 30 November 2020 and realised that the payment had not gone through, so she paid using another card. She was rectifying the payment issue and did not believe she was working on the immigration application after termination of the contract, because the assessment was not part of the service contract. A certificate from NZQA is not part of an expression, since it is not required until the invitation to apply for residence is received.

[85] Ms Murthy does not agree therefore with the Registrar's statement that she worked on the residence application after termination of her services.

[86] At the meeting with the complainant and her husband on 12 September 2020, Ms Murthy denies telling them that the only option was to apply for a skilled migrant residence visa, as she gave them future work visa options. The complainant did not

inform her that her employer would not provide support. Indeed, she wanted advice on an essential skills work visa. The complainant told her she would get back to Ms Murthy. If she had told the complainant that the only option was to file an expression, Ms Murthy asks rhetorically why the complainant filed a work visa application on 22 September.

[87] It is noted by Ms Murthy that the Registrar refers to her message to the husband on 19 October 2020 that the expression could be filed that week. Applications were being accepted into the pool at that time. When she sent that message, she was not aware that Immigration NZ had on that day deferred expressions by a further six months.

[88] The deferral of expressions was discussed over the phone on 20 October 2020 with the complainant and her husband. They said they would book an appointment with her. Ms Murthy accepts she could have written confirming the phone consultation, but she was struggling with her health. She has learned a lesson and will improve communications with clients.

[89] According to Ms Murthy, there was no service contract for the work visa assistance because she did not process the application. She took it over as a favour to an existing client and did not charge a fee. The complainant signed Immigration NZ's adviser authorisation form.

[90] Ms Murthy says she did not complete and file the expression because the complainant asked her to wait until the work visa was approved. From 3 October until 24 November, Ms Murthy was assisting with the complainant's work visa. The complainant was stressed about the work visa and did not want to discuss the expression, so Ms Murthy decided to wait before discussing the expression further with her.

[91] In conclusion, Ms Murthy accepts that she failed to send regular written confirmations to the complainant. She did not send summaries of the meetings on 12 September, 3 October, 15 and 18 November 2020. Nor did she follow up after talking to the complainant and her husband on 20 October 2020 about the deferral announcement. However, she had been honest with them throughout the process.

[92] Ms Murthy produced a medical certificate (7 December 2021) from her general practitioner. He states that he saw Ms Murthy on 26 June 2020 to discuss ongoing treatment for her condition (disclosed). She has had the condition since 2009. Her symptoms were well controlled, but he changed her medication. He saw her again on 25 November 2020 and she was clinically well, though she did report certain symptoms. He changed her medication and recommended she consult a specialist. He does not know whether she did so.

[93] Ms Murthy sent closing submissions to the Tribunal on 6 July 2022. She accepts there were administration and customer service errors for which she apologises. She denies being dishonest. In her view, the complainant set about obtaining as much information as possible from Ms Murthy and then terminated her services intending to seek a full refund. The complainant wanted advice, but not to pay for it.

ASSESSMENT

[94] 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.

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
 - ...

File management

26. A licensed immigration adviser must:
 - ...
 - c. confirm in writing to the client the details of all material discussions with the client
 - ...

Termination of services

28. A licensed immigration adviser must ensure that:
 - a. the termination of services, for any reason, is confirmed to the client in writing
 - ...

Advisers

29. A licensed immigration adviser must not misrepresent or promote in a false, fraudulent or deceptive manner:
 - ...
 - f. New Zealand's immigration requirements.

Dishonest or misleading behaviour, or alternatively breaches of the specified provisions of the Code

- (1) *Advising the complainant and her husband that she would file the assessment application with NZQA on the same day she texted the husband, but not filing it until 1 December 2020, in breach of cl 1*
- (3) *Advising the complainant and her husband that she had not received NZQA's outcome, when she had not lodged the application, in breach of cl 1*
- (4) *Advising the complainant and her husband that the assessment application could not be cancelled when she had not filed it, in breach of cl 1*
- (5) *Continuing to file the assessment application despite being advised by the complainant of termination of her service, in breach of cl 1*

[95] The specific heads of complaint concerning the NZQA assessment application comprise a broader complaint of dishonesty in relation to that application. Essentially, it is alleged that Ms Murthy deliberately misled the complainant and her husband into believing the application had been promptly filed on 17 September 2020 and she was awaiting NZQA's decision, when in fact the application had not been completed and was not being processed (because payment was unsuccessful). The Registrar says that it was not until the complainant and her husband sought cancellation of the assessment application and a refund, followed by the notice of termination of her services on 24 November, that Ms Murthy finally completed the application on 1 December.

