

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2022] NZIACDT 29

Reference No: IACDT 09/22

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **EQ**
Complainant

AND **CHRISTOPHER MARK
McCARTHY**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 19 December 2022

REPRESENTATION:

Registrar: Self-represented
Complainant: X
Adviser: W Calvert, counsel

PRELIMINARY

[1] Christopher Mark McCarthy, a licensed immigration adviser, was engaged by EQ, the complainant, to file an investor residence visa application. He filed three expressions of interest on her behalf. The second and third expressions were made without instructions. Mr McCarthy also failed to communicate with Immigration New Zealand (Immigration NZ) or the complainant for long periods. He advances a medical explanation for his defective service.

[2] A complaint against Mr McCarthy to the Immigration Advisers Authority (the Authority) has been referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It is alleged that Mr McCarthy has been negligent, a ground of complaint under the Immigration Advisers Licensing Act 2007 (the Act), or alternatively that he breached certain obligations set out in the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

BACKGROUND

[3] Mr McCarthy is a director of Corporate Migration NZ Ltd, of Masterton. His licence expired on 27 April 2022.

[4] X, the complainant's representative, is a New Zealand based friend and business partner of the complainant and her husband, WD. The couple has a young daughter. They are nationals of [Country].

[5] X approached Mr McCarthy on 20 November 2019 asking him to represent the family in migrating to New Zealand under Immigration NZ's investor category. The proposed investor was the complainant.

[6] On 25 November 2019, Mr McCarthy wrote to the complainant setting out his terms of service. He recorded having been instructed in relation to a residence application in the investor category. His fee was \$15,550, to be paid in three instalments of \$5,183.33:

1. \$5,183.33 at commencement.
2. \$5,183.33 on selection of the expression of interest.
3. \$5,183.33 on approval in principle of residence.

[7] The letter was intended as an agreement to be signed by both parties. The copies produced to the Tribunal by the Registrar and Mr McCarthy are unsigned by both

Mr McCarthy and the complainant. According to X he did sign it (presumably on behalf of the complainant) and hand delivered the signed copy to Mr McCarthy, but never received a copy with the latter's signature.¹

[8] On the same day, 25 November 2019, Mr McCarthy sent a draft expression of interest to the complainant. He gave some advice as to the details that needed to be completed.

[9] On 26 November 2019, Mr McCarthy emailed to the complainant and/or her husband a list of "personal documents" needed later for residence.² He said he would advise what investment documents were required, once the funds and earnings information had been finalised.

[10] The complainant paid Mr McCarthy \$5,183.33 on 2 December 2019. There is an invoice of the same date.

First expression filed

[11] On 17 December 2019, an expression under the investor category was filed by Mr McCarthy for the family with Immigration NZ. On the following day, Immigration NZ wrote to Mr McCarthy notifying him that the expression had been entered in the pool. It was successful, with Immigration NZ sending a letter to Mr McCarthy on 19 December 2019 inviting the complainant to apply for residence. The invitation was valid for four months.

[12] The complainant again paid Mr McCarthy \$5,183.33, on 30 December 2019.

[13] Mr McCarthy sent an email to the complainant on 12 January 2020 enquiring about progress in gathering the required hard copy support documents. He informed her that the application had to be filed by 19 April 2020. The complainant's husband replied on 14 January to say they had started preparing the documents. He asked that Mr McCarthy complete the form. Mr McCarthy responded on the same day saying he would complete the form as far as he could. He listed the documents needed (being originals or certified copies).

[14] Mr McCarthy then sent the form, presumably completed as far as he could, to the complainant on 29 January 2020. He set a target date of 20 February for having everything together for a final check, before being couriered to him.

¹ Email X to the Authority (14 March 2022).

² Statement of reply (9 September 2022), Attachment I.

[15] The complainant sent an email to Mr McCarthy on 9 April 2020 stating that the family were “under quarantine and Emergency state” from 13 March to 13 May. They would continue with the collection of documents after the recall of quarantine. X then sent an email to the complainant’s husband on 10 April, copied to Mr McCarthy, stating that the couple had been unable to source the documents due to lockdown. He asked if a letter could be written to Immigration NZ seeking an extension. Mr McCarthy does not appear to have replied to X’s email.

[16] No residence application was filed by Mr McCarthy.

[17] X sent an email to Mr McCarthy on 12 October 2020 asking if he had been able to review the comprehensive package of documents given to him the previous weekend, or whether he needed further information, prior to filing with Immigration NZ. Mr McCarthy replied the following day saying the documentation looked fine. He asked if it was possible to get certified copies of the passports. Furthermore, he could not see the actual application form.

[18] On 16 October 2020, X asked Mr McCarthy to send the final form of the document which needed to be signed by the couple.

