

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2023] NZIACDT 4

Reference No: IACDT 06/22

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **TC**
Complainant

AND **IAIN CRAIG MacLEOD**
Adviser

SUBJECT TO SUPPRESSION ORDER

DECISION
Dated 7 February 2023

REPRESENTATION:

Registrar: Self-represented
Complainant: Self-represented
Adviser: S Laurent, counsel

PRELIMINARY

[1] Iain Craig MacLeod, the adviser, was engaged by TC, the complainant, to seek a work visa and residence under the entrepreneur category. Mr MacLeod failed to properly recall or understand the financial forecasts of the business which led to increased costs for the complainant and misrepresenting to him the concerns of Immigration New Zealand (Immigration NZ).

[2] A complaint by the complainant against Mr MacLeod 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 he has been negligent and/or dishonest or misleading, grounds of complaint under the Immigration Advisers Licensing Act 2007 (the Act), and/or that he has breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

BACKGROUND

[3] Mr MacLeod, a licensed immigration adviser, is a director of IMMagine New Zealand Ltd, trading as IMMagine Australia and New Zealand, of Auckland.

[4] The complainant, a national of South Africa, purchased an engineering business in a provincial city. Immigration NZ granted him a Long Term Business Visa (LTBV) on 30 April 2013 and associated temporary visas were granted to his family. The amount he had invested was \$185,000. The Business Plan (BP) showed revenue in the third year of \$379,950, including \$235,950 for machining and reconditioning and \$144,000 for transmission repair. The latter was described as projected additional revenue. The BP does not state whether the figures given are GST inclusive or exclusive. It also showed the employment of two people part-time.

[5] The family moved to New Zealand in 2013. The complainant commenced trading in about July 2013.

First residence application

[6] On 14 April 2016, Mr MacLeod filed an entrepreneur residence application for the complainant, including his wife, son and daughter.

[7] Immigration NZ sent a letter to the complainant on 27 May 2016 identifying a number of issues and requesting more information. In particular, it was noted that the business had not met the forecast annual turnover for the first two years. The third year forecast was stated to be \$379,950. In his reply of 1 September 2016, Mr MacLeod said

to Immigration NZ that the vendor allowed the business to run down after it was purchased by the complainant. He had spent three years building it up and had created a job for an apprentice.

[8] Immigration NZ declined the residence visa on 29 September 2016. It was not satisfied the business was trading profitably, or had the potential to do so by meeting the annual turnover forecasts in the BP within 12 months. An appeal to the Immigration and Protection Tribunal arguing exceptional circumstances was declined on 13 July 2017.

[9] Following Immigration NZ's decline, Mr MacLeod exchanged emails with the visa officer in an endeavour to lower the third year forecast. On 26 October 2016, the officer said that the forecasted revenue in the BP could not be downgraded. Immigration NZ's instructions (policy) required the complainant to continue to work towards the approved BP. A manager telephoned Mr MacLeod on the same day to decline the reduction to \$180,000 he had sought and to confirm the complainant had to meet the third year figure (which Mr MacLeod wrongly recorded as \$235,000 in his email that day to the complainant).

[10] In an email to the officer on 27 October 2016, Mr MacLeod opined that the officer's interpretation of the rules was incorrect. Immigration NZ could agree to a minor change to the original BP. He sought to reduce the forecast from what he said was \$235,000 to \$180,000. It was explained that when the complainant arrived, he found the business to be very different to what he thought he was buying.

[11] On 8 December 2016 (at 5:01 pm), Mr MacLeod recorded in an email to Immigration NZ that it had declined to lower the third year forecast. He appears to have included in his email an extract from an Immigration NZ assessment stating that the third year forecast was \$379,950. On the same day (at 5:06 pm), Mr MacLeod sent an email to the complainant telling him he was required to meet the third year forecast in the original plan, which he said from memory was \$235,000.

[12] Mr MacLeod was more successful in renewing the family's visas. On 13 January 2017, Immigration NZ granted the complainant an entrepreneur work visa and relevant temporary visas for the family, valid until 1 May 2019.

[13] On 11 June 2018, the complainant signed IMMagine's service agreement.¹ The company would prepare a second residence application in the entrepreneur category and a visitor visa for one of the children. It was signed by Mr MacLeod on behalf of

¹ Any earlier service agreement has not been produced to the Tribunal.

IMMagine, though the agreement stated that work could be done by other named licensed advisers, including Mr Janssen.