[96] The Tribunal will first consider a jurisdictional issue raised by Ms Murthy in relation to the NZQA assessment, an issue her former counsel had also raised in an earlier complaint against her. It is contended that the work done by an adviser in relation to an assessment of qualifications by NZQA is outside the statutory regulated services of a licensed adviser.

[97] In that earlier complaint, the Tribunal decided that assisting with an NZQA application is "immigration advice" as defined in the Act and is work which is subject to regulation.²¹ Furthermore, whether or not assisting with an NZQA assessment is part of any written or oral services contract with a client, an adviser is subject to all the statutory and Code obligations imposed on licensed immigration advisers in respect of such work.

²¹ *LS v Murthy* [2022] NZIACDT 5 at [63]–[79].

[98] Turning to the first head of complaint, Ms Murthy advised the husband by text on 17 September 2020 that she would process the complainant's assessment application with NZQA "today". Yet, as the Registrar points out, the application was not completed until 1 December 2020.

[99] It is apparent from NZQA's online record of the application (with draft status) that it was created on 17 September 2020. Ms Murthy says the online application was made by an employee and, unbeknown to her, payment was not effected. At the time, Ms Murthy told the Tribunal, she was unwell, so she was not regularly attending the office. She did not know the application was not being processed by NZQA. When she enquired, the staff always told her the application was being processed and as delays of one to two months were normal, she did not regard the delay as unusual.

[100] When the husband continued to press Ms Murthy in late November 2020 for proof of payment of NZQA's fee, she found out from NZQA that payment had not been effected. She then asked Ms A to attend to it. The payment was successfully made and NZQA sent a letter on 1 December 2020 confirming receipt of the application.

[101] The Tribunal finds that the text sent by Ms Murthy to the husband on 17 September 2020 advising that the assessment application would be made that day was sent in good faith. It was not dishonest. An application was created that day and her evidence that she did not know payment had not been successfully made, is accepted.

[102] The Registrar contends, in the alternative, that advising the husband on 17 September 2020 the assessment application would be filed that day but not doing so until 1 December 2020, is a breach of cl 1 of the Code.

[103] It is found that Ms Murthy was not diligent and nor did she exercise due care in failing to personally check whether the staff had correctly filed the application, once the delay was longer than a few weeks. A delay of about two and a half months before Ms Murthy personally checked with NZQA and then ensured the application was successfully filed, is unacceptable.

[104] Ms Lim submits that it is even more important at a time when Ms Murthy was working intermittently due to ill-health that she put in place processes to ensure that she met her obligations to her clients. The Tribunal agrees. Her medical condition does not justify her lack of follow-up, as she acknowledges. Ms Murthy accepts her customer service mistake, as she describes it, for which she apologises.²²

²² Statement of Ms Murthy (13 August 2021) at [3].

[105] The late filing of the assessment application is a breach of cl 1 of the Code.

[106] In respect of the third head of complaint, Ms Murthy sent a text to the husband on 27 October 2020, in answer to his text requesting the assessment by NZQA, stating that she had not received it and when she did, she would send it to him. Yet, the assessment application was then only in draft form and was not being processed.

[107] The Tribunal finds that, as at 27 October, Ms Murthy believed the assessment application was being processed. She was not aware of the non-payment until about 30 November 2020. Again, the text was sent to the husband in good faith. It was not dishonest.

[108] At the time of the husband's text on 27 October, Ms Murthy should have checked with NZQA herself whether the application had been correctly filed and its status. She should have made enquiries of NZQA, or at the very least asked the staff to do so. She could have checked the online application. The enquiry of NZQA she made on about 30 November 2020 should have been made on about 27 October in response to the husband's query. The failure to do so confirms the Tribunal's finding of a lack of diligence and due care by her in relation to filing the assessment application.

[109] In respect of the fourth head of complaint, on 17 November 2020, the husband texted Ms Murthy asking if the NZQA assessment could be cancelled. Ms Murthy replied immediately to say that it could not. As the Registrar notes, it had still not been lodged with NZQA at that time.