[19] On 23 November 2020, X sent an email to Mr McCarthy to say he had been trying to get hold of him over the past three months to get an update on the complainant’s application. Mr McCarthy had not called him or responded. The process was stalled. He was asked to contact X immediately.

[20] Mr McCarthy replied to X on 24 November 2020. He apologised for being out of touch. He said the documentation was fine. He needed original or certified copies of the passports. The “e-medical number” for each family member was also needed. Nor did he have a signed copy of the application form. He had discussed the delays with Immigration NZ and it was waiting for the documents.

[21] The complainant’s husband sent an email to Mr McCarthy on 24 November 2020. He advised that the notarised passports would be sent to X by 7 December, along with the signed page. He asked for Immigration NZ’s list of hospitals in [Country]. Mr McCarthy replied on 26 November 2020 with the name of the only approved hospital.

[22] X advised Mr McCarthy on 18 January 2021 that the family were scheduled for medical examinations before the end of January. He asked to be advised of the plan for filing the application. Mr McCarthy replied on 19 January to say he was ready to go and was waiting for payment of the government fees and the final invoice previously sent. He also needed the e-medical numbers. X immediately responded asking to be informed

of the government fee and noting that Mr McCarthy's third instalment was not due until the application had been filed and processed. Mr McCarthy advised X of the government fee on 27 January. On the next day, the husband appears to have sent to Mr McCarthy an email which had been sent to him by the [Country] hospital.

[23] On 10 May 2021, the complainant's husband sent Mr McCarthy an email to say he would send funds to X that week for the invoice and government fees.

[24] X sent an email to Mr McCarthy on 31 May 2021 asking him to telephone, so the application could be finalised. He had all the funds and the fees could be paid.

[25] The complainant paid Mr McCarthy \$5,690 on 2 July 2021 to cover Immigration NZ's fee.

[26] X sent an email to Mr McCarthy on 12 July 2021 asking how the application was advancing.

Second expression filed

[27] On 14 July 2021, Mr McCarthy filed another expression for the complainant with Immigration NZ. He did not inform the complainant or X of the application.³

[28] X asked Mr McCarthy again on 4 August 2021 for an update.

[29] On 10 September 2021, X sent another email to Mr McCarthy saying he had been trying to get in touch with him for a couple of months and was starting to worry. He pointed out that Mr McCarthy had received \$10,366 and also \$5,690 for Immigration NZ. X said he had sent eight emails, phoned 14 times and left five voicemail messages. He had called Mr McCarthy's mobile phone and his office number.

[30] In his email, X stated that the family had gone through a lot of emotional turmoil and cost to prepare all the documents. They had invested more than \$1M in New Zealand. Mr McCarthy had taken on the job of advising them on what was an important step in their lives. They were very worried he was not delivering. They had been advised of the possibility of making a complaint to the Authority. Mr McCarthy was asked to advise by the following Tuesday whether he could perform his services, or otherwise make arrangements for a full refund.

[31] Over this period, Immigration NZ visa officers made many attempts to contact Mr McCarthy by email and telephone, commencing on about 23 July 2021.⁴ They

³ Email X to the Authority (31 March 2022).

⁴ There were unanswered emails or telephone calls from Immigration NZ to Mr McCarthy on

succeeded only once, speaking to him on 14 October 2021. He told the officer he would reply to their emails that day, but he did not do so.

[32] On 4 November 2021, Immigration NZ wrote to the complainant, care of Mr McCarthy, stating that the mandatory character information was missing. The government agency said it had sought to contact Mr McCarthy numerous times between 23 July and 28 October 2021, but he did not respond. They were given until 11 November 2021 to provide the requested information. The visa officer also requested that three sections of the application be completed.

[33] On 18 November 2021, Immigration NZ wrote to Mr McCarthy declining the second expression. There was a lack of mandatory information as to character.

[34] On 24 November 2021, the complainant herself wrote to Immigration NZ to say she had invested more than \$1M in New Zealand in private companies and would continue to invest. Two years previously, they had retained Mr McCarthy. When she received the invitation to apply, she immediately initiated steps to prepare all the necessary documents. As a result of the neglect of her adviser, she was not sure what steps had been taken. The complainant said she had paid the government's fee to file the application, but never heard from Mr McCarthy again. She asked to be informed of the status of their application.

COMPLAINT

[35] Meanwhile, on about 1 November 2021, X made a complaint to the Authority against Mr McCarthy on behalf of the complainant. It was contended that the family had to undertake the medical examination twice because Mr McCarthy did not file the application on time. Nor had he made himself available for periods in excess of four to six months, completely disappearing while critical deadlines were missed. Furthermore, he had been dishonest, pocketing \$16,000 while failing to provide the contracted service. The complainant sought a full refund of \$16,000, revocation of Mr McCarthy's licence and the maximum fine.

