

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2022] NZIACDT 5

Reference No: IACDT 03/21

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **LS**
Complainant

AND **NIRMALA KRISHNA
MURTHY**
Adviser

Hearing at Auckland on 22 March 2022

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 4 April 2022

REPRESENTATION:

Registrar: L Lim, counsel

Complainant: No appearance

Adviser: Y Mortimer-Wang, X Zhang, counsel

PRELIMINARY

[1] Ms Nirmala Krishna Murthy acted for LS, the complainant, to seek a work visa. The most serious allegations are that she created an unauthorised email address for him on an assessment of his Indian qualifications by the New Zealand Qualifications Authority (NZQA) and that she continued to act for him after her services had been terminated.

[2] A complaint to the Immigration Advisers Authority (the Authority) against Ms Murthy has been referred to the Tribunal by the Registrar of Immigration Advisers (the Registrar). It alleges dishonest or misleading behaviour and negligence, both statutory grounds of complaint under the Immigration Advisers Licensing Act 2007 (the Act). It also alleges the breach of a number of provisions of the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

BACKGROUND

[3] Ms Murthy, a licensed immigration adviser, is a director of Immigration Consultancies Ltd (the consultancy), of Auckland.

[4] The complainant, a national of India, contacted Ms Murthy on about 11 May 2020. He had come to New Zealand in March 2018 and held an open work visa working as a manager of a bar and café. The visa was based on his partnership with a New Zealander, but “complications” had arisen in the partnership. He had a brief telephone discussion with Ms Murthy as to how he might seek residence in the skilled migrant category. He had tertiary qualifications in hospitality from India and had worked in India, the United States and Australia, before coming to New Zealand.

[5] On 14 May 2020, the complainant and Ms Murthy met in her office. She evaluated his points entitlement in the skilled migrant category and gave him an evaluation (unseen by the Tribunal).

[6] They met again on 18 May 2020 to discuss his questions. On the same day and following this meeting, Ms Murthy sent an email to the complainant requesting a number of documents for the NZQA assessment, including colour copies of his certificates and the like. At some point that day, the complainant paid her \$900 by internet banking for that assessment.

[7] On 20 May 2020 (at 3:44pm), the complainant sent three texts to Ms Murthy combining to form one message, "Sorry mam Could not do colour print out I am working all days".¹

[8] The complainant says he provided his qualification documents to Ms Murthy on about 21 May 2020. She disputes this. She says that at some point between June and early August, he provided coloured copies to Ms A, who was a tenant at the back of her office, but not an employee. Unbeknown to Ms Murthy, the tenant saved them on a computer in her office (she was not aware of this until the complainant told her in a phone call on 18 August 2020).

[9] A written service agreement was signed by the complainant and Ms Murthy on 25 May 2020. She agreed to represent him to process a residence visa in the skilled migrant category. The total fee was \$6,900 (incl. GST), but excluding the fee of Immigration New Zealand (Immigration NZ). On the same day, the complainant paid the consultancy \$3,450, being the first instalment for the residence visa.

[10] There was a meeting on 26 May 2020 between Ms Murthy, the complainant and his employer regarding the complainant's employment.

[11] This was followed by email exchanges between Ms Murthy and the complainant as the former gathered information and documents. Ms Murthy sent him a sample employment contract on 5 June.

[12] On 25 June 2020, Immigration NZ sent an email to the consultancy (but addressed to the complainant) advising that his registration for an online application was complete.

[13] The complainant alleges he made several phone calls to Ms Murthy to give her further details of his job description and previous employment. There was an email exchange about his immigration history. He had a consultation with her on 29 June 2020. It concerned the details needed for the expression of interest (EOI) form. She sent him an email that day noting that she had started the EOI application and requesting further information. According to Ms Murthy, she phoned him a few times seeking colour copies of his qualification certificates and mark sheets, but he did not send them.

[14] An online account with NZQA was created by Ms Murthy's staff for the complainant's assessment application. A Gmail address was also created in the

¹ Hearing file at 48.

complainant's name. It was operated by Ms Murthy and/or her staff. She says the complainant authorised this.