Second residence application

[14] On 17 January 2019, Mr Janssen of IMMagine filed a second entrepreneur residence application on behalf of the complainant and his family. The accounts completed by accountants showed total income of \$260,883 (incl GST) or \$291,116 (additionally including work in progress not invoiced) in the year 1 October 2016 to 30 September 2017, and \$429,031 (incl GST) or \$493,281 (additionally including uninvoiced work) in the period from 1 October 2017 until 30 September 2018. The application stated:

Oct 16 – Sept 17	forecast (year 3)	\$235,950	actual	\$291,116
Oct 17 – Sept 18	forecast (year 3)	\$235,950 ²	actual	\$493,281

[15] The application further stated that there were two fulltime employees, one being a fulltime apprentice (presumably a New Zealander) and one a fulltime machinist seeking residence (understood to be South African).

[16] Immigration NZ sent a letter to Mr MacLeod on 30 September 2019 raising concerns about the second residence application.³ The business had to be trading profitably on the date the application was lodged or within 12 months. The visa officer set out the following revenue table:

Year	BP forecast	Actual
Y1 (FY 2014)	\$280,000	\$ 99,707
Y2 (FY 2015)	\$334,500	\$136,093
Y3 (FY 2016)	\$379,950	\$143,083
Y4 (FY 2017)	\$379,950	\$171,148
Y5 (FY 2018)	\$379,950	\$286,802
Y6 (FY 2019)	\$379,950	\$366,586 (to 31/3/2019)
Y6 (7 months)	\$221,637.45	\$213,841.88

[17] According to Immigration NZ, the BP showed two fulltime positions by the third year, yet there was only one recognisable employee (being a New Zealand citizen or resident). Comments and further information were sought.

² Understood by the Tribunal to mean Year 3 and above.

³ The Tribunal has received two identical copies of this letter, one dated 30 September 2019 and one dated 4 October 2019.

[18] Starting on 7 October 2019, there was a further exchange of emails between Mr MacLeod and the visa officer. In his first email of that date, Mr MacLeod stated that on declining the first residence application, Immigration NZ confirmed that the next residence application would be based on the initial third year forecast, said by Mr MacLeod to be “plus or minus \$235,000”. The officer was asked why it was considered that had not been met. The GST returns indicated that sales since the complainant had been granted a new work visa had exceeded the \$235,000 threshold.

[19] The officer replied on 8 October 2019 attaching the original BP, which he said gave the third year revenue forecast as \$379,950. The officer thought that Mr MacLeod had obtained the figure of about \$235,000 from that portion of revenue representing machining and reconditioning. As outlined in the officer’s letter, the business did not appear to meet the third year forecast even in the sixth year (calculated based on seven months of trading).

[20] Mr MacLeod sent an email to the complainant on 10 October 2019 at 3:04 pm. He noted that Immigration NZ had correctly advised the third year forecast in the BP was around \$379,000. According to Mr MacLeod, “we” were under the impression it was \$235,000. He had believed the figure was \$235,000. He had checked the BP and the forecast was definitely \$379,000 and the gross profit was \$235,000. He wondered if those two numbers had been confused. He had found three emails after 27 October 2016 and could not “for the life of [him]” work out where the \$235,000 came from. It had become stuck in the narrative and he concluded that the complainant had not checked or had forgotten what the forecast was. His first step was understanding why the complainant believed the sales forecast was \$235,000.

[21] The complainant appears to have replied to Mr MacLeod the same day (the format of many emails produced to the Tribunal is confusing). The complainant said the forecast figure in the BP was definitely \$235,950 (as per p13 of the BP, which the Tribunal notes is one of two references to that figure as the third year forecast for machining and reconditioning services). The complainant added that Mr MacLeod had told him that Immigration NZ was not interested in any new business venture or gearbox repair and was talking about the performance of the business purchased. At the time, Mr MacLeod was arguing for a turnover figure around \$185,000, but Immigration NZ would not budge from \$235,000. The complainant reiterated that he was required to maintain a figure of \$235,950 over two consecutive years prior to the application.

[22] Mr MacLeod replied to the complainant at 10:22 pm on the same day, 10 October 2019. He referred to the BP sales forecast of \$379,000. It was appreciated that in the complainant’s mind this had to be read in conjunction with assumptions, which

Immigration NZ had not. The complainant had in his mind separated the existing business from the possible new service of transmission repair. It was said to be clear that in the complainant's mind the "magic number" was \$235,950, despite this being at odds with the forecast clearly suggesting \$379,000.

