

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2023] NZIACDT 19

Reference No: IACDT 012/22

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

BY **THE REGISTRAR OF
IMMIGRATION ADVISERS**
Registrar

BETWEEN **BC**
Complainant

AND **NIRMALA KRISHNA
MURTHY**
Adviser

SUBJECT TO SUPPRESSION ORDER

**DECISION
(Sanctions)
Dated 7 June 2023**

REPRESENTATION:

Registrar: Self-represented
Complainant: Self-represented
Adviser: Self-represented

INTRODUCTION

[1] The complainant, BC, consulted the adviser, Nirmala Krishna Murthy, seeking residence. In representing him, Ms Murthy committed numerous breaches of 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 22 March 2023 in *BC v Murthy*.¹ Ms Murthy was found to have breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code), a ground of 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 and will only be briefly summarised here.

[5] The complainant, a national of Ireland, was in New Zealand on a working visa.

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

[7] The complainant signed Ms Murthy's service agreement on 18 September 2020. She agreed to process for him a skilled migrant residence application. He paid her fee of \$4,025 at the meeting.

[8] On 7 December 2020, Ms Murthy filed an expression of interest with Immigration New Zealand (Immigration NZ). At the time, expressions could be filed, but were not being processed.

[9] The complainant asked Ms Murthy on 14 October 2021 to go ahead with a partnership visa application, as he had recently married a New Zealand woman. She did not reply.

[10] The complainant then terminated the service agreement on 6 December 2021. He told her he expected reimbursement of \$4,025.

[11] In an email to Ms Murthy on 17 January 2022, the complainant said he was happy to pay for the expression filed. He asked for a breakdown of the \$4,025 and for a refund

¹ *BC v Murthy* [2023] NZIACDT 8.

of what did not relate to filing the expression. Then in his complaint to the Authority on about 1 May 2022, the complainant asked for \$3,000 to be returned.

[12] Ms Murthy refunded \$2,012.50 to the complainant on 27 July 2022.

Decision of the Tribunal

[13] It was found by the Tribunal that Ms Murthy had:

- (1) Failed to make a prompt refund, in breach of cl 24(c) of the Code.
- (2) Failed to recognise the complainant's funds remained his property until payable and invoiced, in breach of cl 25(a).
- (3) Failed to withdraw the complainant's funds only when payable and invoiced, in breach of cl 25(e).
- (4) Failed to provide the Authority with a complete client file, in breach of cl 26(e).
- (5) Failed to maintain a well-managed filing system, in breach of cl 26(d).
- (6) Failed to confirm in writing to the client all material discussions, in breach of cl 26(c).
- (7) Failed to confirm to the client when the expression was filed and to provide timely updates, in breach of cl 26(b).
- (8) Failed to inform Immigration NZ that she was no longer representing the complainant, in breach of cl 28(b).

SUBMISSIONS

Submissions from the Registrar

[14] There are submissions (14 April 2023) from Ms Issar of the Registrar's office. It is contended that Ms Murthy's conduct shows a disregard for maintaining professional standards and that the breaches can be considered moderate to high in terms of seriousness, due to:

- (1) Mishandling of the complainant's fees.

- (2) Sustained failure to deal with the complainant's case, which involved poor communication with him and Immigration NZ, as well as poor file management.

[15] An aggravating feature is that this is Ms Murthy's fourth appearance before the Tribunal.

[16] It is contended that a stern penalty is warranted to hold Ms Murthy accountable for her actions, as well as to deter other advisers from engaging in similar behaviour. While depriving Ms Murthy of her livelihood, even for a finite period, is a sanction of last resort, the Tribunal has a significant responsibility to uphold professional standards and mitigate risk to the public. Given the repeated nature of Ms Murthy's misconduct over four cases, this is an appropriate case for suspension of her licence.

[17] The appropriate penalties would be:

- (1) Censure.
- (2) Order suspending her licence until she completes the requirements imposed in an earlier decision of the Tribunal.²
- (3) A penalty in the vicinity of \$6,500.

Submissions from the complainant

[18] The complainant has produced two invoices from the solicitor he instructed to represent him on immigration matters after terminating Ms Murthy's services. They were for \$1,780 (9 May 2022) for professional fees and \$220 (17 May 2022) for Immigration NZ's fee.

Submissions from Ms Murthy

[19] In her submissions (5 May 2023), Ms Murthy acknowledges the findings of the Tribunal. She says she is committed to learning from her mistakes.

[20] It is submitted that the sanctions recommended by the Registrar are disproportionate, given her circumstances. The \$6,500 fine would be extremely difficult for her to pay, in light of the current financial strain on her business. In an effort to keep it afloat, she has already taken out a loan.

² *SU v Murthy* [2022] NZIACDT 22.

[21] Ms Murthy advises that she has enrolled in the LAWS7015 paper previously directed by the Tribunal. She was unable to undertake the paper in the course available in the first half of 2023 due to a fire at her house. This caused significant mental distress and financial hardship. In undertaking the paper, Ms Murthy is eager to address the issues identified and to strive for excellence in her professional practice.

[22] According to Ms Murthy, many of her professional failing are closely linked to [redacted]. She is actively seeking professional help from [redacted] to better improve her ability to manage stress and ensure that such issues do not recur in the future.