[15] Ms Murthy states that the complainant phoned her on 18 August 2020 asking about the status of the NZQA assessment. She explained to him she could not proceed because he had not given her all the documents. As he appeared to be upset and angry with this advice, Ms Murthy decided to file the assessment application with the available documents, knowing that NZQA would request additional documents.²

[16] According to Ms Murthy, she filed the assessment application online with NZQA on 20 August 2020 at about 5:00 pm.

[17] At 5:10 pm, the complainant sent a text to Ms Murthy stating:³

Hi Nirmala,

Please provide me a full copy of my file. I am really unhappy with the service and I don't want you to proceed further. Please provide me a full refund of the amounts.

...

[18] An email acknowledging receipt of the assessment application was sent by NZQA to Ms Murthy at 5:22 pm.

[19] Ms Murthy then lodged the EOI online with Immigration NZ that evening at 10:52 pm (Immigration NZ receipt stamp).

[20] Ms Murthy says it was not until about midnight that evening that she read the complainant's text sent at 5:10 pm effectively terminating her services. It is her evidence that she did not undertake any work on his behalf after she read his text.

[21] Immigration NZ's computer records show someone accessed the online EOI application on 22 August 2020 at 9:05 pm. Both the complainant and Ms Murthy had access to his online account. Ms Murthy does not know who did so. She could have logged on to save the application. The evidence before the Tribunal is that the application saved on 22 August is identical to that lodged on 20 August.

[22] On 5 September 2020, Ms Murthy sent an email to the complainant requesting his bank card details, so that Immigration NZ's fee for the EOI could be paid. She stated that she had commenced the EOI on 25 June 2020.

² Ms Murthy's "Summary of [the complainant]" at 028 of the hearing file (undated but she says it was provided to the Authority on 27 October 2020).

³ Hearing file at 138.

[23] NZQA issued a statement recognising the complainant's bachelor's degree as the equivalent of a New Zealand bachelor's degree, on 14 September 2020.

[24] On 22 September 2020, the complainant requested a meeting with Ms Murthy. It was scheduled for 28 September 2020, but Ms Murthy did not attend because she was unwell. Her son, a provisional licence holder, attended the meeting. According to Ms Murthy, her son showed the complainant and his employer all the work they had done, but he wanted a full refund.

COMPLAINT

The complainant's evidence to the Authority

[25] The complainant filed a complaint against Ms Murthy with the Authority on 29 September 2020. He alleged she had filed the assessment application with NZQA after he had asked her to stop working on his behalf and that she had created a fake Gmail account under his name and without his consent. He had requested meetings with her, but she kept making excuses and did not show up at the scheduled meeting on 28 September 2020. Her son attended, but he refused to provide a copy of the file or a refund. Her advice was completely misleading and the progress of his application, as well as his livelihood and future, had been put at risk due to her greed. He wanted his money back.

[26] On 8 March 2021, the complainant sent an email to the Authority's investigator. He said his main concern was that Ms Murthy never did what she promised, but she took his money. She lied to him. He gave all his documents to her staff. He gave her the money on 18 May but she did not apply until August. She changed his email without informing him.

[27] The complainant sent an email to the Authority's investigator on 29 March 2021, stating that Ms A (the person he had given the colour copies to) was a member of Ms Murthy's staff.

Explanation from Ms Murthy

[28] On the same day that the complaint was filed, Ms Murthy had sent an email to the Authority stating that she was being extorted by the complainant for a full refund of a fee for services rendered. She had been unable to see him due to her health issues. She had charged him 50 per cent of the fee for the EOI. He had threatened to lodge a

complaint if the money was not refunded in full. Ms Murthy explained that she was sending the email as a pre-emptive measure.

[29] On about 27 October 2020, Ms Murthy provided the Authority with an undated summary of her interactions with the complainant.⁴

[30] On 12 March 2021, the Authority wrote to Ms Murthy formally advising her of the details of the complaint and inviting her explanation.