[23] On 11 October 2019, Mr MacLeod sent an email to the officer seeking a copy of the complainant's file. He stated that the complainant was stunned as, Mr MacLeod contended, Immigration NZ had always worked to the \$235,000 figure. He genuinely believed that to be the third year forecast. Immigration NZ had added together two future revenue streams, one on growing the existing business and the other being "blue sky" thinking on other possible services that could be added (transmission repair). In his email of 27 October 2016 to the then visa officer, he requested a reduction in the third year target from \$235,000 to \$180,000. In declining the request, Immigration NZ did not query the \$235,000 figure, if \$379,000 was the starting number. There was a lot of correspondence in October to December 2016 with senior immigration managers who never questioned why he was talking about \$235,000.

[24] Mr MacLeod sent a string of emails to the visa officer on the evening of 14 October 2019. It is material to cite some only. At 7:23 pm, Mr MacLeod stated that on three occasions in late 2016, he had specifically referred to the complainant's understanding that \$235,000 was the figure which needed to be delivered. It was shocking news that Immigration NZ was working off a figure of \$379,000. The complainant had taken over a business in a parlous state, so the discussions in late 2016 had been about making a reasonable change to the forecasts. If the complainant had any idea he was to be held to \$379,000, he would have simply filed another application because it was unlikely he could increase the sales to that figure so quickly. The business was profitable and had been for a couple of years. It had a consistent upward trajectory in sales.

[25] Mr MacLeod sent another email to the visa officer at 8:50 pm. He said that on three occasions on or before 8 December 2016, he had made clear his understanding that the third year forecast was \$235,000. Immigration NZ did not dispute this. It might be called a misunderstanding or miscommunication. He asked whether Immigration NZ believed the business had the potential to be profitable in the 12 months following the filing of the residence application. At 10:28 pm in another email, Mr MacLeod referred to a possibly mistaken belief of one party that it was not intended to lump together two potential revenue streams and stated that it would be remiss of the other party not to ask why they kept talking about \$235,000 when it was working on the number of \$379,000.

[26] On 15 October 2019, the officer clarified that he was looking at the potential for profitable trading within 12 months of lodgement. He advised on 4 November 2019 that the financial evidence allowed Immigration NZ to consider this. Mr MacLeod then worked with the complainant, who in turn worked with his accountant, to present additional financial reports (special purpose financial statements) showing profitability within 12 months.

[27] On 8 November 2019, the officer confirmed he was still looking at the figure of \$379,000.

[28] Also on 8 November 2019, the complainant employed a second New Zealander.

[29] On 19 November 2019, the officer advised Mr MacLeod that the commercial norm was that financial statements and forecasts were exclusive of GST. He would look back at the BP and other material to determine whether to discount 15 per cent. Later on the same day, the officer said the financial information was in the correct format, but it was GST inclusive which might be an issue as the assessment proceeded. The officer confirmed on 26 November that Immigration NZ proceeded on a GST exclusive basis as per the norm unless the BP said otherwise.

[30] On 28 November 2019, Mr MacLeod sent to Immigration NZ:

- (1) Revised *pro forma* financial statements for the year ending 31 October 2019 (starting January 2019).
- (2) A letter from the accountant explaining that uninvoiced work in progress had been included.

[31] According to Mr MacLeod's email to the officer, the GST exclusive sales were over the threshold of \$379,000. As for the recent employment of a second New Zealander, Immigration NZ already had the evidence.

Residence granted

[32] On 22 January 2020, the family were granted residence visas.

Fees

[33] IMMagine issued the following invoices to the complainant (at \$400 per hour, incl GST):

8/10/2019	\$ 9,430
17/12/2019	\$11,845
24/1/2020	\$ 1,265
	\$22,540

[34] The complainant declined to pay. There was an exchange of emails between the complainant and Mr MacLeod. The debt was referred to a debt collection agency and later IMImagine filed a claim in the Disputes Tribunal. It is understood that the Disputes Tribunal has deferred the claim, pending the result of this professional complaint against Mr MacLeod.

COMPLAINT

[35] On 8 September 2020, the complainant made a lengthy complaint against Mr MacLeod to the Authority. He stated that the background to the complaint was a case in the Disputes Tribunal where Mr MacLeod was seeking payment of his fees. The complainant alleged breaches of numerous provisions of the Code.

[36] To the extent material, the complainant alleged that Mr MacLeod had contended there was written advice from Immigration NZ allowing deviation from the original forecast, which the government agency failed to honour. Yet it was clear to the complainant that Immigration NZ had informed Mr MacLeod the third year forecast would apply. Mr MacLeod was trying to manufacture written advice from emails and telephone discussions, but such written advice was nowhere to be found on the complainant's Immigration NZ file. The complainant said he pointed out to Mr MacLeod that the sales turnover in the BP showed two income streams, being \$235,000 for the core engineering business purchased and \$144,000 for the implementation of transmission repairs as a new addition. Mr MacLeod was trying to shift the blame for his own failings onto Immigration NZ.

