

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2018] NZIACDT 44

Reference No: IACDT 001/18

BETWEEN **MARCELLE FOLEY of
Immigration New Zealand
Complainant**

AND **BENJAMIN NEIL
STEWART DE'ATH
Adviser**

DECISION
Date: 6 November 2018

REPRESENTATION:

Registrar: In person

Complainant: In person

Adviser: P Moses, counsel

PRELIMINARY

[1] Marcelle Foley, an Immigration New Zealand manager, is the complainant due to Mr De'Ath's conduct and language in his dealings and communications with staff there. It is alleged that he has lodged with Immigration New Zealand malicious and unprofessional complaints, inappropriately utilising Immigration New Zealand's complaint procedures for personal attacks on staff.

[2] In referring this complaint against Mr De'Ath to the Tribunal, the Registrar of the Immigration Advisers Authority (Authority) contends that Mr De'Ath has breached the Code of Conduct 2014 (the Code), by making allegations of serious misconduct against the staff of Immigration New Zealand without providing evidence and expressing unprofessional criticisms of them. Furthermore, his advice to one client was dishonest and misleading.

[3] Mr De'Ath acknowledges using intemperate and unnecessarily abrasive language. He has provided a written apology to one manager involved. He denies dishonesty or any lack of probity on his part. The essential issue remaining to consider is whether Mr De'Ath's advice in one communication reaches the serious threshold of dishonest or misleading behaviour.

BACKGROUND

[4] Mr Benjamin Neil Stewart De'Ath is a licensed immigration adviser.

Complaints against staff

[5] According to the statement of complaint lodged with the Tribunal by the Registrar, Mr De'Ath may have been unprofessional or disrespectful in certain communications relating to complaints against staff of Immigration New Zealand. The communications and their extracts set out below are those relied on by the Registrar.

[6] Mr De'Ath appears to have made numerous complaints against multiple immigration officers and managers in different offices concerning different clients. The Registrar's statement of complaint does not connect Mr De'Ath's various communications relied on to specific complaints by him, but they appear to largely relate to one matter involving one client, which spawned formal complaints against two staff members.

[7] In an email to Ms Price of Immigration New Zealand dated 16 September 2016, Mr De'Ath stated (*verbatim*):

The OIA request for [Ms X's] JD has come in, needless to say notions of purpose, deliverable or accountability has not been adhered to for the period [Ms X] was receiving public funds to perform this role – as far as the entire sample size, covering three incidents which I dealt with her on when she was in the TA role.

This JD has ironically arrived the day that [Ms S's] shortcomings have come to a head, and I have been compelled to start dealing with [Ms S's] incompetence (at a much higher level), for which a very pragmatic answer would be how on earth can the private sector expect role performance from the likes of [Ms X], if the likes of [Ms S], are performing so poorly.

I want to be fair in this, and not let my disappointment with one person within INZ effect how I deal with others but the overall INZ conduct of multiple staff members, as multiple under performers place others in a very bad light.

...I acknowledge this will be something you don't enjoy doing amidst your already busy workload which my complaints are now making even busier, however I for see a meeting with you to discuss what level of reprimand you are willing to give [Ms X] for the blatant non adherence to her contracted role, for this you would of course need to seek [Ms X's] permission to do this, and discuss such subject matter, in light of privacy law. I am more than willing for [Ms X] to attend the same meeting.

I see such an offer as a fair middle of the road.

My position is that there must be accountability, not lip service, not assurances of internal discussions and reviews.

Accountability which can be verified to the external parties subjected to disruption as a result of the misconduct.

I am happy to seek approval from my board to take this the judicial route, as I have done with MSD professional misconduct, if we cannot have faith that internal reprimand and subsequent learning can occur from the events, which as I allude to above, the only way I forsee that taking place is for the proposed reprimand / internal consequences to be shared with me.

[8] The perceived wrongdoing which gave rise to Mr De'Ath's dissatisfaction with Ms X and Ms S is not known.