[36] The Authority copied the complaint to Mr McCarthy by email on 22 November 2021. He was required to send his file to the Authority.

[37] On 4 March 2022, Mr McCarthy sent an email to X. He said that notwithstanding the complaint, he sought to resolve matters with the complainant. It had not been his

23, 26 (twice), 29 July, 12 August ("multiple times"), 21 September (email and call), 1 and 28 October 2021 – see Registrar's bundle of documents at 86–92, 94.

intention to put himself in such a position by his lack of action. He asked whether they should meet or talk.

[38] On 10 March 2022, Mr McCarthy was formally notified of the details of the complaint by the Authority and his explanation was invited. It was noted that despite numerous requests, he had not provided his file to the Authority.

Third expression filed

[39] On 11 March 2022, Mr McCarthy filed a third expression for the complainant and her family with Immigration NZ. He had no instruction to do so. It is apparent to the Tribunal that the complainant and X had no engagement with Mr McCarthy at this time (except in relation to the complaint) and were not aware of the new (third) expression.

[40] Mr McCarthy sent an email to the Authority on 25 March 2022. According to him, he had been actively working with the complainant since early March to progress matters and had filed a new expression on 11 March. He would work towards filing a residence application as soon as the invitation was received.

[41] A further email was sent by Mr McCarthy to the Authority on 28 March 2022. He said he was extremely embarrassed by his failure to comply with the Code. He found the COVID-19 lockdowns extremely tough. These had combined with significant personal events, including the death of close friends. He found himself suffering from periods of anxiety, brain fog and [redacted]. This caused an inability to react in an appropriate manner when contacted by people. He realised he could no longer properly discharge his obligations and would not renew his licence when it expired. According to Mr McCarthy, he had endeavoured to put things right and was awaiting the issue of another invitation. He wanted to restore the trust and confidence that he once had.

[42] On 29 March 2022, Immigration NZ wrote to the complainant, care of Mr McCarthy, advising that her expression filed on 11 March 2022 had been selected and she was invited to apply for residence.

[43] X advised the Authority on 31 March 2022 that Ms Tian, another licensed immigration adviser, had been instructed by the complainant the previous month and she had been in touch with Immigration NZ.

[44] X sent another email to the Authority on the same day. He noted that they had been advised of only one "preliminary application" (presumably the first expression) and, following positive feedback in early 2020 (presumably the invitation), the collection of documents had begun. This had been hindered by the lockdowns in [Continent] and

New Zealand. Mr McCarthy had assured them that he had asked Immigration NZ for an extension and it had agreed to accept a late filing of the comprehensive support documents. Mr McCarthy had advised him the previous day of a third expression, which had been approved. Mr McCarthy no longer represented the family. They could not be sure what claims he had made to Immigration NZ as he would be using information which was two years old.

[45] The Authority sent an email to Mr McCarthy on 1 April 2022 stating that it had been advised that he was not authorised to file any further applications and that he was not in dialogue with the complainant. She had retained another adviser. It was noted that he appeared to have filed the recent expression without a written agreement or authority.

[46] Mr McCarthy advised the Authority on 4 April 2022 that he had no intention of misleading the Authority or the parties. He had been trying to keep the parties updated. He had not received any notification from any of the parties or from the new adviser that he was no longer acting.

Complaint filed in the Tribunal

[47] The Registrar filed a statement of complaint (12 April 2022) in the Tribunal alleging the following against Mr McCarthy:

Negligence or alternatively breach of the specific provisions of the Code

- (1) Failed to carry out the instruction of the complainant to file a residence application, in breach of cl 2(e).
- (2) Failed to exercise due care and diligence in ensuring the expression was completed correctly and failed to carry out the complainant's instructions, in breach of cls 1 and 2(e) respectively.
- (3) Failed to inform the complainant that he could not continue to provide services and advise her where she could get further assistance, in breach of cl 28(c).
- (4) Failed to provide a fair and reasonable refund, in breach of cl 24(c).
- (5) Failed to maintain a relationship of confidence and trust by failing to engage with the complainant, in breach of cl 2(a).
- (6) Failed to update the complainant regarding communications with Immigration NZ, in breach of cl 26(b).

- (7) Failed to follow his internal complaints procedure, in breach of cl 15(b).
- (8) Failed to explain significant matters in the agreement to the complainant, in breach of cl 18(b).
- (9) Failed to maintain and/or provide the client file to the Authority on request, in breach of cl 26(a) and (e).
- (10) Failed to provide a copy of the applications and return all documents following decline of the expression, in breach of cls 26(f) and 27(b).
- (11) Failed to have a written agreement with the complainant and/or obtain instructions for the second expression application and/or misled Immigration NZ, in breach of cls 18(a), 2(e) and 1 respectively.