[37] In the complainant's mind, Mr MacLeod had advised that it was not a requirement to implement the transmission repair business, so it would make no sense to include its sales turnover. He was further advised by Mr MacLeod that it would not be necessary to file a new BP with the second application.

[38] According to the complainant, Mr MacLeod shockingly failed to consult and diligently check the BP and verify the actual figures with Immigration NZ. He admitted on 10 October 2019 that he had not read the BP for almost six years. Had he read the BP and sought clarification from Immigration NZ on this crucial issue, the mistake could have been avoided. Instead, he advised he had reached an agreement or understanding

with Immigration NZ and quoted the figure of \$235,000 as a goal. Incredibly, Mr MacLeod was of the opinion that the complainant or Immigration NZ knew all along that the correct sales figure was \$379,000 and failed to inform him that \$235,000 was incorrect.

[39] In the complainant's view, Mr MacLeod was negligent and did not check the facts. He failed in his duty to read and interpret the BP, alongside Immigration NZ's immigration instructions.

[40] As for the fees, Mr MacLeod had expressed the view that the application would be straightforward. He offered to do it for half his normal set fee of \$9,500. Mr MacLeod also recommended a time and attendance agreement, as a saving. It was not possible to determine how Mr MacLeod had constructed the invoices. He was responsible for Immigration NZ's letter of 4 October 2019 and the subsequent efforts to remedy the concerns raised. It was unfair that a client should be charged for time spent rectifying mistakes or finding crucial evidence readily at hand.

[41] The Authority advised Mr MacLeod of the particulars of the complaint on 8 September 2021 and sought his explanation.

Explanation from Mr MacLeod

[42] Counsel, Mr Laurent, replied to the Authority with Mr MacLeod's explanation on 14 October 2021. The specific arguments made will be set out when assessed later. It is noted that Mr MacLeod admitted failing to estimate the time required in his advice to the complainant about fees at the outset of the residence application engagement. The heads of complaint were otherwise denied.

Complaint filed in the Tribunal

[43] The Registrar filed a statement of complaint (16 March 2022) in the Tribunal alleging against Mr MacLeod:

Negligence or alternatively breaches of identified provisions of the Code –

- (1) Failing to take due care in ensuring sufficient knowledge of the complainant's BP and thereby not being aware the third year revenue forecast was \$379,950 and there should be two New Zealand employees, in breach of cl 1.

- (2) Failing to take due care in filing the complainant's financials in November 2019 without properly reviewing the documents, in breach of cl 1.
- (3) Failing to provide an estimate of time in the written agreement, in breach of cl 19(f).
- (4) Failing to ensure the fees charged were fair and reasonable, in breach of cl 20(a).
- (5) Failing to work in a manner that did not unnecessarily increase fees, in breach of cl 20(b).

Dishonest or misleading behaviour –

- (6) Blaming the complainant and Immigration NZ for the wrong third year forecast when it was Mr MacLeod's responsibility to review the BP and provide the complainant with accurate and professional advice, thereby failing to be professional, honest and respectful in his services.
- (7) Advising the complainant that he had written advice from Immigration NZ stating that the \$235,000 revenue forecast was the target when there was no such document, thereby failing to be honest.
- (8) Advising the complainant Immigration NZ had never referred to the correct third year forecast of \$379,950 when Immigration NZ had done so, thereby being incorrect and misleading.

Alternatively to dishonest or misleading behaviour, breaches of cl 1 of the Code –

- (9) Blaming the complainant and Immigration NZ for his wrong advice that the third year forecast was \$235,000 instead of \$379,950, thereby failing to be professional and respectful.
- (10) Claiming that Immigration NZ had given him written advice that the third year forecast was \$235,000 when there was no evidence Immigration NZ had done so, thereby failing to exercise diligence and due care.
- (11) Claiming that Immigration NZ had never mentioned the third year forecast was \$379,950 when there was evidence it had done so, thereby failing to exercise diligence and due care.

JURISDICTION AND PROCEDURE

[44] 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.

[45] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.⁴

[46] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.⁵ It has been established to deal relatively summarily with complaints referred to it.⁶

[47] 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.⁷

[48] The sanctions that may be imposed by the Tribunal are set out in the Act.⁸ The focus of professional disciplinary proceedings is not punishment but the protection of the public.⁹

[49] 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.¹⁰

⁴ Immigration Advisers Licensing Act 2007, s 45(2) & (3).