[9] The complaint raised in the Tribunal is mainly about a dispute which arose between Mr De'Ath and Ms L, a Christchurch based immigration officer. It concerned what had been said to Ms L by a former employer of Mr De'Ath's client during a verification phone call. The call was to confirm the experience and competence of the client. It was asserted by Ms L that the employer had stated that the client did not know a lot. Mr De'Ath contended that this was refuted by the employer who had said that he knew the basics.

[10] On 20 March 2017, Mr De’Ath sent to Immigration New Zealand a formal complaint against Ms L, titled “Stage 1 CCRP – s 342 of the Immigration Act 2009”, concerning this client. The CCRP is Immigration New Zealand’s Client Complaint Resolution Process, now known as the Complaints and Feedback Process. The complaint alleged Ms L committed a criminal offence under s 342 of the Immigration Act 2009 in providing false or misleading information. The particulars of the complaint are set out at length in the document.

[11] Mr De’Ath stated in his complaint that the former employer felt so strongly about his comment being misinterpreted that he had written to Ms L to clarify what he had said. However, despite his efforts, she had chosen (*verbatim*) “to presumptively and irrationally attack the character of the applicant, and [the former employer] discrediting the subsequent written communication from [the former employer].”

[12] According to Mr De’Ath’s complaint (*verbatim*):

It defies logic to accept a phone call statement and then refute a signed letter from the same source, and to this end, it is submitted the recipient of the email, when choosing to refute the email and the clarifying interpretation which she had so erroneously misinterpreted, did in fact, engage in providing false information on the assessment, and by virtue of this, provided this false information to Immigration NZ.

...

Such a breach by the Immigration officer sits well outside conventional basis for a CCRP and the breaching of Immigration Instructions in an assessment.

The asserted wrongdoing in this instance exposes the Immigration officer to potential prosecution under penalties which are conveyed under The Immigration Act 2009, if this information were to be upheld in judicial proceedings.

[13] It is understood by the Tribunal that Ms M, a manager in Immigration New Zealand, handled the formal complaint against Ms L.

[14] Mr De’Ath sent an email to Mr R, an Immigration New Zealand manager, on 10 April 2017 (*verbatim*):

Good Morning [Mr R],

You might recall me from Friday’s seminar, [Ms M] escorted you over to introduce us.

I found this a peculiar action by [Ms M], on the back of very damaging and disappointing conduct by INZ Hamilton staff.

At this moment, I have been compelled to file an OIA request for [Ms M’s] role description, for which she is a recipient of public funds given [Ms M’s] inability to address one tangent of a 2 tangent CCRP, and [Ms M’s] brushing over with no substantive response in the first point of the CCRP.

...

My placing resources into reprimanding three staff from the same branch was not a decision I made lightly, both from a time and resource point of view, and a relationship and vantage point.

I disclosed our need to do this Associate Minister of Immigration, David Bennett, as I am rather pessimistic at this point, that if a branch manager such as [Ms M] cannot comprehend a CCRP these grievances might have to be taken some distance either via the judicial framework, or the The Ombudsman / The Minister of Immigration.

This decision to file these complaints and address the shortcoming with a comprehensive and un-relenting approach, comes on the back of several other instances of disappointing conduct, and a visible decline in professionalism from our local branch, thus arriving at this juncture was not an overnight event, nor a decision I took lightly.

...

In one respect I could simply request to have another branch – such as the advisers branch at Henderson assess our applications, given it would appear the misconduct of INZ Hamilton staff will take sometime to resolve, and the inability / unwillingness of a senior staff member such as [Ms M] to even address the grievance, however upon consideration that would not fix the issue, if anything it would simply allow the unbecoming conduct of INZ Hamilton staff – in future cases, should it occur, not to be scrutinized be further.

...

[Ms M] and her staff conduct has left a huge amount to be desired to this juncture, and it is evident [Ms M] brought you over to meet me on Friday in some crude attempt at self preservation.

In light of this disappointing state of affairs, I invite you, in your role as Relationship Manager, to suggest actions which can be undertaken to redress some of the damage done to the relationship between CCR and INZ Hamilton, due to the professional misconduct conduct of INZ Hamilton staff.

