

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2022] NZIACDT 22

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

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 29 August 2022**

REPRESENTATION:

Registrar: Self-represented

Complainant: Self-represented

Adviser: Self-represented

INTRODUCTION

[1] Nirmala Krishna Murthy, a licensed immigration adviser, was engaged by SU (the complainant) and her husband for immigration matters. Ms Murthy was late seeking an assessment of the complainant's overseas qualification by the New Zealand Qualifications Authority (NZQA).

[2] A complaint to the Immigration Advisers Authority (the Authority) was referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It was partially upheld in a decision issued on 18 July 2022 in *SU v Murthy*.¹ Ms Murthy was found to have breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] It is now for the Tribunal to determine the appropriate sanctions.

BACKGROUND

[4] The narrative leading to the complaint is set out in the earlier decision of the Tribunal and will only be briefly summarised here.

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

[6] The complainant and her husband, nationals of India, were in New Zealand on work visas which were due to expire in December 2020. They initially made contact with Ms Murthy on 2 June 2020 and signed her service contract at a meeting with her on 12 September 2020. It covered representation for a residence application for the complainant, which would also include the husband. They paid \$2,803 of her fee of \$5,606.

[7] The husband paid Ms Murthy \$750 on 17 September 2020 in order that NZQA's fee could be paid for an assessment of the complainant's qualifications.

[8] Ms Murthy duly prepared the assessment application on that day and an employee created an online application, but she was not successful in paying the fee so the online status of the application remained "Draft". Ms Murthy was not, however, aware that payment had been unsuccessful. She believed that the application was being processed by NZQA.

[9] On 3 October 2020, Ms Murthy accepted instructions to take over a work visa application the complainant had filed herself.

¹ *SU v Murthy* [2022] NZIACDT 17.

[10] On about 18 November 2020, the complainant sought a refund from Ms Murthy. Then on 24 November 2020, the complainant sent an email to Ms Murthy informing her she would handle the work visa application on her own. This was a termination of Ms Murthy's services in relation to that application.

[11] On 1 December 2020, Ms Murthy's staff successfully paid NZQA's fee and NZQA confirmed it had received the assessment application.

[12] Ms Murthy offered the complainant a refund of \$1,500 on 7 December 2020. She said she had spent considerable time on their matters.

Decision of the Tribunal

[13] The Tribunal found:

- (1) The late filing of the assessment application was a breach of Ms Murthy's obligation in cl 1 of the Code to conduct her work with diligence and due care.
- (2) Ms Murthy did not have a written contract for the work visa application, in breach of cl 18(a).
- (3) Ms Murthy failed to confirm in writing to the complainant the termination of her services in relation to the work visa, in breach of cl 28(a).
- (4) Ms Murthy failed to confirm in writing to the complainant and her husband the details of material discussions, in breach of cl 26(c).

SUBMISSIONS

Submissions from the Registrar

[14] In submissions (5 August 2022) from Ms Issar, on behalf of the Registrar, it is contended that the appropriate sanctions would be:

- (1) Censure.
- (2) An order that Ms Murthy complete the LAWS 7015 Professional Practice paper offered by Toi-Ohomai Institute of Technology.

- (3) An order for payment of a penalty to the Registrar in the vicinity of \$2,000.

[15] The Registrar notes that Ms Murthy has previously been sanctioned by the Tribunal, with the present complaint having significant similarities to the earlier complaint.

[16] It is submitted that the conduct involved in the breaches is of concern and indicates a lack of understanding and appreciation by Ms Murthy of her obligations as a licensed immigration adviser. While her conduct in the current case is not serious, it is concerning and indicates a pattern of conduct. It was not an isolated incident, rather Ms Murthy does not have good practices and systems in place to ensure compliance with her professional obligations. Ms Murthy's continued practice in the profession should therefore be supplemented with further training to support an understanding and address deficiencies in her professional conduct and enhance compliance with the Code.