JURISDICTION AND PROCEDURE

[48] 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.

[49] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.⁵

[50] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.⁶ It has been established to deal relatively summarily with complaints referred to it.⁷

[51] 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.⁸

⁵ Immigration Advisers Licensing Act 2007, s 45(2) & (3).

⁶ Section 49(3) & (4).

⁷ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁸ Section 50.

[52] The sanctions that may be imposed by the Tribunal are set out in the Act.⁹ The focus of professional disciplinary proceedings is not punishment but the protection of the public.¹⁰

[53] 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.¹¹

From the Registrar

[54] The Tribunal has received from the Registrar the statement of complaint (12 April 2022), with supporting documents.

From the complainant

[55] While no statement of reply or submissions were received from the complainant, there have been numerous communications from X seeking early determination by the Tribunal. X also replied to the psychological report from [doctor 1] (see below).

[56] X regards the extensions granted by the Tribunal to Ms Calvert to obtain the report as a flagrant procedural violation by the Tribunal. In his view, the Tribunal has allowed the case to drag on. He contends it is contradictory for Mr McCarthy to claim to be incapacitated from March 2020, yet not to seek professional advice until August 2022, 30 months later. It is further contended that the report is another unequivocal example of Mr McCarthy's dishonest nature. The latter is alleged to have misrepresented the facts to [doctor 1] to create a level of sympathy for himself.

From Mr McCarthy

[57] Mr McCarthy filed a statement of reply (9 September 2022) with supporting documents. Following a request from the Tribunal on 7 October 2022, further information was provided by Ms Calvert on 31 October 2022. In addition, a report (27 September 2022) from [doctor 1], clinical psychologist, was produced to the Tribunal.

[58] The report from [doctor 1] is thorough. Given its private nature, certain parts were redacted prior to its presentation to the Tribunal, as permitted by the Tribunal. The report will, for the same reason, only be briefly summarised here.

⁹ Section 51(1).

¹⁰ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

¹¹ *Z v Dental Complaints Assessment Committee*, above n 10, at [97], [101]–[102] & [112].

[59] Mr McCarthy had earlier in his life been a police officer for some years, but left due to burnout and a diagnosis of [redacted]. In addition, he developed a number of chronic stress-associated health problems, which are identified. This was followed by a near death experience as a result of another condition.

[60] As an immigration adviser with his own business, his usual way of working completely changed at the start of the global pandemic in March 2020. This led to financial insecurity and anxiety. During 2020 and 2021, he accordingly took on a large amount of work – contact tracing, survey work for the government, immigration advice work and supporting his wife in her business. There were other matters involving family and friends which added to his stress.

[61] By June 2021, Mr McCarthy was feeling entirely overloaded, burnt out and was consumed with stress and anxiety. He also had an accident which left him with chronic pain and other symptoms.

[62] According to [doctor 1], it was accepted by Mr McCarthy that he omitted to do what was needed for the client, in relation to this complaint. When things started opening up globally, he failed to take appropriate steps to reopen the case. He took some steps and requested additional information from the client, though omitted to follow up. He would think about the case, then avoid or procrastinate acting as there were many other pressing stressors on his plate. The longer he avoided acting, the more likely he was influenced by his fear of receiving an upset response from his client.

[63] Mr McCarthy was remorseful, confused and blamed himself. He did not renew his licence and did not intend to work as an immigration adviser. This showed good insight and judgement, in the view of [doctor 1].

[64] The psychologist sets out in her report Mr McCarthy's elevated scores on various tests. She says that he fits the criteria for [redacted]. The traumatic incidents since leaving the Police, the heightened and prolonged stress and uncertainty of the pandemic, the large amount of additional work, the chronic pain and poor sleep, led Mr McCarthy to "hit peak overwhelm with 'all coping systems overwhelmed'". He became emotionally flooded and immobilised in regard to his immigration work.

ASSESSMENT

[65] 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.

Client Care

2. A licensed immigration adviser must:
 - a. maintain a relationship of confidence and trust with the client and provide objective advice
 - ...
 - e. obtain and carry out the informed lawful instructions of the client, and
 - ...

Complaints procedure

15. A licensed immigration adviser must:
 - ...
 - b. if a complaint is made to the adviser, follow their internal complaints procedure.

Written agreements

18. A licensed immigration adviser must ensure that:
 - a. when they and the client decide to proceed, they provide the client with a written agreement
 - b. before any written agreement is accepted, they explain all significant matters in the written agreement to the client
 - ...

Refunds

24. A licensed immigration adviser must:
 - ...
 - c. promptly provide any refunds payable upon completing or ceasing a contract for services.

