

## IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2023] NZIACDT 17

Reference No: IACDT 014/22

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

**BY** **THE REGISTRAR OF  
IMMIGRATION ADVISERS**  
Registrar

**BETWEEN** **NG**  
Complainant

**AND** **NIRMALA KRISHNA MURTHY**  
Adviser

**SUBJECT TO SUPPRESSION ORDER**

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**DECISION  
(Sanctions)  
Dated 24 May 2023**

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### **REPRESENTATION:**

Registrar: In person  
Complainant: R Small, counsel  
Adviser: In person

## INTRODUCTION

[1] Nirmala Krishna Murthy, the adviser, made two unsuccessful s 61 requests for the complainant, NG, who was in New Zealand unlawfully.<sup>1</sup> In doing so, she did not comply with her professional obligations.

[2] A complaint to the Immigration Advisers Authority (the Authority) was referred by the Registrar of Immigration Advisers (the Registrar) to the Tribunal. It was upheld in a decision issued on 15 March 2023 in *NG v Murthy*.<sup>2</sup> Ms Murthy was found to have breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code), a ground for complaint under the Immigration Advisers Licensing Act 2007 (the Act).

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

## BACKGROUND

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

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

[6] The complainant is a national of Tonga. He was in New Zealand unlawfully. He entered into a service agreement with Ms Murthy on 21 July 2021 for a s 61 request. She wrote to Immigration New Zealand (Immigration NZ) on 19 October 2021, but the request was refused on 5 November 2021. A second request made by Ms Murthy on 24 December 2021 was refused on 4 February 2022.

[7] A complaint made to the Authority on 14 June 2022 on behalf of the complainant was referred by the Registrar to the Tribunal.

### *Decision of the Tribunal*

[8] In its decision, the Tribunal found that Ms Murthy:

- (1) Failed to lodge an information request with Immigration NZ seeking the complainant's immigration records, breaching the obligation of diligence and due care in cl 1 of the Code.

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<sup>1</sup> Section 61 of the Immigration Act 2009 permits the Minister of Immigration to grant a discretionary visa to those unlawfully in the country.

<sup>2</sup> *NG v Murthy* [2023] NZIACDT 10.

- (2) Failed to provide the complainant with the opportunity to review either of the s 61 requests prior to their lodgement, in breach of the obligation of diligence and due care in cl 1.
- (3) Failed to provide a written agreement for the second s 61 request, in breach of cl 18(a).

## **SUBMISSIONS**

### *From the Registrar*

[9] In her submissions (6 April 2023), Ms Issar, from the Registrar's office, notes that this is Ms Murthy's third appearance before the Tribunal, which is an aggravating factor. Despite the Tribunal previously ordering her to complete a specific paper at Toi Ohomai Institute of Technology at its next intake, she did not do so. She has, however, enrolled in the paper for the semester commencing on 10 July 2023.

[10] The Registrar submits that Ms Murthy's conduct shows a disregard for maintaining professional standards. It can be considered moderate to high in terms of seriousness. Her earlier breaches indicate a pattern of misconduct. A penalty is warranted to hold Ms Murthy accountable, as well as to adequately deter other advisers from engaging in similar behaviour. It is submitted that the appropriate sanctions would be:

- (1) Censure.
- (2) Payment of a penalty in the vicinity of \$6,000.

### *From the complainant*

[11] Mr Small, counsel for the complainant, submits (22 March 2023) that the appropriate sanctions would be:

- (1) Censure.
- (2) Undertake training on disclosure within 90 days.
- (3) As a condition of continued licensing –
  - (a) Provide a written apology to the complainant.
  - (b) Provide an undertaking to the Tribunal to seek disclosure from Immigration NZ in similar cases in the future.

- (c) Is audited in six months to ensure ongoing compliance.
- (4) Any licence application be declined until Ms Murthy has complied with the conditions.
- (5) Compensation of \$2,500.

[12] In further comprehensive submissions (7 May 2023), Mr Small seeks a refund of \$2,200 on behalf of the complainant, but no longer seeks compensation. The complainant located supporting documents that show only \$2,200 paid to Ms Murthy.