Submissions from the complainant

[17] In an email to the Tribunal (8 August 2022), the complainant says she and her husband invested a significant part of their time, money and energy seeking better living in New Zealand, but they are now back to where they had started from. There had been mental and financial suffering due to Ms Murthy's negligence. They requested:

- (1) A full refund of the fees paid to her amounting to \$2,803 and \$750, together with compensation for the time delay in refunding the fees.
- (2) A one-off residence visa, as provided to many other visa holders during the COVID-19 period.
- (3) Compensation for their losses as a result of leaving New Zealand abruptly. They incurred unreasonable expenses in booking flights at double the price of normal tickets and additional baggage. In addition, they disposed of other belongings they could not sell in such a short period of time.

Submissions from Ms Murthy

[18] There are no submissions from Ms Murthy.

JURISDICTION

[19] The Tribunal's jurisdiction to impose sanctions is set out in the Immigration Advisers Licensing Act 2007 (the Act). Having heard a complaint, the Tribunal may take the following action:²

50 Determination of complaint by Tribunal

After hearing a complaint, the Tribunal may—

- (a) determine to dismiss the complaint:
- (b) uphold the complaint but determine to take no further action:
- (c) uphold the complaint and impose on the licensed immigration adviser or former licensed immigration adviser any 1 or more of the sanctions set out in section 51.

[20] The sanctions that may be imposed are set out at s 51(1) of the Act:

51 Disciplinary sanctions

(1) The sanctions that the Tribunal may impose are—

- (a) caution or censure:
- (b) a requirement to undertake specified training or otherwise remedy any deficiency within a specified period:
- (c) suspension of licence for the unexpired period of the licence, or until the person meets specified conditions:
- (d) cancellation of licence:
- (e) an order preventing the person from reapplying for a licence for a period not exceeding 2 years, or until the person meets specified conditions:
- (f) an order for the payment of a penalty not exceeding \$10,000:
- (g) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:
- (h) an order directing the licensed immigration adviser or former licensed immigration adviser to refund all or any part of fees or expenses paid by the complainant or another person to the licensed immigration adviser or former licensed immigration adviser:
- (i) an order directing the licensed immigration adviser or former licensed immigration adviser to pay reasonable compensation to the complainant or other person.

² Immigration Advisers Licensing Act 2007.

[21] In determining the appropriate sanction, it is relevant to note the purpose of the Act:

3 Purpose and scheme of Act

The purpose of this Act is to promote and protect the interests of consumers receiving immigration advice, and to enhance the reputation of New Zealand as a migration destination, by providing for the regulation of persons who give immigration advice.

[22] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:³

...It is well established that professional disciplinary proceedings are civil and not criminal in nature. That is because the purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure that appropriate standards of conduct are maintained in the occupation concerned.

...

The purpose of disciplinary proceedings is materially different to that of a criminal trial. It is to ascertain whether a practitioner has met appropriate standards of conduct in the occupation concerned and what may be required to ensure that, in the public interest, such standards are met in the future. The protection of the public is the central focus.

...

Lord Diplock pointed out in *Ziderman v General Dental Council* that the purpose of disciplinary proceedings is to protect the public who may come to a practitioner and to maintain the high standards and good reputation of an honourable profession.

[23] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the collective reputation and public confidence in the profession itself.⁴

[24] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.⁵

³ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

⁴ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Bolton v Law Society* [1994] 2 All ER 486 (EWCA) at 492; *Z v Dental Complaints Assessment Committee*, above n 3, at [151].

⁵ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

[25] The most appropriate penalty is that which:⁶

- (a) most appropriately protects the public and deters others;
- (b) facilitates the Tribunal's important role in setting professional standards;
- (c) punishes the practitioner;
- (d) allows for the rehabilitation of the practitioner;
- (e) promotes consistency with penalties in similar cases;
- (f) reflects the seriousness of the misconduct;
- (g) is the least restrictive penalty appropriate in the circumstances; and
- (h) looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

DISCUSSION

[26] As the Registrar notes, this is not Ms Murthy's first appearance before the Tribunal. In a decision issued on 4 April 2022,⁷ Ms Murthy was found by the Tribunal to have:

- (1) Failed to confirm in writing to the client when she lodged an assessment application with NZQA, in breach of cl 26(b).
- (2) Failed to confirm in writing to the client when her services were terminated, in breach of cl 28(a).