File management

26. A licensed immigration adviser must:
 - a. maintain a hard copy and/or electronic file for each client, which must include:
 - i. a full copy of the client's application or other immigration matter

- ii. copies of all written agreements and any changes to them
 - iii. copies of all written communications (including any file notes recording material oral communications and any electronic communications) between the adviser, the client and any other person or organisation
 - iv. copies of all invoices and receipts relating to the client
 - v. copies of all personal documents relating to the client supplied to the adviser, and
 - vi. evidence of the safe return of the client's original documents
- b. confirm in writing to the client when applications have been lodged, and make on-going timely updates
- ...
- e. maintain each client file for a period of no less than 7 years from closing the file, and make those records available for inspection on request by the Immigration Advisers Authority, and
 - f. when requested by the client or their new licensed or exempt immigration adviser, release a copy of all applications lodged on behalf of the client and all correspondence relating to the client.

Document security and return

27. A licensed immigration adviser must:

...

- b. when requested or required, return passports and other personal documents to the client without delay and in a secure manner.

Termination of services

28. A licensed immigration adviser must ensure that:

...

- c. if, for any reason, the adviser cannot continue to act for the client, the adviser fully updates the client on the status of their immigration matter and advises them of where they could get assistance.

Negligence or alternatively breach of the specific provisions of the Code

(1) *Failed to carry out the instruction of the complainant to file a residence application, in breach of cl 2(e)*

[66] It is contended that Mr McCarthy did not carry out the complainant's instruction to file a residence application, following an invitation from Immigration NZ to her on 19 December 2019.

[67] It is apparent that COVID-19 intervened in [Country] to prevent the complainant from assembling all the documents before the deadline of 19 April 2020.¹² Mr McCarthy was not responsible for the residence application not proceeding. The first head of complaint is dismissed.

(2) *Failed to exercise due care and diligence in ensuring the expression was completed correctly and failed to carry out the complainant's instructions, in breach of cls 1 and 2(e) respectively*

[68] Following the failure to take up the offer to apply for residence, Mr McCarthy filed a second expression on 14 July 2021. It is alleged Mr McCarthy lacked due care and diligence in that he did not provide the required character information (presumably clean [redacted] police certificates) and complete various sections of the form. It was the lack of character information which led to the decline of the application on 18 November 2021. Mr McCarthy had been informed by Immigration NZ of the information which was missing in communications to him from 23 July to 4 November 2021, but he still did not provide it.

[69] Mr McCarthy did not, in fact, have instructions to file the second expression. The complainant and X did not know about it. They thought he was pursuing the residence application invited as a response to the first expression, but which could not be filed due to the pandemic restrictions in [Country] preventing all the necessary documents being collected.

[70] Putting Mr McCarthy's lack of instructions to one side, he endeavoured to recover the situation by filing the second expression. However, he did not collect all the necessary information nor complete the forms, and nor did he respond to Immigration NZ's numerous attempts to contact him. The expression accordingly failed.

[71] On its face, it would appear that Mr McCarthy lacked due care and diligence. He advances a medical explanation for his failures. He says he was unable to react appropriately due to anxiety, brain fog and [redacted].

[72] In the statement of reply, Ms Calvert contends that Mr McCarthy was not in a position to interact or communicate with people.¹³ The anxiety he was experiencing caused a complete shutdown and he was not able to communicate consistently, if at all, or function confidently with anyone. This occurred from January to November 2021. It is said he shut out everyone from his work and could only interact with his immediate

¹² See the complainant's email of 9 April 2020 to Mr McCarthy and X's email of 10 April 2020 to the husband, copied to Mr McCarthy.

¹³ Statement of reply (9 September 2022) at [13]–[15].

family. It was towards late 2021 that he started slowly communicating and recognised that he needed professional help to deal with his anxiety.

[73] A psychological report has been produced in support. [Doctor 1]'s diagnosis is [redacted] and states Mr McCarthy "hit peak overwhelm with 'all coping systems overwhelmed'". He had become emotionally flooded and immobilised in regard to his immigration work.

[74] The Tribunal does not belittle Mr McCarthy's condition or dispute [doctor 1]'s expert psychological opinion as to his psychological condition now or during 2021, but does not accept that throughout 2021 (from January to November 2021 as contended) Mr McCarthy could not function or communicate professionally at all. After all, he was able to file the second expression in July 2021, albeit inadequately. According to [doctor 1], Mr McCarthy took on additional work in the period from 2020 to 2021. He was assisting his wife in her business.