⁵ Section 49(3) & (4).

⁶ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁷ Section 50.

⁸ Section 51(1).

⁹ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

¹⁰ *Z v Dental Complaints Assessment Committee*, above n 9, at [97], [101]–[102] & [112].

From the Registrar

[50] The Tribunal has received from the Registrar the statement of complaint (16 March 2022), with supporting bundle of documents.

From the complainant

[51] There is a statement of reply (27 April 2022) from the complainant. He says that a precondition for filing the second application for residence was for Mr MacLeod to successfully negotiate a variation of the BP so as to commit only to the sales figure for the original motor machining business (\$235,950), without revenue from any other business. This was because of the death of the only person able to drive sales, leaving the complainant responsible for the entire production and training the apprentice. At the time of purchase, the annual sales were only \$135,000. Mr MacLeod was also told that if the figure of \$235,950 could not be successfully negotiated, the complainant would not file the further application and would leave New Zealand.

[52] The complainant says that prior to Immigration NZ's letter of concern, Mr MacLeod was so confident he offered to do the residence application for about half the normal fee. It remains the complainant's conviction that all the work following the letter was totally due to Mr MacLeod's own doing.

[53] According to the complainant, a worrying aspect of Mr MacLeod's earlier response to the Authority is that he never accepted responsibility for what transpired. He blamed either Immigration NZ or the complainant. He excludes his own failure to read and understand the BP.

[54] The consequences had been far reaching and destructive. The business had to adopt aggressive strategies to meet sales turnover, including discounting work to obtain sales. The complainant had to take on a second person to boost sales, but this turned into a nightmare in terms of an unproductive severance salary. On a personal level, it strained personal relationships in the family, given his 18-hour days and working weekends. Mr MacLeod's unprofessional conduct impacted on the whole family.

From Mr MacLeod

[55] There is a statement of reply (27 April 2022) from Mr MacLeod.

[56] In his memorandum (27 April 2022), Mr Laurent refers to Mr MacLeod's affirmation as to the source of the BP issues. In late 2016, Mr MacLeod and Immigration NZ were talking about the third year forecast of \$235,950, when it later transpired this

was not the case. He believed he had the agreement of the government agency when it later transpired that he did not.

[57] Mr MacLeod is prepared to accept a finding that not all the fees billed for the time spent reviewing file records after Immigration NZ's letters in September and October 2019 were appropriate, given that some stemmed from miscommunication with Immigration NZ in 2016. The additional time does not, however, reflect a lack of care in trying to secure the complainant's best interests. He sought to understand why Immigration NZ referred to a sales projection of \$379,950 and to communicate this to the complainant. Around the time of 10 October 2019, the complainant was firmly of the view that the figure of \$235,950 from the BP was meant to have applied.

[58] Immigration NZ's insistence upon the complainant creating a second job, in line with the BP, was not supportable by the relevant immigration instructions. Mr MacLeod was put to additional time by Immigration NZ's misinterpretation of its own rules. In the end, Mr MacLeod was able to secure residence by exploring ways by which a second job could be created. There is no case to answer on the issue of the second job.

[59] According to counsel, it is contended by the Registrar that Mr MacLeod dishonestly claimed to have written advice from Immigration NZ that it was working towards a third year forecast of \$235,950. Mr MacLeod thought Immigration NZ was referring to the sales figure for the original business and not the \$379,950 in the original BP. They never corrected or commented on his repeated references to \$235,950 and he took this to be agreement that \$235,950 was the right figure. This may be seen to be a strained conclusion from the evidence before Mr MacLeod, but that does not make it dishonest. That was his genuinely held belief.

[60] In support, there is an affirmation (26 April 2022) from Mr MacLeod. He honestly believed that he had obtained agreement with Immigration NZ that the third year forecast to meet was \$235,950. The complainant had argued this figure should be adopted, providing an extensive explanation which Mr MacLeod gave Immigration NZ. His subsequent correspondence led him to believe the government agency understood this as it was the figure he referred to several times and the agency did not disabuse him. In hindsight, he failed to press them to quantify what number the agency had in mind.

[61] Mr MacLeod says he was clear as to what the original BP said, but was not clear until receiving Immigration NZ's letter of 30 September 2019 that it was still expecting the complainant to meet \$379,950. That letter shocked him.