[15] In an email dated 27 April 2017 to Mr R among others, Mr De’Ath stated (*verbatim*):

I am the owner of a small private sector company, working in the Immigration space in 2017, I am absolutely run off my feet with clients trying to engage me, I do not sleep enough, I do not see my wife and children enough.

If you staff were “professionals” I would not be, becoming increasingly bellicose and taking time away from my family, my sleep and or paying clients, to seek accountability given the absence of professionalism of your staff.

The time I have having to put into this proverbial, is literally worth thousands of dollars.

Nevertheless in the interests of Immigration system Integrity I will continue down this road, as Christine is aware on a file she is handling, the next stop is the ombudsman, and it is increasingly likely I will file a private prosecution for mis-use of public funds against INZ staff involved in the [names deleted] mess.

At this juncture, I am raising concerns as follows.

1 – [Mr R] has clearly provided a very naïve and misguided reply that all INZ staff are professionals, the fact any matter within this line of communication ever had to be opened is self evident of an absence of professionalism...

I have an outstanding OIA request for [Ms M's] job description, relating to [Ms M's] inability to comprehend a stage 1 CCRP and a failure to address 50% of the subject matter in a one page reply, which I am told [Ms M] herself did not write, by someone not willing to go on record with that comment.

When branch managers lack such professional integrity, it is not surprising that actions as cited above occur.

However, I will not let this rest.

2 – I cite a below comment from an email thread which another INZ Hamilton staff member articulated my policy advocacy seeking a position statement on VOC policy for positions removed from the ISSL, which effected hundreds of my clients, as forcibly exiting saliva from my mouth.

...

3 – Pulling this together, we have three incidents stemming from INZ Hamilton which would appear to evidence prejudice towards me and my company.

Does anyone copied in on this email have any other interpretation?

Please save crude attempts at self preservation in any response, I am starting to loose my patience with this.

[16] In a formal letter of complaint to Ms McGaughey, an Immigration New Zealand area manager, dated 3 May 2017, Mr De'Ath alleged that Ms M had engaged in "serious misconduct and procedural impropriety". He sought an independent investigation. This appears to the Tribunal to relate to Ms M's review of the complaint against Ms L.

[17] Mr De'Ath had earlier obtained a copy of Ms M's role description and in the letter of 3 May he set out specific aspects of the "contracted role description which may not have been adhered to". According to Mr De'Ath, Ms M had failed to address an entire section of the complaint and did not substantively address the other 50 percent of the complaint.

[18] In the letter of complaint of 3 May, Mr De'Ath continued:

...[Ms M's] failure to adhere to the role description (**attached**) in the contracted role of a civil servant, created a situation where due process was not followed, which resulted in an immigration application for a man previously working on the client's dairy farm, who has now left New Zealand not receiving due consideration.

...

My client's position is that grounds for prosecution exist on the basis of serious misconduct by a civil servant, and or procedural impropriety.

...non-adherence to any *one* facet of the contracted role description for which the civil servant has accepted public funds in exchange for performing would be serious, in this instance with so many apparent breaches, the underlying issues are exceedingly concerning, as if this is occurring in one case, it is likely to be occurring in other cases until the civil servant receives retraining, and can evidence an apt standard of professional conduct.

...if there is any shred of evidence that the civil servant is not capable of substantive legal analysis, and or not conducting her own analysis on the Immigration Instructions she is paid to administer, this will have serious repercussions.

...In the overwhelming likelihood that some or all of these accusations are found out to be true – as would appear to be illustrated in the pitiable attempt at a CCRP response which was delivered to me, this information will be added to the case as it moves forward.

[19] On 19 May 2017, Mr De'Ath received a response from Ms McGaughey to his complaint of 3 May about Ms M. She advised him that the process followed and outcomes had been reviewed with the result that Immigration New Zealand was satisfied the process followed was appropriate and the outcome reasonable. The matters he had raised did not warrant an independent investigation.

Dishonest or misleading advice

[20] The allegation against Mr De'Ath that he engaged in dishonest or misleading behaviour relates to one email sent to a client.