[75] Furthermore, had Mr McCarthy been so overwhelmed that he could not function professionally at all, communicating only with immediate family, he or his wife on his behalf would have sought earlier medical or psychological attention. Mr McCarthy does not appear to have sought any psychological assistance until about June 2022 in the context of this complaint.¹⁴ There is no evidence of any earlier consultation with his general practitioner, apart from a brief certificate from [doctor 2] (31 August 2022) stating that he was seen that day, was in an "unsettled state" and had previously had unspecified mental health issues.

[76] While the Tribunal finds that Mr McCarthy's then mental ill-health is not a defence to the various breaches of the Code alleged in this complaint, it will be an important mitigating factor in determining the appropriate sanction at the next stage of the Tribunal's process.

[77] The Tribunal finds that Mr McCarthy lacked due care and diligence in completing the expression and its supporting documents. This is a breach of cl 1.

[78] The Registrar additionally alleges that in failing to provide the character information or complete the form, Mr McCarthy failed to carry out the complainant's instructions, in breach of cl 2(e). This is correct and the breach will be upheld, though in reality it is just another way of saying he lacked due care in putting the expression together. It will not add to the sanctions. The second head is upheld.

¹⁴ Mr McCarthy's email to the Tribunal on 27 June 2022.

- (3) *Failed to inform the complainant that he could not continue to provide services and advise her where she could get further assistance, in breach of cl 28(c)*

[79] It is certainly the case that Mr McCarthy effectively provided no services after filing the second expression on 14 July 2021 until it was declined on 18 November 2021. Immigration NZ had tried “numerous times” to contact him from 23 July, but to no avail. On 10 September, X had even asked Mr McCarthy whether he could still perform his services.

[80] The Tribunal has already found that Mr McCarthy suffered from [redacted] through 2021. His ability to function professionally would have been impacted. However, it has not been established that Mr McCarthy’s mental incapacity was so acute throughout this period, particularly in the early stages, that he was unable to recognise the onset of mental ill-health and developing incapacity and was incapable of informing the complainant of the need to obtain assistance from elsewhere. Even the report of [doctor 1] shows that he had some insight into the state of the complainant’s application and the effect on it of his inaction. The psychologist says he would think of the case, then avoid acting as there were other more pressing “stressors” on his plate. The longer he avoided it, the more he was influenced by a fear of receiving an upset response. At this point, Mr McCarthy had a level of functioning sufficient to have advised the complainant to seek professional assistance elsewhere.

[81] Clause 28(c) is for the protection of the client and places the onus on the practitioner to send the client elsewhere if “for any reason” the adviser cannot act.

[82] Mr McCarthy accepts that he was unable to continue to act in an appropriate manner for the complainant. That being the case, he was obliged to update the complainant on the status of the application, inform her that he could not continue to act and advise her of the name of another licensed adviser who could assist. His failure to do so is a breach of cl 28(c). The third head is upheld.

- (4) *Failed to provide a fair and reasonable refund, in breach of cl 24(c)*

[83] The complainant paid Mr McCarthy a substantial fee of \$10,386.66, largely in advance of the work. X first raised a refund with him on 10 September 2021. In her submissions, Ms Calvert says Mr McCarthy carried out his instructions in providing advice and lodging an expression, so no refund was due.

[84] The provision of advice and filing the first expression was only a part of Mr McCarthy’s contracted service. It transpired that the complainant could not complete the documentation required due to lockdowns in [Country]. The invitation to file a

residence application eventually lapsed. Without instructions, Mr McCarthy then filed a second expression. Due to his failure to properly compile the application, compounded by his failure to respond to Immigration NZ, the second expression was declined. At the same time, he was not communicating with X or the complainant to inform them of what was happening.

[85] Even if Mr McCarthy is not responsible for the failure to file the residence application, it is self-evident he did not carry out the full contracted service or his instructions. At the very least, he should have immediately advised the complainant of the status of the residence application. Instead, he filed another expression without instructions, at the same time failing to communicate with Immigration NZ or the complainant.

[86] It follows that upon effectively ceasing his services, at the latest immediately after filing the second expression on 14 July 2021, Mr McCarthy was required to refund a fair and reasonable amount.¹⁵ Having failed to do so when he ceased his services, he should have made a refund when X raised it on 10 September 2021. The formal complaint itself (1 November 2021) also sought a refund. When this was sent to him on 22 November 2021, he should have offered a refund. This continuing failure to make a refund is a breach of cl 24(c). The fourth head is upheld.

(5) *Failed to maintain a relationship of confidence and trust by failing to engage with the complainant, in breach of cl 2(a)*

[87] It is clear that the complainant lost confidence and trust in Mr McCarthy. This is hardly surprising. He had ceased engaging with her or X, from sometime before filing the second expression on about 14 July 2021 (and did not tell them about that expression). It is apparent from X's email to him on 10 September 2021 that the former had tried many times without success to contact him. Mr McCarthy does not appear to have recommenced communication with them until his email to X on 4 March 2022.