[13] It is submitted that the complainant's partial refund is clearly linked to the unprofessional and inappropriate level of service provided. The most serious breach by Ms Murthy was failing to seek the complainant's immigration records from Immigration NZ. This rendered the request for a visa under s 61 all but worthless. The Tribunal has made it clear in an earlier decision that an adviser cannot simply rely on client instructions on historical matters.<sup>3</sup>

[14] Mr Small also notes that there has been no real acknowledgement by Ms Murthy of harm to the interests of the complainant, a factor relevant to the penalty and a refund.

[15] Mr Small notifies the Tribunal that the complainant suffered traumatic life-threatening injuries from a workplace accident. Counsel has more recently been able to obtain residence for him.

[16] Counsel submits that a penalty of \$4,000 and a refund of \$2,200 would best serve vulnerable migrants.

[17] Attached to counsel's further submissions are:

- (1) A receipt (21 July 2021) from Ms Murthy for the payment of \$1,000.
- (2) An email (29 March 2022) from the manager at Ms Murthy's immigration company stating that \$2,200 had been paid to date.

[18] There are additional submissions (16 May 2023) from Mr Small replying to those of Ms Murthy (16 May 2023). He says she seems to be apologetic towards the Registrar only and not the complainant who trusted her and paid for her services. The Tribunal also acknowledges Mr Small's email of 18 May 2023.

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<sup>3</sup> *KXBK v GVH* [2019] NZIACDT 74 at [70].

*From Ms Murthy*

[19] Ms Murthy wrote to the Tribunal on 13 April 2023. She notes that it had been her intention to process the s 61 request as soon as possible and that she completed the first draft on 9 August 2021, but it was delayed by the complainant's partner being unable to provide a document.

[20] Ms Murthy says that in the future she will proactively obtain the immigration history of clients with unlawful status for whom she processes a s 61 request. She also understands the need for a service agreement. Ms Murthy acknowledges the mistake in thinking the second request was covered by the service agreement for the first request.

[21] As for the training previously directed by the Tribunal, Ms Murthy says she could not commence the course in February 2023 as there was a fire at her home on 28 January 2023. This caused serious personal issues, including [redacted]. She has had to live at multiple locations but now has a more permanent living situation. She has enrolled for the course commencing in the second semester.

[22] According to Ms Murthy, she has been suffering from [redacted]. Her symptoms relapsed during COVID-19 and she had to rely on her office staff. This led to major administration and customer service errors. She notes that the previous complaints occurred during the period she was experiencing relapses of [redacted] from mid-2020 to early 2021.

[23] Ms Murthy states that due to the impact of COVID-19 on the business, she was struggling to cope and meet the business expenses. Any penalty would make the financial situation worse and make it very difficult to continue running the business. She had taken out a substantial business loan, as well as personal loans from friends.

[24] A number of documents have been produced by Ms Murthy. One of them is a letter (10 March 2022) from her general practitioner. The doctor lists consultations between 20 June 2020 and 7 December 2021. The Tribunal notes a long history of [redacted].

[25] There are further submissions (16 May 2023) from Ms Murthy, replying to Mr Small's submissions (7 May 2023).

[26] Ms Murthy acknowledges the Tribunal's findings and accepts she did not meet the expectations of cls 1 and 18(a) of the Code. She is committed to learning from the experience.

[27] In the strongest terms, Ms Murthy contests the assertion that the complainant suffered harm due to the failed s 61 request. It was unclear how he had been disadvantaged by the outcome. It was part of an earnest effort by her to regularise his immigration status. Ms Murthy sincerely regrets any perception that her actions were harmful to the complainant's interests.

[28] As for failing to request Immigration NZ's records, her belief then was that the urgency of the situation justified the course of action taken.

[29] The isolated incident is not indicative of the overall quality of her practice. She has demonstrated professionalism and success in her practice over the years.

[30] As for the refund of \$2,200 sought, Ms Murthy maintains that the fee was commensurate with the work completed. Nonetheless, she was open to discussing a resolution, including a potential refund.

[31] It is submitted by Ms Murthy that the proposal for censure, training, a written apology and ongoing audits is disproportionate. She is, however, open to providing a written apology, undergoing training and a single audit.