[21] On 20 June 2017, an officer of Immigration New Zealand sent an email to the Authority stating that an Argentine national had travelled to New Zealand that day under the visa waiver program to undertake employment. The person had a job prearranged, so according to the officer, he should have obtained a work visa prior to travel and should not have been travelling under the visa waiver program.

[22] The officer stated that the Argentinian had provided to Immigration New Zealand an email from Mr De'Ath which the officer stated contained incorrect advice that he should travel under the visa waiver program and apply for a work visa once in New Zealand. This information was being provided to the Authority so it could take whatever action it deemed necessary.

[23] The officer's email to the Authority recorded that Mr De'Ath's email to his client was as follows (date unknown, *verbatim*):

Given the delays with immigration branches outside nz, I advise you enter nz as visitor's and given you are from a visa waiver country you do not need to prepare apply for a visitors visa.

We will Lodge a work visa application once you are in nz, and this will be assessed by a branch inside the country.

Please note you are only allowed to visit and not work while your work visa application is under assessment.

You can show this letter to any immigration officials on your phones if you are queried about your plans on your entrance to NZ, and my contact details are below if you wish to check anything with me.

Benjamin De'Ath

Managing Director/LLB, BA/LIA 201401414

[contact details]

COMPLAINT

[24] A complaint against Mr De'Ath was lodged by Marcelle Foley on 25 July 2017. It was contended that Mr De'Ath had been negligent, engaged in dishonest or misleading behaviour and had breached the Code.

[25] Mr De'Ath is said to have lodged malicious, threatening and unprofessional complaints, inappropriately utilising Immigration New Zealand's complaint procedure. Mr De'Ath had exhibited threatening behaviour in person. The complaints process was for process flaws, not for personal attacks on the staff of Immigration New Zealand.

[26] It is alleged Mr De'Ath had submitted Official Information Act (OIA) requests for staff job descriptions and then complained that they were not completing their role in accordance with their job description. Mr De'Ath had made complaints of serious misconduct without any supporting evidence.

[27] According to Mr Foley's complaint, it was also a significant concern that Mr De'Ath appeared to have deliberately instructed a migrant with a job offer to enter New Zealand on an incorrect visa.

[28] The Authority notified Mr De'Ath of the complaint on 3 November 2017.

[29] In his response to the Authority dated 20 November 2017, Mr De'Ath explained the context in which the complaints he had made arose (*verbatim*, as relied on by the Registrar):

The catalysts for such OIA requests and corresponding complaints, range from complete omissions to address complaints, appalling failure to understand applicable immigration instructions and legislation by senior INZ officials...an Immigration Manager, unable to address a complaint.

...

1. [Ms M] an Immigration Manager, cannot, or will not address the nature of a complaint under F & NJ instructions.

2. [Ms L], an Immigration Officer, wildly mis-interpreted a verbal statement, refused to accept basic principles of evidence and provided information to INZ which, at the very least was a gross misrepresentation of what the employer had said, and reiterated in writing. However, in communication with Steve Jones, largely on the basis of accepting Steve's assurances this matter was set to rest, and I am confident learning and betterment occurred as a result of the complaint and review process.
3. [Ms S], a Senior Business and Policy Adviser, does not understand the operation of Substantive match of ANZSCO when presenting to an audience of LIA's and will not issue a corrective statement about this. [Ms S] then sets her email to out of office with no forwarding details.
4. [Ms X], a Technical Adviser, suggests that my advocating for clients amidst, in part, the issues [Ms S] had created was "spitting the dummy".

Come on.

...

In conclusion, I am deeply bothered by the actions of INZ staff in suggestion that my advocacy and seeking accountability within the boundaries of the system are unprofessional.

...

If INZ staff are so unaccustomed to performance review of contracted role descriptions by stakeholders that they make complaints to the ethical body whom I report to for my license maintenance as a means of trying to remove me as a thorn from their side, or discourage me from future complaints / reviews, then the problems within the culture of civil servants who seek not to be accountable for their actions and roles, are likely much deeper than I first realized.

[30] The Registrar of the Authority filed a statement of complaint with the Tribunal on 10 January 2018.