[31] Ms Murthy wrote to the Authority explaining her conduct on 24 March 2021. As for the email address created for the complainant, she had no intention of being misleading. It had been done “simply to separate and direct communication regarding [the complainant’s] application”.

[32] Nor had the complainant terminated her contract when she filed the NZQA application. He had expressed a concern about delay. The draft application had been created a long time before it was filed. The delay was due to the complainant not providing scanned colour copies of the necessary documentation, a mandatory requirement of NZQA.

[33] According to Ms Murthy, the complainant had said in a *WhatsApp* chat message that he could not provide scanned colour copies of certificates due to his busy work schedule. When she told him over the phone on 18 August 2020 about the colour copies, he said he had given them to Ms A, a tenant of Ms Murthy. This person was known to the complainant. Ms Murthy said she then went to Ms A’s workstation and found that the documents had been scanned and saved on the desktop computer at the back of the office. She had not been aware of this. By this time, Ms A had left New Zealand. Ms Murthy stated that the complainant had not been told to give his documents to Ms A.

[34] Ms Murthy said in her explanation that she then uploaded the colour copies and filed the NZQA application. She had delayed the filing for no other reason than the absence of the colour copies of his qualification certificates.

[35] Ms Murthy denied being dishonest or breaching the provisions of the Code.

Complaint referred to Tribunal

[36] The Registrar referred the complaint to the Tribunal on 7 April 2021. It alleges the following against Ms Murthy:

⁴ Hearing bundle at 026–029.

Dishonest or misleading behaviour, or alternatively breach of the identified provision of the Code:

- (1) creating a false Gmail account for the complainant without his consent or knowledge when lodging the assessment application with NZQA, in breach of cl 1; and
- (2) continuing to provide immigration advice to the complainant after he had terminated her services, in breach of cl 1.

Negligence, or alternatively breaches of the identified provisions of the Code:

- (3) failing to lodge the assessment application with NZQA in a timely manner, in breach of cl 1;
- (4) failing to confirm in writing to the complainant when she lodged the assessment application, in breach of cl 26(b);
- (5) failing to confirm in writing to the complainant when he terminated her services, in breach of cl 28(a); and
- (6) failing to provide the complainant with a copy of his documents when requested, in breach of cl 26(f).

JURISDICTION AND PROCEDURE

[37] 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.

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

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

[39] 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

[40] 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

[41] 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

[42] 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

[43] The Registrar has filed the statement of complaint (7 April 2021), with supporting documents.

Submissions on behalf of the complainant

[44] There are no submissions from the complainant.

Submissions on behalf of Ms Murthy

[45] There is a statement of reply (7 June 2021) from Ms Mortimer-Wang, counsel for Ms Murthy, together with a supplementary statement from Ms Murthy (6 July 2021) and a letter from an employee of Ms Murthy (3 June 2021).

[46] In the statement of reply, Ms Mortimer-Wang accepts that Ms Murthy could have acted more diligently in providing written updates to the complainant, including when he terminated her services (see heads of complaint (4) and (5) under “Negligence”). She is remorseful and wishes to make a formal apology and voluntary offer of amends to the complainant.

⁶ Section 49(3) & (4).

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

⁸ Section 50.

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].

[47] Ms Mortimer-Wang asks the Tribunal to take into account Ms Murthy's health during this period, details of which are given. This affected her standard of care. A medical certificate (7 December 2021) was later provided to the Tribunal.

[48] Ms Murthy expressly denies the allegation of dishonest or misleading behaviour.

[49] As for the Gmail account, this was authorised by the complainant. An employee had created the email address. The complainant had requested her to do so and to respond to any queries or requests about the assessment. He said he did not have the time or energy to deal with the paperwork and wanted her to take care of everything.