[62] In order to get to grips with this and explain it to the complainant, he spent a number of hours reviewing the BP and the documents accessible while overseas. If the Tribunal is of the view this was not entirely justified, he accepts that some of the fee might not be due. However, some of this time was spent trying to understand why Immigration NZ was insisting on creating a second job. It misapplied the residence instructions. When he perceived Immigration NZ might decline the application on this ground, he took steps to find a way in which the complainant could meet this requirement. This required significant additional time. It was not brought about by his own failure to understand the BP or the residence instructions.

[63] As for his claim to have had written advice from Immigration NZ that it was working with \$235,950, Mr MacLeod received an email from Immigration NZ on 27 October 2016 stating that he needed to achieve the “3rd year’s forecasts”.¹¹ He assumed this to be \$235,000 (which he had been trying to reduce to \$180,000). He honestly believed he was justified in saying he had it in writing from Immigration NZ.

[64] Mr MacLeod notes the allegation that he dishonestly claimed Immigration NZ had never referred to \$379,950 until it wrote on 30 September 2019, based on the reference to that figure in Immigration NZ’s letter of 27 May 2016. This is something he overlooked when writing to Immigration NZ and the complainant three and a half years later.

[65] At the Tribunal’s request, Mr Laurent sent further documents on 24 January 2023.

ASSESSMENT

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

General

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

Written agreements

...

19. A licensed immigration adviser must ensure that a written agreement contains:

...

¹¹ Despite the Tribunal requesting this mail from counsel on 24 January 2023, it was not produced. Mr MacLeod may be confusing it with the visa officer’s email of 26 October 2016 which requires him to achieve the third year forecast though does not give any figure.

- f. where fees are to be charged, the fees for the services to be provided by the adviser, including either the hourly rate and the estimate of the time it will take to perform the services, or the fixed fee for the services, and any New Zealand Goods and Services Tax (GST) or overseas tax or levy to be charged

...

Fees

20. A licensed immigration adviser must:

- a. ensure that any fees charged are fair and reasonable in the circumstances
- b. work in a manner that does not unnecessarily increase fees, and

...

Negligence or alternatively breaches of identified provisions of the Code –

- (1) *Failing to take due care in ensuring sufficient knowledge of the complainant's BP and thereby not being aware the third year revenue forecast was \$379,950 and there should be two New Zealand employees, in breach of cl 1*

Dishonest or misleading behaviour –

- (6) *Blaming the complainant and Immigration NZ for the wrong third year forecast when it was Mr MacLeod's responsibility to review the BP and provide the complainant with accurate and professional advice, thereby failing to be professional, honest and respectful in his services*
- (7) *Advising the complainant that he had written advice from Immigration NZ stating that the \$235,000 revenue forecast was the target when there was no such document, thereby failing to be honest*
- (8) *Advising the complainant Immigration NZ had never referred to the correct third year forecast of \$379,950 when Immigration NZ had done so, thereby being incorrect and misleading*

Alternatively to dishonest or misleading behaviour, breaches of cl 1 of the Code –

- (9) *Blaming the complainant and Immigration NZ for his wrong advice that the third year forecast was \$235,000 instead of \$379,950, thereby failing to be professional and respectful*

(10) *Claiming that Immigration NZ had given him written advice that the third year forecast was \$235,000 when there was no evidence Immigration NZ had done so, thereby failing to exercise diligence and due care*

(11) *Claiming that Immigration NZ had never mentioned the third year forecast was \$379,950 when there was evidence it had done so, thereby failing to exercise diligence and due care*

[67] These heads of complaint are various iterations of an allegation that Mr MacLeod did not understand the third year forecast in the approved BP (\$379,950), which led him to state to the complainant that Immigration NZ had agreed to lower the forecast to \$235,950 and to blame the complainant and Immigration NZ for his own wrong assumption that all parties (the complainant, Mr MacLeod and Immigration NZ) were agreed on \$235,950.

[68] The Tribunal will say at the outset of this assessment that it is self-evident that Mr MacLeod made a significant blunder in misinterpreting the BP, or more likely simply not consulting it, as regards the third year forecast. The complainant's assertion that Mr MacLeod wrongly assumed it was \$235,950 and sought to blame everyone but himself, is accepted. What is not accepted by the Tribunal is that Mr MacLeod has been dishonest. His unfounded yet sincere belief in what he regarded as the correct and agreed forecast is obvious from the communications at the time. It is as obvious as his lack of care in making that assumption. Once he realised the assumption was erroneous (apparently after the officer's email of 8 October 2019), Mr MacLeod stubbornly refused to concede any fault on his part. It was the complainant and Immigration NZ who were to blame, according to Mr MacLeod.