[110] The Tribunal has already accepted that Ms Murthy believed until about 30 November 2020 that the assessment application had been filed and was being processed by NZQA. At 17 November 2020, Ms Murthy did not know that the assessment application was not regarded by NZQA as filed. She thought NZQA was processing the application, so it could not be cancelled.

[111] In cross-examination, Ms Murthy accepted that she might have been able to get a refund, depending on the stage at which NZQA's processing (which she thought was occurring) was at. She gave the Tribunal a variety of reasons: it was the complainant's application and she did not want to take instructions from the husband, she was struggling with her health, and the husband had a tendency to get annoyed. Finally, in her evidence to the Tribunal, she repeated that she thought it was too late to cancel the assessment.

[112] Ms Murthy's evidence as to why she did not tell the husband of the possibility of a refund is not compelling, but that does not mean she was deceitful in saying to the husband the assessment application could not be cancelled. It is plausible she genuinely believed that, some two months after she thought the application had been made, it would have been too late to cancel.

[113] The Tribunal accepts Ms Murthy's text of 17 November 2020 was sent in good faith. It was not dishonest. The husband's text though should have yet again prompted Ms Murthy to find out herself from NZQA what was happening to the application. It is further evidence, as the Tribunal has already found, of Ms Murthy's lack of diligence and due care in filing the assessment application.

[114] In respect of the fifth head of complaint, Ms Murthy was informed by the complainant by email on 24 November 2020 that the latter would handle the work visa on her own. It is apparent, however, that after this termination of her services Ms Murthy paid NZQA's fee in order to complete filing of the assessment application (acknowledged by NZQA on 1 December 2020).

[115] Ms Murthy's explanation for going ahead with the assessment application is that she did not consider the email of 24 November 2020 to have anything to do with the assessment. In her mind the work undertaken to prepare and file the assessment application was not immigration work. It was an administrative job (meaning staff could undertake it as "clerical work").²³ She was only being asked on 24 November to stop immigration work.

[116] At 24 November 2020, Ms Murthy was waiting for NZQA's assessment. At the time, there was nothing for her to do on that application (so she thought). It was not until about 30 November that she knew it had not been paid for and was not being processed.

[117] On learning a few days later of the non-payment of NZQA's fee, rather than complete payment, a better approach would have been to ask the complainant to clarify whether Ms Murthy should go ahead with the assessment application. That is particularly so given the husband's text on 17 November asking if the assessment could be cancelled. In her evidence to the Tribunal, Ms Murthy explained that she was focused on rectifying what she regarded as a "major customer service issue" in failing to complete the filing earlier.

[118] Ms Murthy's explanation for going ahead with payment is plausible. Certainly, the email terminating her services only expressly mentions the work visa. Given

²³ Immigration Advisers Licensing Act 2007, s 7(1)(b)(iii).

Ms Murthy's health which was affecting her concentration, the Tribunal accepts there was no dishonesty on her part in completing the filing of the application.

[119] The Tribunal finds that the instruction to staff to effect payment and complete the application was made in good faith. What the Tribunal has found to be wrong about completing the application on 1 December 2020 was the delay in doing so. It should have been done much earlier, certainly by 27 October 2020 at the latest.

(2) *Advising the complainant and her husband that she would file the expression with Immigration NZ in the same week but not doing so, in breach of cls 1 and 29(f)*

[120] On 19 October 2020, Ms Murthy replied to the husband's text asking whether there was any update on when Immigration NZ would accept expressions. She said they could be submitted "now" and she will submit it "this week". However, the Registrar says the "EOI [Expression of Interest] provision under SMC [Skilled Migrant Category] was not open at that time".²⁴

[121] According to Ms Murthy, Immigration NZ was accepting expressions for filing the whole time. It was only selections from the pool which were being deferred. She says that deferral commenced on about 1 April 2020 for an initial period of six months. She thought selections would recommence on about 1 October 2020.

[122] The Tribunal finds that the Registrar is not correct to contend that Immigration NZ's pool was not "open" for expressions. Immigration NZ never ceased to accept expressions, as Ms Murthy states. The public announcement made by Immigration NZ on 8 April 2020 did not state the deferral was for six months, but Ms Murthy nonetheless correctly predicted a review after six months. She was wrong about the outcome though, as on 19 October 2020, the deferral was extended for six months.