[31] The Registrar contends that Mr De'Ath has breached cl 1 of the Code obligation to be professional and respectful, in the following manner:

- (1) Submitted OIA requests regarding the job descriptions of Immigration New Zealand staff and then made complaints alleging the staff are failing to adhere to the terms and conditions of their employment contracts.
- (2) Made allegations of serious misconduct without providing evidence to substantiate the allegations.
- (3) Expressed unprofessional criticisms of the staff of Immigration New Zealand.

[32] The Registrar also contends that Mr De'Ath has engaged in dishonest or misleading behaviour in the following manner:¹

- (1) He appears to have deliberately instructed a migrant to enter New Zealand on an incorrect visa.

[33] While not expressly stated in the statement of complaint, the Registrar relies on this being a ground for complaint under s 44(2)(d) of the Immigration Advisers Licensing Act 2007 (the Act). The Registrar contends that, alternatively, it is a breach of cl 1 of the Code.

JURISDICTION AND PROCEDURE

[34] The grounds for a complaint to the Registrar of the Authority 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.

[35] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.²

[36] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.³

[37] 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.⁴

[38] The sanctions that may be imposed by the Tribunal are set out in the Act.⁵ It may also suspend a licence pending the outcome of a complaint.⁶

¹ No charge is precisely set out, but the statement at [13] of the statement of complaint is the closest to expressing a charge.

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

³ Sections 49(3) & (4).

⁴ Section 50.

⁵ Section 51(1).

⁶ Section 53(1).

[39] The burden of proving each head of complaint lies with the Registrar. 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.⁷

[40] Following the receipt of the statement of complaint against Mr De'Ath with supporting documents, the Tribunal advised the Registrar and Mr De'Ath on 15 January 2018 that complaints are usually determined on the papers, with no oral hearing. On 16 March 2018, the parties were advised that the decision would be made without further notice.

[41] There is a statement of reply dated 28 February 2018 from Mr Moses, counsel, on behalf of Mr De'Ath. Mr Moses produced a written apology from Mr De'Ath to Ms M, dated 27 February 2018. Having taken advice, he acknowledged having criticised her personally and he retracted the complaint. He appreciated having lost the necessary objectivity. It was copied to Ms M's manager, Ms McGaughey.

[42] No submissions were filed by the complainant or Registrar.

ASSESSMENT

[43] I will deal with each head of complaint in the order in which it is presented in the statement of complaint.

BREACH OF CODE

(1) *Submitted OIA requests regarding the job descriptions of Immigration New Zealand staff and then made complaints alleging the staff are failing to adhere to the terms and conditions of their employment contracts*

[44] The Registrar contends that Mr De'Ath has a practice of submitting OIA requests for the job descriptions of the staff of Immigration New Zealand and then making formal CCRP complaints alleging they are failing in their roles. Immigration New Zealand states that the complaints process is not for personal attacks on staff.

[45] This is alleged to be a breach of cl 1 of the Code, which states:

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

⁷ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [101]–[102] & [112].

[46] The Tribunal has been sent evidence of Mr De’Ath obtaining job descriptions for two officers, Ms X and Ms M. It has been sent evidence of only one formal complaint against an officer for whom a job description was obtained, that of 3 May 2017 against Ms M. The other formal complaint disclosed to the Tribunal is that of 20 March 2017 against Ms L, but there is no evidence he sought her job description. While one example of obtaining a job description and then making a formal complaint does not amount to a practice, Mr De’Ath admits he has done this in relation to “staff members” (plural).

[47] Whether or not there was such a practice by Mr De’Ath, I do not regard complaints that an officer is not performing his or her role as outside the internal complaints procedure.

[48] The Tribunal has been provided with the “INZ Complaints and Feedback Policy” of May 2017 (revised August 2017), previously known as the CCRP. The policy is particularly broad, inviting not just complaints but also feedback and suggestions. The term “complaint” is defined widely:

An expression of dissatisfaction or grievance made to or about INZ, related to our administrative processes, products and tools, staff or services, that is formally raised and where a response or resolution is expected.