[50] Counsel submits that Ms Murthy stood to gain nothing from the unauthorised creation or use of the Gmail account. She was not trying to conceal the timing of the assessment application. She had never denied that it had not been filed as at 18 August 2020. Ms Murthy was always going to have to supply the complainant with the application and certificate later, at which juncture the timing of the application and the alternative email address would have been clear. Furthermore, it was also incredibly easy for him to discover the address by contact directly with NZQA. It must also be borne in mind that the assessment was not a necessary component for the EOI, so she did not need any excuse for the later filing of the application with NZQA.

[51] Ms Murthy also denies knowingly providing immigration services for the complainant after he had terminated her service. She says she received the notice of termination by text at 5:10 pm on 20 August 2020. By the time she became aware of this message, the EOI and assessment applications had been filed. They had been filed at about 5pm. She did not read the *WhatsApp* message until later that evening.

[52] In answer to the complaint regarding the failure to file the assessment application with NZQA in a timely manner, counsel states that Ms Murthy was not responsible for the delay. It was not until the complainant told her on 18 August 2020 that the documents had been given to Ms A, a tenant in the consultancy's offices, that she was aware of this. By this time, Ms A had left the offices. She investigated and found the scanned copies. Following the complainant's clear dissatisfaction, she then filed the assessment application, as well as the EOI application, at about 5pm.

[53] Furthermore, there was no urgency for the application as it did not need to be relied on for the EOI application. It is not required until much later in the visa application process, after the invitation to apply for residence is received.

[54] As for the alleged failure to provide the complainant with a copy of his documents, Ms Murthy denies not doing so.

[55] Finally, Ms Mortimer-Wang contends that the complaints about the Gmail account and the delay in filing the assessment application are not complaints within s 44 of the Act. This jurisdictional issue is dealt with later in more detail.

[56] There is a supporting supplementary statement (6 July 2021) from Ms Murthy. It confirms the facts set out in counsel's statement of reply. In particular, Ms Murthy:

1. sets out the circumstances around the creation of the Gmail account, which was not intended to mislead or deceive;
2. states that the assessment application is not part of the skilled migrant visa application. It is routine for clients to obtain such NZQA certificates themselves, for their visa applications;
3. states that the complainant provided the coloured marksheet documents to Ms A sometime between June and early August 2020. Ms Murthy was not aware of this until the telephone call on 18 August. She did not authorise Ms A, who was not her employee, to access her client files;
4. states that the EOI had been prepared and was ready for filing around the first week of July. The complainant was requested to pay Immigration NZ's fee of \$530, but he did not do so. The EOI was therefore not filed. She filed it on 20 August without paying the fee, knowing that it would not be processed until the fee was paid; and
5. sets out the details concerning her health in the period from July to September 2020, which she requests be considered. While acknowledging that it is not an excuse for failing to send frequent written communications, it gives some context as to why the communications dropped off in the period from July to early August 2020.

[57] A supporting letter from Ms Murthy's employee (3 June 2021) has also been provided. As she declined to attend the hearing, no weight can be placed on her evidence.

[58] Further documents were filed on behalf of Ms Murthy on 15 March 2022, including a medical certificate (7 December 2021).

[59] There is a supplementary statement from Ms Murthy (21 March 2022). She did not see the complainant's 5:10 pm text on 20 August until just before midnight that evening.

Oral hearing

[60] Ms Mortimer-Wang requested an oral hearing under s 49(4) of the Act, given the serious allegation of dishonest or misleading behaviour which is disputed. The Tribunal accepted the request and issued Minute 1 (20 July 2021) directing an oral hearing of the first and second heads of complaint only.

[61] There was a hearing on 22 March 2022. There was no appearance by the complainant. Where his version of the events differs from that of Ms Murthy and it is not corroborated by other evidence (such as contemporary documents), Ms Murthy's version of the events will be preferred. Ms Murthy was the only witness to give evidence.

ASSESSMENT*Jurisdiction*

[62] Ms Mortimer-Wang raises a jurisdictional issue relating to the heads of complaint concerning the NZQA assessment ((1), (3) & (4)).

[63] It is contended that the Tribunal does not have jurisdiction as the provision of services by Ms Murthy in relation to the assessment application by NZQA falls outside the definitions of "immigration matter" and "immigration advice" in ss 5 and 7 of the Act and therefore outside matters that can be the subject of a complaint under s 44.