[88] According to Ms Calvert, Mr McCarthy tried to rebuild a relationship of trust, demonstrated by the continued joint purpose in lodging the third expression in March 2022. It is contended he interacted with the complainant and tried to address their concerns. Mr McCarthy seems to concede here, quite properly in my view, that the relationship had indeed been initially lost.

[89] Whether Ms Calvert is making any such concession on Mr McCarthy's behalf, there patently was no such joint purpose. Mr McCarthy filed the second and third

¹⁵ See cl 24(a) of the Code as to the requirement for the refund to be fair and reasonable.

expressions without instructions. By the time of the third expression, the complainant had already made a formal complaint against Mr McCarthy and instructed another adviser. He did try to recover the relationship from about 4 March 2022, but that was far too late. It had been well and truly permanently severed by then.

[90] The loss of confidence and trust by X and the complainant in Mr McCarthy was justifiable. This is a breach of cl 2(a). The fifth head is upheld.

(6) *Failed to update the complainant regarding communications with Immigration NZ, in breach of cl 26(b)*

[91] As Mr McCarthy had stopped communicating with the complainant or X from sometime before 14 July 2021, he failed to update them on the status of the second expression. Indeed, as noted above, there is no evidence he sought instructions to file that expression. He did this without the complainant's knowledge. Furthermore, he had spoken to an officer on 14 October 2021 and must therefore have become aware of the emails from Immigration NZ before then, but he did not inform the complainant of those emails or the telephone call. Mr McCarthy did not advise the complainant of Immigration NZ's letter of 4 November 2021 seeking information. Nor did he advise her of the decline of the second expression on 18 November 2021.

[92] The failure to inform the complainant and/or X of the second expression and of the communications from Immigration NZ, is a breach of cl 26(b). The breach is largely accepted by Mr McCarthy.¹⁶ The sixth head is upheld.

(7) *Failed to follow his internal complaints procedure, in breach of cl 15(b)*

[93] On 10 September 2021, X expressed concern at Mr McCarthy's lack of engagement. They were very worried he was not delivering. They were considering a complaint to the Authority. Mr McCarthy was asked to advise by the following Tuesday whether he could perform and, if not, to make arrangements for a refund.

[94] While the letter of 10 September is clearly a complaint, Mr McCarthy's relationship with the complainant and X was not severed at that point. According to Mr McCarthy's unsigned contract, his internal complaints procedure was very simple. It provided that the client should endeavour to resolve the complaint with him prior to approaching the Authority.

¹⁶ Statement of reply (9 September 2022) at [34].

[95] Mr McCarthy's response to the 10 September letter was to do nothing. The appropriate response to this letter would have been to immediately communicate with X, obtain a retrospective instruction for the second expression and to progress its processing by contacting Immigration NZ and/or supplying the information sought by the visa officer.

[96] As Mr McCarthy failed to engage with the complainant in resolving the complaint about his lack of communication, he failed to follow his internal complaints procedure. This is a breach of cl 15(b). Mr McCarthy accepts this breach.¹⁷ The seventh head is upheld.

(8) *Failed to explain significant matters in the agreement to the complainant, in breach of cl 18(b)*

[97] At or prior to entering into the contract with the complainant on 25 November 2019 (assuming a signed contract or approbation by conduct), Mr McCarthy was obliged to explain to her (or X as her agent) all significant matters in the contract. The Registrar says there is no evidence he did. In the statement of reply, Mr McCarthy denies this head of complaint and states that the core terms, particularly his fees and those of Immigration NZ, were explained.

[98] The "significant matters" requiring explanation go beyond just the fees and extend to such matters as being bound by the Code and the adviser's complaints procedure. While the Registrar says there is no evidence Mr McCarthy did explain all such matters, there is no evidence before the Tribunal that he did not. Notably, there is no allegation by X in the complaint of any such breach. The eighth head of complaint is unproven and is dismissed.

(9) *Failed to maintain and/or provide the client file to the Authority on request, in breach of cl 26(a) and (e)*

[99] The Registrar contends that Mr McCarthy failed to maintain and produce a full client file. He was required by the Registrar to provide his client file on 22, 30 November, 9 December 2021 and 19 January 2022, but he did not do so.

[100] In the statement of reply on behalf of Mr McCarthy, Ms Calvert says he did have an electronic file. She produced it to the Tribunal with her reply.¹⁸ She accepts that Mr McCarthy did not provide it to the Authority when requested. This was because of

¹⁷ Statement of reply (9 September 2022) at [23].

¹⁸ Statement of reply (9 September 2022) at [33].

his mental health. The Tribunal has already found that Mr McCarthy's mental condition is not a defence to his failure to comply with his professional obligations, though it will be relevant in setting the sanctions later.