[49] The purpose and principles of the policy are set out:

2.1 Purpose and principles of the Process

2.1.1. The aims of the Complaints and Feedback Process are to:

- resolve concerns or complaints as fairly and promptly as possible
- provide managers with feedback and insight into the INZ’s quality of service
- provide an informed basis for targeted training and development, and for systems improvement
- highlight for INZ areas of immigration instructions which are ambiguous or confusing and which may need clarification.

[50] Complaints about a staff member not performing his or her role or performing outside his or her role would be within the scope of the policy. The real issue here is whether there was any substantive evidence to support the complaint, but that is not the subject of this head of complaint. There is also an issue about Mr De’Ath’s language, but that also is not the subject of this head of complaint. I will deal with those matters shortly. While I agree with the observation by Mr Foley that the complaints procedure is not available for personal attacks on staff, that will be considered in the context of the complaint about Mr De’Ath’s language.

[51] I dismiss this head of complaint.

- (2) *Made allegations of serious misconduct without providing evidence to substantiate the allegations*

[52] While many officers of Immigration New Zealand are criticised in the communications relied on by the Registrar, the only formal complaints made by Mr De'Ath sent to the Tribunal are those against Ms L and Ms M. I will consider these only. Mr De'Ath's alleged failure to provide evidence to substantiate the complaints is said to be a breach of the cl 1 obligation to be professional and respectful.

[53] The complaint against Ms L was made on 20 March 2017. It is comprehensively set out in a document of four pages in length, with references to evidence in support. Mr De'Ath believed his client had been unfairly treated, as he considered that Ms L had misinterpreted what a former employer had said and would not change her mind when confronted with the employer's written evidence to the contrary.

[54] Mr De'Ath alleged Ms L provided false and misleading information in breach of s 342(1)(a)(i) of the Immigration Act 2009:

342 Provision of false or misleading information

- (1) Every person commits an offence against this Act who—
- (a) makes any statement, or provides any information, evidence, or submission, knowing that it is false or misleading in any material respect, in support of—
 - (i) any application or request (whether by that person or by another person) for a visa or entry permission, or any expression of interest in a visa;

[55] In his email of 27 April 2017 to Mr R and others, Mr De'Ath threatens the staff involved with a private prosecution for the misuse of public funds. He does not name the staff, but this is presumably directed at Ms L and Ms M. The latter is mentioned elsewhere in the letter.

[56] On the basis of the documents sent to the Tribunal, which includes the former employer's letter to Immigration New Zealand correcting Ms L's misunderstanding, I accept counsel's submission that Mr De'Ath believed his client had been treated unfairly by Ms L. The client's application had been declined, requiring him to leave New Zealand. According to counsel, Mr De'Ath believed that a hard working decent man had been deprived of an opportunity to work and live in this country because officials were not prepared to accept they were wrong.

[57] There is some justification for the former employer's frustration at Ms L's misunderstanding of what he had said to her and her apparent unwillingness to correct it. Accordingly, there would be merit to a complaint by Mr De'Ath, confined to the mistake of Ms L, but there is no merit to *the* complaint that was actually made by him.

[58] Putting to one side whether an immigration officer processing an application could ever be subject to the criminal offence set out at s 342(1) of the Immigration Act, which I doubt, there is utterly no evidence of any knowledge of falsity on the part of Ms L. The officer seems to have misunderstood what the former employer said and then to have firmly held on to that belief in the face of contradictory evidence. She appears to have been wrong, but there is no reason to believe it was anything other than an honest mistake by her. Mr De'Ath's complaint is therefore unwarranted.

[59] However, given the merit of Mr De'Ath's underlying criticism of Ms L, I accept his complaint was not malicious. I see no evidence of personal *animus* or ill-will towards Ms L.

[60] In respect of the complaint against Mr De'Ath in relation to his complaint against Ms L, I uphold it. While not malicious, it was unprofessional and disrespectful to make a formal complaint of serious misconduct against an immigration officer in the absence of some substantive evidence in support. That evidence is lacking in respect of the *mens rea* or knowledge component of the offence. If Mr De'Ath had confined his complaint against Ms L to her mistake and unwillingness to correct it, I would have dismissed this aspect of the complaint against him.