## **JURISDICTION**

[32] The Tribunal's jurisdiction to impose sanctions is set out in the Act. Having heard a complaint, the Tribunal may take the following action:<sup>4</sup>

### **50 Determination of complaint by Tribunal**

After hearing a complaint, the Tribunal may—

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

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

### **51 Disciplinary sanctions**

- (1) The sanctions that the Tribunal may impose are—
  - (a) caution or censure:

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<sup>4</sup> Immigration Advisers Licensing Act 2007.

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

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

### **3 Purpose and scheme of Act**

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

[35] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:<sup>5</sup>

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

...

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

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<sup>5</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

...

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

[36] Professional conduct schemes, with their attached compliance regimes, exist to maintain high standards of propriety and professional conduct not just for the public good, but also to protect the collective reputation and public confidence in the profession itself.<sup>6</sup>

[37] While protection of the public and the profession is the focus, the issues of punishment and deterrence must also be taken into account in selecting the appropriate penalty.<sup>7</sup>

[38] The most appropriate penalty is that which:<sup>8</sup>

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

## DISCUSSION

[39] In the period from July to December 2021, Ms Murthy breached three professional obligations in representing the complainant:

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<sup>6</sup> *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 & 727; *Bolton v Law Society* [1994] 2 All ER 486 (EWCA) at 492; Z, above n 5, at [151].

<sup>7</sup> *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

<sup>8</sup> *Liston v Director of Proceedings* [2018] NZHC 2981 at [34], citing *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 at [44]–[51] and *Katamat v Professional Conduct Committee* [2012] NZHC 1633, [2013] NZAR 320 at [49].



- (1) Failed to lodge an information request with Immigration NZ to better inform herself of the complainant's immigration history, a breach of cl 1 (lack of diligence and due care).
- (2) Failed to ensure she was accurately portraying the complainant's circumstances in her letter to Immigration NZ by giving him the opportunity to review her draft letter, a breach of cl 1 (diligence and due care).
- (3) Failed to formally confirm her instructions for the second request by entering into a new or amended service agreement, a breach of cl 18(a).

[40] As the Registrar observes, this is Ms Murthy's third appearance before the Tribunal.<sup>9</sup>

[41] In the *LS* decision on 4 April 2022,<sup>10</sup> Ms Murthy was found by the Tribunal to have:

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

[42] The conduct occurred in August 2020. It was found to be at the lower end of the scale and the only sanction was a caution.<sup>11</sup>

[43] In the *SU* decision on 18 July 2022,<sup>12</sup> Ms Murthy was found to have:

- (1) Filed an assessment application with NZQA late (she took 2.5 months for a straight-forward application), in breach of the obligation to exercise diligence and due care in cl 1.
- (2) Failed to have a written contract for a visa application, in breach of cl 18(a).
- (3) Failed to confirm in writing to her client the termination of her services in relation to a work visa, in breach of cl 28(a).

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<sup>9</sup> The Tribunal has more recently upheld a fourth complaint against Ms Murthy. As the sanctions for that complaint have not yet been determined, that additional complaint will not be taken into account here. However, this current complaint will be taken into account in setting the sanctions for that fourth complaint.

<sup>10</sup> *LS v Murthy* [2022] NZIACDT 5.

<sup>11</sup> *LS v Murthy* [2022] NZIACDT 12.

<sup>12</sup> *SU v Murthy* [2022] NZIACDT 17.

- (4) Failed to confirm in writing to her client the details of material discussions, in breach of cl 26(c).

[44] The conduct occurred between June and November 2020. The Tribunal found it could not be described as serious. It noted that while Ms Murthy's health provided some explanation, the Registrar was correct to contend that there was a pattern of casual compliance with her 'paperwork' obligations. The sanctions were censure, completion of LAWS 7015 at Toi Ohomai, payment of a penalty of \$1,500 and compensation to the client of \$3,553.<sup>13</sup>

[45] As the Tribunal observed in *SU*, there is a pattern to Ms Murthy's misconduct. Most of the wrongdoing is carelessness about proper paperwork, particularly inadequate communication with her clients. This is not trivial. It is part of protecting and properly informing a client that there is a written contract and the client is aware of what is happening. In the current complaint, the first and second heads of complaint are not so much about paperwork, as about Ms Murthy's failure to properly inform herself as to the complainant's immigration and other circumstances. The first head in the *SU* decision, her tardiness in filing an application, is also a failure of diligent professional service.