[101] The failure to provide the file on request by the Authority is a breach of cl 26(e). The ninth head of complaint is partially upheld.

(10) Failed to provide a copy of the applications and return all documents following decline of the expression, in breach of cls 26(f) and 27(b)

[102] The Registrar alleges that following the decline of the second expression on 18 November 2021, Mr McCarthy did not provide a copy of the applications to the complainant or return the couple's documents to them.

[103] X alleges he requested the original documents back multiple times, but did not receive them.¹⁹ In fact, the allegation that Mr McCarthy has retained documents (the nature of which is not known) has generated considerable communication with the Tribunal by X and Mr McCarthy. The latter confirmed to the Tribunal on 27 June 2022 that he did hold documentation relating to the "intended application". He later said he had never previously been asked to return any documents, but he had now returned "all original documents" to X at the registered address of his company.²⁰ X disputes they were returned and suggests they were sent to the wrong address.²¹

[104] While the Tribunal does not know what documents were not returned to the complainant, Mr McCarthy has accepted that (at or immediately before 27 June 2022) he had not done so. He should have returned them not later than 18 November 2021, if not when he effectively ceased his services not later than 14 July 2021. Ms Calvert confirms this in the statement of reply and acknowledges the breach.²² Mr McCarthy has breached cls 26(f) and 27(b). The 10th head is upheld.

(11) Failed to have a written agreement with the complainant and/or obtain instructions for the second expression application and/or misled Immigration NZ, in breach of cls 18(a), 2(e) and 1 respectively

[105] The second expression was filed on 14 July 2021 and the third expression was filed on 11 March 2022. Whether or not the contract of 25 November 2019 concerning the first expression was ever binding, there is no evidence Mr McCarthy ever told the

¹⁹ Email X to the Authority (14 March 2022).

²⁰ Email Mr McCarthy to X (1 August 2022), copied to the Tribunal; see statement of reply (9 September 2022), attachment H.

²¹ Email X to Mr McCarthy and the Tribunal (1 August 2022).

²² Statement of reply (9 September 2022) at [38] & [50.6].

complainant (or X) about the second expression or sought her instructions. The Tribunal has found that the complainant and X thought that Mr McCarthy was proceeding late with preparing a residence application following the invitation to apply on 19 December 2019. As for the third expression, Mr McCarthy had no instruction to file it and nor did he notify her that he had filed it.

[106] Ms Calvert contends that it was fair and reasonable for Mr McCarthy to believe he was still acting under the original instructions in the contract, as a result of the conduct of X. Mr McCarthy had not been advised that his instructions had been terminated, nor had he received any communication from any new adviser.

[107] This is an unrealistic expectation on the part of Mr McCarthy. His original instructions concerned only one expression, not a series of expressions. Mr McCarthy was required to obtain express written approval, if not a change to the service specified in the contract, for each and every immigration application made.²³ The contract (25 November 2019) was more than 18 months before the second expression was filed. It was Mr McCarthy's responsibility to ensure he had instructions to proceed, not the complainant's responsibility to instruct him not to proceed (in respect of an application she did not know was to be made) and presumably terminate his services.

[108] Mr McCarthy failed to obtain instructions from the complainant to proceed with the second and third expressions. This is a breach of cl 2(e). It is also arguably a breach of cl 18(a) (failing to obtain a new contract or vary the existing contract by consent) and cl 1 (to be professional), but these add nothing to the breach of cl 2(e). Mr McCarthy also arguably misled Immigration NZ in filing these expressions as filing was a representation he was instructed to do so, whereas in fact he had no such instruction. In the circumstances, this also adds nothing to the failure to obtain instructions itself. The 11th head is partially upheld.

OUTCOME

[109] I uphold the complaint. Mr McCarthy has breached cls 1, 2(a) and (e), 15(b), 24(c), 26(b), (e) and (f), 27(b) and 28(c) of the Code.

SUBMISSIONS ON SANCTIONS

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

²³ Code of Conduct 2014, cls 18(d), 19(e).

[111] A timetable is set out below. Any request that Mr McCarthy 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

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

- (1) The Registrar, the complainant and Mr McCarthy are to make submissions by **20 January 2023**.
- (2) The Registrar, the complainant and Mr McCarthy may reply to submissions of any other party by **3 February 2023**.

ORDER FOR SUPPRESSION

[113] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.²⁴

[114] There is no public interest in knowing the name of Mr McCarthy's client. Certain medical information concerning Mr McCarthy will also be redacted in the public decision to protect his privacy.

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

D J Plunkett
Chair

²⁴ Immigration Advisers Licensing Act 2007, s 50A.