[69] Starting with the BP, it clearly sets out (at pp 4 and 16) that the third year revenue forecast is \$379,950, made up as follows:

Machining and Reconditioning	\$235,950
Transmission Repair	\$144,000
	<u>\$379,950</u>

[70] The BP also stated that the machining and reconditioning was existing business and the transmission repair was new business.

[71] The visa officer pointed out the breakdown to Mr MacLeod on 8 October 2019. While recognising the correct forecast of \$379,000 in his email two days later to the complainant, Mr MacLeod extraordinarily claimed \$235,000 was the "third year gross

profit". It was not. The gross "Margin" in the BP was \$225,368 (there is no item described as gross profit). The "Net Profit" before tax was stated as \$96,353.

[72] Mr MacLeod could not "for the life of [him]" work out where the \$235,000 came from.¹² It is difficult to fathom why he could not work it out, since the answer is so patently clear on reading the BP.

[73] In his email to the complainant of 10 October 2019, Mr MacLeod states that his first step was to understand why the complainant believed the sales forecast target was \$235,000. The Tribunal will assess his fees later, but it is clear the complainant should not have to pay for Mr MacLeod to work out what is so obvious from the BP.

[74] It is also surprising that Mr MacLeod blamed the complainant in both of his emails to him of 10 October 2019.¹³ He accused him of not checking or of forgetting the forecast and thereby failing to disabuse Mr MacLeod in their communications.

[75] It is understandable that the complainant thought Mr MacLeod was pursuing renewal of the visas and residence on the basis he had successfully negotiated the forecast down to \$235,950 with Immigration NZ (the complainant believing Mr MacLeod's advice that Immigration NZ did not require implementation of the proposed transmission business). This was all the complainant could commit to, since he could not afford to recruit for the proposed business. Mr MacLeod was the person who should have known that Immigration NZ had never agreed to lower the figure. The complainant would not know Immigration NZ had refused to lower the figure to \$235,950 (though he was aware Immigration NZ had refused to lower it to \$180,000).

[76] Mr MacLeod consistently provided advice to the complainant that the third year forecast was \$235,950.¹⁴ It was not until about 10 October 2019 that Mr MacLeod realised he was mistaken and the forecast in the BP was \$379,950, at which point he blamed the complainant and Immigration NZ for failing to disabuse him of the \$235,950 figure.¹⁵

[77] Mr MacLeod admits not checking the BP in file notes on 8 and 10 October 2019.¹⁶

¹² Email Mr MacLeod to the complainant of 10 October 2019 at 3:04 pm.

¹³ See also Mr MacLeod's file notes of 8 and 10 October 2019, and his emails to the complainant of 11 October, 20 December 2019, 31 January and 2 March 2020.

¹⁴ See his emails to the complainant of 26 October, 3 November, 8 December 2016, his telephone note of 3 October 2017, emails to the complainant of 10 April and 24 October 2018.

¹⁵ Mr MacLeod blames Immigration NZ in his emails to the officer on 11 and 14 October 2019, his file note of 16 December 2019 and his email to the complainant of 20 December 2019.

¹⁶ File notes created by Mr MacLeod (8 and 10 October 2019) at 230 and 243 respectively of the Registrar's bundle.

[78] Having dismissed the dishonest or misleading behaviour heads of complaint ((6), (7) and (8)), the Tribunal will now turn to the various breaches of cl 1 of the Code alleged.

[79] As for the first head of complaint, it is found that Mr MacLeod failed to take care in ensuring he had sufficient knowledge of the third year forecast of \$379,950 in the BP, in breach of cl 1.

[80] It is not necessary to review whether he also lacked care in relation to the number of employees (New Zealand citizen or resident) the complainant had to employ. The position under the instructions is not clear to the Tribunal. Any lack of care as to this aspect of the approved BP adds little to his significant failure concerning the revenue forecast.

[81] Since the Tribunal has addressed the alternative allegation of a breach of cl 1 in the first head of complaint, there is no need to consider whether such conduct amounts to negligence.

[82] In respect of the ninth head of complaint, Mr MacLeod was not professional or respectful in blaming the complainant and Immigration NZ for his wrong advice to the complainant that the agreed forecast was \$235,950, not \$379,950. This was a breach of cl 1.

[83] In respect of the 10th head of complaint, it is alleged by the Registrar that Mr MacLeod informed the complainant he had written advice from Immigration NZ that the third year forecast was \$235,950 when there was no evidence it had done so.

[84] In his email of 5 October 2019 to the complainant, Mr MacLeod said:

We have it in writing that from the first application the forecast for the second application was to be based on **year three** of the original plan and therefore \$235,000 more or less.