[61] There is also the threat of a private prosecution for misuse of public funds in the email of 27 April. Mr De'Ath does not elaborate how this could come about. It just seems to be spur of the moment nonsense which could not be taken seriously. I will say more of this in the next head of complaint against Mr De'Ath.

[62] In respect of Mr De'Ath's 3 May 2017 complaint against Ms M, my understanding is that the genesis of this was Ms M's perceived inadequacies in dealing with the formal complaint against Ms L. The Tribunal has not been sent Ms M's response of 21 March 2017 to that complaint, so I cannot know the extent to which Mr De'Ath's complaint against Ms M is justified. I agree with counsel though that Mr De'Ath saw Ms M's response as a lack of accountability within Immigration New Zealand for what he regarded as Ms L's bureaucratic intransigence, as counsel has described it.

[63] The Registrar's statement of complaint against Mr De'Ath does not identify the serious misconduct said to have been alleged against Ms M, which it is contended was not substantiated by evidence. However, I can identify one allegation in the complaint against Ms M which would amount to serious misconduct:

The responses thus far, if they can be called responses in this case, appear to indicate staff trying to cover for one another and a mind-set that the disadvantaged migrant will leave NZ...

[64] It is plain that the allegation of a cover-up of known wrong-doing and a general intention to disadvantage migrants would amount to serious misconduct. Mr De'Ath provided no evidence in support. His apology and retraction shows there was none. This head of complaint is also upheld in relation to Ms M. The complaint against her was unprofessional and disrespectful.

(3) *Expressed unprofessional criticisms of the staff of Immigration New Zealand*

[65] The Registrar alleges that Mr De'Ath has expressed unprofessional criticisms of Immigration New Zealand's staff in his correspondence with the department, in breach of cl 1 of the Code.

[66] Counsel for Mr De'Ath accepts the obvious, that Mr De'Ath's correspondence with Immigration New Zealand was inadequately worded, intemperate, unnecessarily abrasive, accusatory and ill advised. It unnecessarily personalised his complaints against officers. They amount to personal attacks. When looked at cumulatively, it plainly crossed the disciplinary threshold, as counsel concedes on behalf of Mr De'Ath. The extracts of his communications set out above are replete with so many examples I do not need to identify them. I will, however, refer to one and that is the threat of a private prosecution. It may be nonsense but the substance of the statement is unprofessional.

[67] I accept that Mr De'Ath was not malicious or motivated by ill-will against the staff involved. Despite the extravagance of his language, I see no evidence of personal *animus*. His language is not abusive. There is a kernel of merit to his criticism of Ms L. He allowed his frustration, if not anger, at the treatment of his client by Ms L to overwhelm his objectivity and detachment, which was unprofessional.

[68] I uphold this head of complaint. The language, tone and even substance of Mr De'Ath's correspondence is intemperate, abrasive and accusatory and is therefore a breach of cl 1 of the Code obligation to be professional and respectful.

DISHONEST OR MISLEADING BEHAVIOUR

(1) *Mr De'Ath appears to have deliberately instructed a migrant to enter New Zealand on an incorrect visa*

[69] The Registrar contends that the email sent before 20 June 2017 by Mr De'Ath to his client, an Argentine national, is dishonest or misleading. The Registrar does not say

so, but is presumably relying on s 44(2)(d) of the Act. The email has not been sent to the Tribunal but Immigration New Zealand's record of it is set out above.⁸

[70] Counsel for Mr De'Ath explains that the Argentine client did not seek to enter New Zealand on a visitor's visa in order to work here, but came to explore job opportunities and, if he was happy with an offer, to apply for the requisite work visa, subject to his ability to meet the applicable immigration instructions.

[71] Counsel contends this is not illegitimate. He concedes it is clear from Immigration New Zealand's manual that intending to undertake employment is not a lawful purpose for visitors, but its internal administration circular 13/09 dated 8 November 2013 ("Assessing 'bona fide applicant' criteria") goes on to state at [14]:

The potential that an applicant may apply for a further temporary visa, or apply for residence, within New Zealand does not in itself mean that they do not genuinely intend a temporary stay in New Zealand for a lawful purpose. A person may genuinely intend a temporary stay in New Zealand for a lawful purpose despite potentially applying for a further visa from within New Zealand.