[64] Ms Murthy had entered into the service agreement with the complainant on 25 May 2020 to lodge a residence visa. The NZQA assessment was a separate service requested by the complainant that was not covered by the service agreement for the provision of immigration advice. He had agreed to assistance with the assessment application and paid for it on 18 May 2020, before he decided to proceed with the visa application. The invoice for the residence visa did not refer to the assessment application, nor to the \$900 paid on 18 May 2020.

[65] Ms Mortimer-Wang describes the application as an administrative task. The complainant could have applied for it himself.

[66] Ms Lim for the Registrar submits that the statutory definition of immigration advice is broad, relying on the decision of the District Court in *Yang*.¹²

[67] It is acknowledged by Ms Lim that applying for an assessment by NZQA is not a requisite part of the complainant's EOI, but it was required for his skilled migrant category

¹² *Immigration Advisers Authority v Yang* DC Auckland CRI-2013-004-2413, 5 March 2014 at [42].

residence visa application. It was part of the entirety of the service she provided. Counsel notes that the complainant initially spoke to Ms Murthy on 11 May 2020 to request her services to process a residence application under the skilled migrant category. She met with him on 14, 18 and 26 May 2020. She collected information from him and spoke to his employer.

[68] It is submitted by Ms Lim that it is clear from these interactions that the complainant was seeking assistance from Ms Murthy in preparing his residence application. All the steps she took, including filing the assessment application, constituted immigration advice as they involved using her own knowledge and experience to assist the complainant. The NZQA assessment was not a separate service. It was directly relevant to the complainant's overall application, even if it was not immediately required.

[69] Ms Lim points out the service agreement (at [2.2]) states that Ms Murthy will prepare and compile all information and documentary evidence required for filing the residence visa application, including giving advice about the options and collecting all the information. The visa application required that any qualifications be recognized by NZQA.

[70] Counsel contends that even if the service agreement did not refer directly to the NZQA assessment, Ms Murthy's service involved providing her expertise and experience of the process to assist the complainant in obtaining an assessment by NZQA. This constituted more than clerical work and was clearly immigration advice.

[71] The Tribunal accepts that a complaint to the Registrar pursuant to s 44 of the Act which is capable of being referred to the Tribunal, must concern "immigration advice" as defined:

5 Interpretation

In this Act, unless the context otherwise requires,—

...

immigration advice has the meaning given to it by section 7

...

immigration matter means any matter arising under or concerning the application of the Immigration Act 2009 (including any regulations or instructions made under that Act); and includes—

- (a) an application or potential application for a residence class visa, temporary entry class visa, or transit visa:
- (b) a request or potential request for a special direction:

- (c) a claim for recognition as a refugee or a protected person, and any related appeal or matter:
- (d) a matter relating to immigration sponsorship:
- (e) a matter relating to an immigration obligation:
- (f) an appeal in relation to an immigration matter
- ...

7 What constitutes immigration advice

- (1) In this Act, *immigration advice*—
 - (a) means using, or purporting to use, knowledge of or experience in immigration to advise, direct, assist, or represent another person in regard to an immigration matter relating to New Zealand, whether directly or indirectly and whether or not for gain or reward; but
 - (b) does not include—
 - (i) providing information that is publicly available, or that is prepared or made available by the Department; or
 - (ii) directing a person to the Minister or the Department, or to an immigration officer or a refugee and protection officer (within the meaning of the Immigration Act 2009), or to a list of licensed immigration advisers; or
 - (iii) carrying out clerical work, translation or interpreting services, or settlement services.
- (2) To avoid doubt, a person is not considered to be providing immigration advice within the meaning of this Act if the person provides the advice in the course of acting under or pursuant to—
 - (a) the Ombudsmen Act 1975; or
 - (b) any other enactment by which functions are conferred on Ombudsmen holding office under that Act.