[85] Mr MacLeod believed Immigration NZ had accepted that the third year forecast was \$235,000, not \$379,000, but he was wrong. It was never agreed by the government agency. His assertion to the complainant of written confirmation was not dishonest, but lacked diligence and due care. This was a breach of cl 1.

[86] In respect of the 11th head of complaint, Mr MacLeod advised the complainant in two emails on 11 October 2019 that Immigration NZ never stated they were working off the figure of \$379,950, yet on 27 May 2016 the officer wrote to the complainant (care of Mr MacLeod) citing the figure of \$379,950. Mr MacLeod acknowledges he overlooked

that reference to the figure.¹⁷ Mr MacLeod failed to exercise diligence and due care, in breach of cl 1.

Negligence or alternatively breaches of identified provisions of the Code –

(2) *Failing to take due care in filing the complainant's financials in November 2019 without properly reviewing the documents, in breach of cl 1*

[87] As for the second head of complaint, it is alleged Mr MacLeod breached cl 1 in failing to properly review the revamped financial forecasts filed in November 2019. The Registrar says that had he done so, he would have noted the revenue figure exceeded \$379,950 only because it was GST inclusive and the company was not therefore potentially profitable (in terms of the forecast in the BP).

[88] The November 2019 financial statements are expressly GST inclusive. However, the BP says nothing about GST. Whether it is the industry norm to include GST and this should have been assumed in relation to the BP, is not known. The Tribunal does not therefore know whether the forecast of \$379,950 is GST exclusive or inclusive. It declines to assess this second head of complaint and accordingly it is dismissed. In any event, any failure by Mr MacLeod to understand whether the BP and/or the November 2019 statements included GST adds little to his more significant and obvious failure concerning the revenue forecast.

(3) *Failing to provide an estimate of time in the written agreement, in breach of cl 19(f)*

(4) *Failing to ensure the fees charged were fair and reasonable, in breach of cl 20(a)*

(5) *Failing to work in a manner that did not unnecessarily increase fees, in breach of cl 20(b)*

[89] Mr Laurent, on behalf of Mr MacLeod, admits the latter did not provide an estimate of time (though he did provide his hourly rate).¹⁸ This was not a fixed fee instruction. He explains that he did not provide such an estimate because he rarely charged on an hourly basis, normally charging a fixed fee. This is a breach of cl 19(f).

[90] While not expressly admitting that his fees were not fair and reasonable or that he worked in a manner which did not necessarily increase fees, Mr MacLeod

¹⁷ Affirmation Mr MacLeod (26 April 2022) at [18]–[19].

¹⁸ Mr Laurent memorandum (14 October 2021) at item 4.

acknowledges that not all his fees for the time spent reviewing the file records after Immigration NZ's letter of 30 September 2019 may be entirely justified.¹⁹

[91] Mr MacLeod should not have needed to spend any time trying to understand why the complainant believed the sales forecast was \$235,950 (as he says in his email of 10 October 2019). His time "getting up to speed" resolving the revenue discrepancy cannot be justified.²⁰ This is a breach of cl 20(a) and (b). While both heads of complaint are upheld, they are really just two ways of saying the fee was not reasonable since Mr MacLeod did not deliberately run up excessive fees.

OUTCOME

[92] The Tribunal upholds heads of complaint (1), (3), (4), (5), (9), (10) and (11). Mr MacLeod has breached cls 1, 19(f), 20(a) and (b) of the Code. Heads of complaint (2), (6), (7) and (8) are dismissed.

SUBMISSIONS ON SANCTIONS

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

[94] A timetable is set out below. Any request that Mr MacLeod undertake training should specify the precise course suggested. Any request for the payment of costs or expenses or for compensation must be accompanied by a schedule particularising the amounts and basis of the claim.

[95] It is understood that the complainant has not paid any part of the professional fees, so a refund of such fees could not be directed. The parties are invited to address the Tribunal on whether it should indicate what would be a reasonable fee and, if so, how much.

Timetable

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

- (1) The Registrar, the complainant and Mr MacLeod are to make submissions by **1 March 2023**.

¹⁹ Affirmation of Mr MacLeod (26 April 2022) at [8].

²⁰ At n 19.

- (2) The Registrar, the complainant and Mr MacLeod may reply to submissions of any other party by **15 March 2023**.

ORDER FOR SUPPRESSION

[97] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.²¹

[98] There is no public interest in knowing the name of Mr MacLeod's client.

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

D J Plunkett
Chair

²¹ Immigration Advisers Licensing Act 2007, s 50A.