[72] According to counsel, Immigration New Zealand has acknowledged the legitimacy of what are known as visitor visa applications to "look, see and decide". A document headed "Purpose of Entry" (which he says was published in about 2016 but has since been removed from the website of Immigration New Zealand) states:

If an applicant declares on the application form that the purpose of their visit is to holiday but also to assess whether they want to live and work in New Zealand ("look, see and decide"), then these should be considered on a case by case basis (as usual), with particular care to assess the likelihood of obtaining lawful work in New Zealand and the risk of non-compliance.

...

Some immigration advisers encourage applicants from visa waiver countries to apply for a visitor visa when travelling to New Zealand for the purposes of a job interview. This enables the assessment of the application to be completed offshore which is preferable to being assessed at the Border and may prevent a wasted journey.

[73] It is submitted that Mr De'Ath took the view that his client's situation entitled him to arrive in New Zealand on a visitor's visa and to consider the opportunities on a "look, see and decide" basis. Counsel further submits that whether that was appropriate could be the subject of genuine disagreement, depending in part on how firm the client's intention was to work. In other words, if the client was intending to do so regardless of whether a visa was granted, that would not be legitimate.

[74] It is submitted that the material intention of Mr De'Ath's client was to enter New Zealand for the purpose of a further visa application, not in order to work on his visitor's

⁸ At [23].

visa in breach of his visa conditions. The express advice to the client in the email that he show the letter to immigration officials if queried, is evidence that Mr De'Ath was confident of his assessment that the client was entitled to enter on a visitor's visa and to subsequently apply for a work visa. Most importantly, it shows that everything was intended to be "above board", as counsel submits. There was no intention to mislead and no lack of probity.

[75] These submissions are not contested by the Registrar.

[76] It is not my role to rule on the ambit or interpretation of Immigration New Zealand's policy, but I agree with Mr Moses that it appears to allow lawful entry into New Zealand on a visitor's visa, with the possibility of using that time to look for a job and apply for a work visa. Much would seem to depend on the intention of the visitor as to his or her conduct in New Zealand.

[77] That one email from Mr De'Ath to his client does not show, let alone prove, any intention on Mr De'Ath's part to facilitate deception by his client. It does not show dishonesty, bad faith or any lack of probity. On its own, it is not advice to his client as to how to circumvent New Zealand immigration law and policy. The advice to his client to show the communication to officials at the border is good evidence that Mr De'Ath was not intending to be dishonest or misleading.

[78] I note also that no evidence has been sent to the Tribunal establishing that the Argentinian national had a job prearranged, as alleged in Immigration New Zealand's email of 20 June 2017.

[79] There is no evidence of dishonest or misleading advice to the client. A complaint under s 44(2)(d) is not made out, nor has cl 1 of the Code been violated.

[80] I dismiss this head of complaint.

OUTCOME

[81] I conclude:

- (1) That Mr De'Ath has been unprofessional and disrespectful to Immigration New Zealand staff in respect of his correspondence with them, in breach of cl 1 of the Code and also s 44(2)(e) of the Act. He has made allegations of serious misconduct against Ms L and Ms M without providing supporting evidence. The language, tone and substance of his correspondence with Immigration New Zealand is intemperate, abrasive and accusatory.

- (2) The filing of OIA requests for the job descriptions of Immigration New Zealand staff and then making complaints they are not adhering to their employment contracts is not of itself a breach of the Code.
- (3) It has not been established that Mr De'Ath engaged in dishonest or misleading behaviour.

SUBMISSIONS ON SANCTIONS

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

[83] A timetable is set below. Any request that Mr De'Ath 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

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

- (1) The Authority, the complainant and Mr De'Ath are to make submissions by **29 November 2018**.
- (2) The Authority, the complainant and Mr De'Ath may reply to any submissions by any other party by **13 December 2018**.

D J Plunkett
Chair