[72] There is little higher court authority on the definition. In *Yang*, the High Court said that “assist” (as used in s 7) should not be given a restrictive meaning and is not confined to conduct of a formal nature.¹³ In the District Court in *Yang*, the words “advise” and “assist” in s 7 were regarded as having a “very broad ambit”.¹⁴

[73] According to Ms Mortimer-Wang, there was a separate agreement between Ms Murthy and the complainant to represent him in relation to the assessment application with NZQA. He paid \$900 for this. It was not part of the service agreement for the EOI/residence visa.

¹³ *Yang v Ministry of Business, Innovation and Employment* [2015] NZHC 1307 at [23].

¹⁴ *Immigration Advisers Authority v Yang*, above n 12 at [41]–[42].

[74] With respect to counsel, while there was a separate oral agreement for the work, it is unrealistic to sever the NZQA assessment from the EOI/residence visa work. The EOI/residence work clearly falls within “immigration advice” as defined. It is appreciated that such an assessment is not necessary for an EOI and that clients often deal with NZQA themselves. However, the assessment was indisputably necessary for the residence visa.

[75] Ms Murthy contracted to seek a residence visa for the complainant (though ultimately did not undertake this work as her services were terminated). Given the need for NZQA’s assessment for the purpose of the residence application, it is clear that in representing him on the assessment, Ms Murthy was (pursuant to s 7(1)(a)):

using ... knowledge of or experience in immigration to ... assist, or represent [the complainant] in regard to an immigration matter ... whether directly or indirectly.

[76] As the High Court said in *Yang*, “assist” is not to be given a restrictive meaning. The relevant “immigration matter” was the intended residence visa application.

[77] While the agreement to assist the complainant with the assessment occurred orally on 18 May 2020, it is not accepted that this was before the complainant had decided to proceed with the visa application. Ms Murthy had been advising the complainant about how to achieve residence since their first discussion on 11 May. The meeting on 18 May was more about immigration than the NZQA assessment.¹⁵

[78] The service agreement of 25 May may be dated seven days after she agreed to help him with the assessment application, but the complainant must have decided to instruct Ms Murthy on his EOI/residence application on 14 May when he asked her to assist with the NZQA assessment. While separately charged, the assessment, EOI and visa are part of the same total engagement package.¹⁶ She processed the assessment as a necessary document for a residence application.

[79] Ms Murthy’s work on the NZQA assessment was “immigration advice” within the Act. It follows that the Registrar was entitled to accept the complaint about the NZQA assessment and to refer it to the Tribunal.

[80] The Tribunal will now turn to the substantive complaint.

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

¹⁵ Ms Murthy’s summary at 026–029 of the Hearing file.

¹⁶ See the discussion in *Immigration NZ v Cleland* [2019] NZIACDT 25 at [78] regarding documents collected for recruiting and immigration purposes. Whether pursuant to one agreement or separate agreements, the additional tasks are for the purposes of immigration.

General

1. A licensed immigration adviser must be honest, professional, diligent and respectful and conduct themselves with due care and in a timely manner.

File management

26. A licensed immigration adviser must:

...

- b. confirm in writing to the client when applications have been lodged, and make on-going timely updates

...

- 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.

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

...

Dishonest or misleading behaviour, or alternatively breach of the identified provision of the Code:

(1) *creating a false Gmail account for the complainant without his consent or knowledge when lodging the assessment application with NZQA, in breach of cl 1; and*

(2) *continuing to provide immigration advice to the complainant after he had terminated her services, in breach of cl 1*

[82] Dealing with the first head of complaint, it is Ms Murthy's evidence that the complainant authorised her employee to create an email address in his name and to deal with NZQA's document and information requests, as he did not have the time to do so.

[83] The complainant has chosen not to attend the hearing, so his version that he did not authorise the Gmail account cannot be relied on. The Tribunal also finds Ms Murthy's explanation to be plausible. It is difficult to understand the benefit to Ms Murthy of an unauthorised address. As Ms Mortimer-Wang says, there was no urgency to the assessment and no reason why Ms Murthy needed to hide from the complainant any delays to the NZQA application, given that it was not needed for the EOI application.