[123] Ms Murthy may have been unduly optimistic in believing the selections would recommence in October 2020, but she was not deceitful in advising the husband on 19 October that she would file it that week. She did not learn until the next day that selections had been deferred again. The complainant appears to have then lost interest in filing an expression, which is presumably why Ms Murthy did not go ahead and prepare it that week.

[124] The dishonesty heads of complaint are dismissed. The alternative head of a breach of cl 1 in the delayed filing of the assessment application is upheld.

²⁴ Statement of complaint (30 June 2021) at [12].

Negligence, or alternatively breaches of the specified provisions of the Code

(6) *Failing to have a written agreement for the work visa application, in breach of cl 18(a)*

[125] Ms Murthy entered into a service contract with the complainant on 12 September 2020 for the expression of interest and residence visa. However, she did not enter into any such contract on accepting instructions on 3 October 2020 to assist with the work visa. From 5 October, Ms Murthy was dealing with Immigration NZ in relation to the work visa application until her instructions were terminated on 24 November 2020.

[126] This is a breach of cl 18(a) of the Code. It is irrelevant that Ms Murthy did not compile and file the application and did not charge for her services on this application. The complainant's signature on Immigration NZ's adviser authorisation form does not amount to a service contract with her client and does not satisfy the Code obligation.

[127] The sixth head of complaint is upheld.

(7) *Failing to inform or explain to the complainant and her husband Immigration NZ's decision to defer the expression selection for a further six months, in breach of cl 1*

[128] It is Ms Murthy's evidence that she discussed Immigration NZ's deferral announcement of 19 October 2020 with the complainant and/or her husband on the following day. The seventh head of complaint is dismissed.

(8) *Failing to confirm in writing to the complainant termination of her service, in breach of cl 28(a)*

[129] The complainant sent an email to Ms Murthy on 24 November 2020 advising her that she would handle the work visa application on her own. This is clearly a termination of Ms Murthy's services in relation to that application. She has provided no evidence of confirming this in writing with the complainant.

[130] This is a breach of cl 28(a). The eighth head of complaint is upheld.

(9) *Failing to confirm in writing to the complainant and her husband the details of material discussions, in breach of cl 26(c)*

[131] Ms Murthy has produced no evidence of any written advice to the complainant or her husband. In particular, she did not confirm in writing the advice given and material discussions at the meetings on 3 June, 12 September, 3 October, 15 and 18 November

2020. In her letter to the Authority on 9 March 2021, Ms Murthy sets out what was discussed at the meetings.²⁵ In her statement provided to the Tribunal (13 August 2021), she accepts she did not send them summaries after the meetings on 12 September, 3 October, 15 and 18 November. Nor did Ms Murthy confirm in writing the advice given on 20 October concerning the further deferral of selections.

[132] This is a breach of cl 26(c). The ninth head of complaint is upheld.

[133] Since the Tribunal has found breaches of the Code for each of the sixth, eighth and ninth heads of complaint, it is not necessary to assess the alternative ground of negligence. As for the seventh head of complaint, there is no evidence of negligence concerning the advice given to the couple on 20 October 2020.

OUTCOME

[134] The Tribunal upholds the first head of complaint to the extent that the late filing of the assessment application amounts to a lack of diligence and due care. The dishonesty complaints are dismissed. The sixth, eighth and ninth heads of complaint are also upheld. Ms Murthy has breached cls 1, 18(a), 26(c) and 28(a) of the Code. The seventh head of complaint is dismissed.

SUBMISSIONS ON SANCTIONS

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

[136] This is the second complaint against Ms Murthy upheld by the Tribunal. In determining the sanctions, it will take into account the first complaint and the sanction set.

[137] A timetable is set out below. Any request that Ms Murthy 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

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

²⁵ Bundle at 63–67.

- (1) The Registrar, the complainant and Ms Murthy are to make submissions by **9 August 2022**.
- (2) The Registrar, the complainant and Ms Murthy may reply to submissions of any other party by **23 August 2022**.

ORDER FOR SUPPRESSION

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

[140] There is no public interest in knowing the name of Ms Murthy's client, the complainant, or her husband.

[141] The Tribunal orders that no information identifying the complainant or her husband is to be published other than to Immigration NZ.

D J Plunkett
Chair

²⁶ Immigration Advisers Licensing Act 2007, s 50A.