[27] In that case, Ms Murthy's conduct was found to be at the lower end of the scale and the only sanction was a caution.⁸

[28] The complainant requests that consideration be given to a residence visa. The Tribunal has no power to grant visas, which are a matter for Immigration New Zealand.

⁶ *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], citing *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633, [2013] NZAR 320 at [49].

⁷ *LS v Murthy* [2022] NZIACDT 5.

⁸ *LS v Murthy* [2022] NZIACDT 12.

Caution or censure

[29] The Tribunal agrees with the Registrar that Ms Murthy's misconduct in the current case could not be described as serious, though there are now two cases showing a pattern of neglect of her professional duties. It is appropriate to mark the Tribunal's disapproval of her conduct by censuring her.

Training

[30] The Tribunal agrees with the Registrar that despite her long experience as a licensed immigration adviser, it is apparent that Ms Murthy's systems and understanding of her professional obligations are deficient. She had told the Tribunal in the earlier complaint that she had put in place additional preventative measures to improve her consultancy's services, including a new document management system. She has said nothing about this to the Tribunal in the current complaint, but nonetheless it will be taken into account here.

[31] Some explanation for Ms Murthy's conduct lies in her health at the relevant time. Nonetheless, the Registrar is correct in contending that a pattern of casual compliance with her 'paperwork' obligations is evident. These obligations could not be described as trivial, notably the failure to have a written agreement for the work visa application.

[32] Ms Murthy does not oppose a direction that she undertake some professional development. The Tribunal agrees with the Registrar that Toi Ohomai's LAWS 7015 paper is the appropriate course.

Financial penalty

[33] The Registrar contends that the financial penalty should be \$2,000. There are no submissions from Ms Murthy as to the penalty. While there were multiple breaches of the Code and this is the second complaint upheld (the first resulting in a caution only), a penalty of \$1,500 would be appropriate.

Refund

[34] The complainant seeks a full refund of the fees paid, being \$2,803 and \$750, a total of \$3,553. Ms Murthy makes no submissions. It is noted she has previously offered \$1,500, pointing out that she has spent considerable time on the complainant's file.

[35] The Tribunal also notes that of the \$750 paid, \$445 was for NZQA's fee. However, Ms Murthy should not have paid that fee and completed the online assessment application at such a late stage without checking first with the complainant whether the application should go ahead. At that point, the complainant did not want to proceed.

[36] The work undertaken by Ms Murthy was of no ultimate benefit to the complainant and her husband. Ms Murthy has not provided a submission opposing a refund. A full refund will be directed. The Tribunal declines to award interest on the late payment of the refund, first sought on 18 November 2020, which in any event would be minimal.

Compensation

[37] The complainant seeks compensation for their losses in having to abruptly leave New Zealand, including for expensive flights, additional baggage and the disposal of some of their belongings. There is no schedule or other details of the amounts claimed, as directed by the Tribunal in the earlier decision (at [137]). No evidence has been provided of any loss. It is also doubted that the couple's losses could be said to have been caused by Ms Murthy's wrongdoing, as upheld by the Tribunal. It is not appropriate to award compensation.

OUTCOME

[38] Ms Murthy is:

- (1) Censured.
- (2) Directed to undertake and complete the LAWS 7015 paper at Toi-Ohomai Institute of Technology, at its next intake.
- (3) Ordered to pay immediately to the Registrar \$1,500.
- (4) Ordered to pay immediately to the complainant \$3,553.

ORDER FOR SUPPRESSION

[39] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.⁹

⁹ Immigration Advisers Licensing Act 2007, s 50A.

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

[41] The Tribunal orders that no information identifying the complainant is to be published other than to Immigration New Zealand.

D J Plunkett
Chair