[84] The first head of complaint is dismissed.

[85] As for the second head of complaint, Ms Murthy filed the EOI application at 10:52 pm on 20 August 2020, after the complainant had effectively terminated her services at 5:10 pm. She says she did not read his text until about midnight.

[86] Ms Murthy's evidence as to when she filed the EOI application has not been entirely consistent. In her counsel's statement of reply (7 June 2021), it is said that the EOI was filed at around 5:00 pm, which would be before the complainant's text.¹⁷ This apparent inconsistency was not explored at the hearing. Notwithstanding this possible contradiction, Ms Murthy's evidence that she did not see the text until after filing the EOI application, has been consistent and will be accepted.

[87] Ms Murthy says she ceased working on the complainant's file once she had read his text at about midnight on 20 August 2020. As for the 22 August online access to the EOI, there is no evidence any work was done, even if it was Ms Murthy who accessed the file. Nor does the 5 September 2020 email to the complainant concerning payment of Immigration NZ's EOI fees, of itself, establish any continuing work.

[88] The second head of complaint is dismissed.

Negligence, or alternatively breaches of the identified provisions of the Code:

- (3) *failing to lodge the assessment application with NZQA in a timely manner, in breach of cl 1;*
- (4) *failing to confirm in writing to the complainant when she lodged the assessment application, in breach of cl 26(b);*
- (5) *failing to confirm in writing to the complainant when he terminated her services, in breach of cl 28(a); and*
- (6) *failing to provide the complainant with a copy of his documents when requested, in breach of cl 26(f)*

[89] I intend to deal with these heads of complaint in turn.

[90] The complainant instructed Ms Murthy to proceed with the NZQA assessment on 18 May 2020. On the same day, she requested from him the necessary documents, including colour copies of his certificates. He told her on 20 May he could not provide colour prints as he was working "all days". The complainant says he provided them to

¹⁷ Statement of reply (7 June 2021) at [32].

her on 21 May. Ms Murthy says he provided them to Ms A sometime between June and early August.

[91] Irrespective of when and to whom the copies were provided, the assessment was not needed for the EOI, so there was no urgency for it. In the circumstances, I dismiss the third head of complaint.

[92] In respect of the fourth head of complaint, Ms Murthy provides no evidence of written confirmation to the complainant of the filing of the assessment application with NZQA on 20 August 2020. The fourth head is upheld. Ms Murthy has breached cl 26(b) of the Code.

[93] In respect of the fifth head of complaint, Ms Murthy accepts that she failed to provide written confirmation to the complainant of the termination of her services on 20 August 2020. The fifth head is upheld. Ms Murthy has breached cl 28(a) of the Code.

[94] As for the sixth head of complaint, the Registrar refers to the complainant's text to Ms Murthy on 20 August 2020 requesting a full copy of his file. However, the statement of complaint does not identify what documents Ms Murthy subsequently provided to the complainant (if any) and what documents she did not provide to him. There is no supporting evidence before the Tribunal. Ms Murthy denies this charge. This head of complaint is dismissed.

[95] The Tribunal has reviewed the medical certificate (7 December 2021) concerning Ms Murthy. It is not necessary to set out the particulars in this decision. As Ms Mortimer-Wang submits (6 July 2021), her health provides context but does not excuse her failure to communicate.

OUTCOME

[96] The fourth and fifth heads of complaint are upheld. Ms Murthy is in breach of cls 26(b) and 28(a) of the Code. The complaint is otherwise dismissed.

SUBMISSIONS ON SANCTIONS

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

[98] 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

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

- (1) The Registrar, the complainant and Ms Murthy are to make submissions by **29 April 2022**.
- (2) The Registrar, the complainant and Ms Murthy may reply to submissions of any other party by **13 May 2022**.

ORDER FOR SUPPRESSION

[100] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.¹⁸

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

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

D J Plunkett
Chair

¹⁸ Immigration Advisers Licensing Act 2007, s 50A.