[46] The misconduct here occurred in the second half of 2021, later than that in the earlier two complaints which was between June and November 2020. The pattern has therefore continued over a prolonged period. However, the misconduct in this complaint was before the Tribunal's decisions in the *LS* and *SU* complaints. It could not be said that the current complaint shows Ms Murthy failed to learn any lesson from the earlier complaints or the Tribunal's decisions.

[47] Ms Murthy is unrealistic in describing her failings concerning the complainant as an isolated incident. While she no doubt was successful over the years for a large number of clients, this was the third complaint upheld by the Tribunal (and a fourth complaint has just been upheld).

[48] The medical evidence gives some context but provides no justification for the wrongdoing and nor is that contended by Ms Murthy. The medical certificate shows that she has been treated for [redacted] from before June 2020 until at least October 2021. However, Ms Murthy says in her submissions that she experienced a relapse of [redacted] from mid-2020 only until early 2021. [Redacted] is therefore irrelevant to the wrongdoing here in the second half of 2021. The medical certificate produced, dated more than one year ago (10 March 2022), gives the Tribunal no useful information about

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<sup>13</sup> *SU v Murthy* [2022] NZIACDT 22.

[redacted]. In any event, Ms Murthy does not advance her current health as a relevant factor.

[49] The Tribunal will now consider the potential sanctions.

#### *Caution or censure*

[50] While the misconduct here is not of itself serious, this is the third complaint upheld. The Tribunal marks its disapproval of Ms Murthy's systemic professional wrongdoing by censuring her.

#### *Training*

[51] The Tribunal agrees with the Registrar that, given the training previously directed which Ms Murthy is about to undertake (paper commencing July 2023), any other training would not be necessary. Mr Small has not identified any course in "disclosure", as he was asked to do in the liability decision.<sup>14</sup> The Tribunal records its expectation that Ms Murthy will undertake and successfully complete LAWS 7015 commencing in July 2023.

#### *Financial Penalty*

[52] In the *SU* decision, a penalty of \$1,500 was imposed. The Registrar seeks about \$6,000 here. Mr Small submits \$4,000 would be appropriate.

[53] A penalty of \$6,000 would be disproportionate for the professional breaches here, even taking into account Ms Murthy's poor disciplinary history. So would \$4,000, at least for the breaches in the current complaint. The Tribunal also intends to give some priority to a refund for the complainant. Additionally, it is accepted that Ms Murthy's financial circumstances are not robust. Ms Murthy has acknowledged her professional failings. Having regard to all these matters, the penalty will be \$2,000.

#### *Refund and compensation*

[54] The complainant has sought a refund of \$2,200, the amount he can show he has paid Ms Murthy. The Tribunal agrees with Mr Small that Ms Murthy's failure to accurately inform herself of the complainant's immigration history likely contributed to the unsuccessful s 61 request she made. There is a link between the professional wrong and the wasted fee. The s 61 request appears to have been doomed, though the

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<sup>14</sup> *NG v Murthy*, above n 2, at [53].

Tribunal cannot say it would have succeeded had Ms Murthy not committed any professional wrongdoing. A refund of \$2,200 will therefore be directed.

### *Apology*

[55] It is doubtful that the Tribunal has the power to direct a written apology and the value of any apology given pursuant to a direction by a judicial body is equally doubtful. Nonetheless, in this case it seems important to the complainant and Ms Murthy says she is open to making an apology. While the Tribunal will not order Ms Murthy to make a written apology, she is invited to do so. It is right that she does so and it may be helpful to the complainant.

### **OUTCOME**

[56] Ms Murthy is:

1. Censured.
2. Ordered to pay to the Registrar within one month a penalty of \$2,000.
3. Ordered to refund to the complainant within one month the sum of \$2,200.

### **ORDER FOR SUPPRESSION**

[57] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.<sup>15</sup> This involves balancing the privacy of individuals with the public interest in the transparency and accountability of judicial bodies.

[58] There is no public interest in knowing the name of Ms Murthy's client, the complainant, nor any details of Ms Murthy's health.

[59] The Tribunal orders that no information identifying the complainant or the details of Ms Murthy's health are to be published other than to Immigration NZ.

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D J Plunkett  
Chair

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<sup>15</sup> Immigration Advisers Licensing Act 2007, s 50A.