[23] It is noted by Ms Murthy that the Registrar has sought her suspension until the course is completed. This would jeopardise her business and hinder her ability to assist her present clients. It might also lead to a loss of trust from her clients and further financial hardship. She requests alternative solutions that would allow her to continue supporting her existing clients while working towards completing the course and improving her professional conduct.

[24] Ms Murthy has produced a medical history (10 March 2022) from her general practitioner covering the period from 20 June 2020 until 7 December 2021. The Tribunal notes a long history of [redacted].

JURISDICTION

[25] The Tribunal's jurisdiction to impose sanctions is set out in the Act. Having heard a complaint, the Tribunal may take the following action:³

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.

[26] 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:

³ 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.

[27] 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.

[28] The focus of professional disciplinary proceedings is not punishment, but the protection of the public:⁴

...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.

⁴ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] and [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.

[29] 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.⁵

[30] 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.⁶

[31] The most appropriate penalty is that which:⁷

- (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

[32] The misconduct found here is detailed above. There were eight breaches by Ms Murthy of her professional obligations. Broadly, they involved inadequate

⁵ *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724–725 and 727; *Bolton v Law Society* [1994] 2 All ER 486 (EWCA) at 492; and *Z*, above n 4, at [151].

⁶ *Patel v Complaints Assessment Committee* HC Auckland CIV-2007-404-1818, 13 August 2007 at [28].

⁷ *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].

communications with her client and Immigration NZ, improperly (but not dishonestly) dealing with his money and mismanagement of file paperwork. The Registrar describes their overall gravity as moderate to high. The Tribunal sees it as moderate.

[33] As noted by the Registrar, this is the fourth complaint against Ms Murthy upheld by the Tribunal.

[34] In the *LS* decision on 4 April 2022,⁸ 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) of the Code.
- (2) Failed to confirm in writing to the client when her services were terminated, in breach of cl 28(a).

[35] 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.⁹

[36] In the *SU* decision on 18 July 2022,¹⁰ 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 of the Code.
- (2) Failed to have a written contract for a work 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 the work visa, in breach of cl 28(a).
- (4) Failed to confirm in writing to her client the details of material discussions, in breach of cl 26(c).

[37] The conduct occurred between June and November 2020. The Tribunal found it could not be described as serious. It noted that while there was some explanation in her health, the Registrar was correct to contend that there was a pattern of casual compliance with her 'paperwork' obligations. The sanctions were censure, completion

⁸ *LS v Murthy* [2022] NZIACDT 5.

⁹ *LS v Murthy* [2022] NZIACDT 12.

¹⁰ *SU v Murthy* [2022] NZIACDT 17.

of LAWS 7015 at Toi Ohomai, payment of a penalty of \$1,500 and compensation to the client of \$3,553.¹¹

[38] In the *NG* decision on 15 March 2023, Ms Murthy was found to have:¹²

- (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.
- (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 a second s 61 request, in breach of cl 18(a).

[39] The conduct occurred between July and December 2021. The Tribunal said the conduct was not, of itself, serious. The sanctions were censure, a penalty of \$2,000 and a refund of \$2,200.¹³

[40] As the Tribunal has said before, the medical evidence concerning Ms Murthy gives some context but provides no justification for her wrongdoing.¹⁴ She says she is seeking professional help from [redacted]. No current medical evidence has been produced, with the general practitioner's list of consultations (dated 10 March 2022) being more than one year old. Ms Murthy is to be commended for seeking help on such matters, but if she cannot give clients in the future a full professional service because of [redacted], then she should voluntarily relinquish her licence.

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

Caution or censure

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

¹¹ *SU*, above n 2.

¹² *NG v Murthy* [2023] NZIACDT 10.

¹³ *NG v Murthy* [2023] NZIACDT 17.

¹⁴ *NG v Murthy*, above n 13, at [48].

Training

[43] The Tribunal agrees with the Registrar that it is unnecessary to direct additional training, as Ms Murthy will shortly undertake the relevant training as previously directed by the Tribunal.

Suspension

[44] The Registrar urges suspension of Ms Murthy's licence until she completes the previously directed course, presumably late in 2023. This is on the basis of her misconduct over four complaints. Ms Murthy says this would jeopardise her business, hinder her ability to assist her present clients and would lead to financial hardship.

[45] As the Registrar recognises, depriving someone of their ability to earn an income in their chosen profession is a sanction of last resort. The gravity of the wrongdoing in the current complaint would not justify suspension. Nor would the gravity in any of the previous complaints. In none of those complaints was the wrongdoing regarded by the Tribunal as serious. So the issue, as the Registrar acknowledges, is whether the cumulative effect of the breaches of professional standards over all four complaints now warrants suspension.

[46] In the current complaint, Ms Murthy has acknowledged her wrongdoing. She is about to undertake a paper in professional practice which will help her to better service her clients. The Tribunal must also weigh the consequences of suspension to her business, which appears to be financially fragile. Those consequences tip the balance against suspension, notwithstanding her poor disciplinary record. The Tribunal does not consider that the risk to the public is such that Ms Murthy should be temporarily removed from the profession.

[47] It is to be noted that the misconduct here occurred from late 2020 through 2021. None of the complaints have concerned conduct in 2022. Should further complaints regarding more recent conduct be upheld, the Tribunal would have to consider removing Ms Murthy from the profession, temporarily or indefinitely.

Financial Penalty

[48] The Registrar seeks a penalty in the vicinity of \$6,500. Ms Murthy says such a penalty would be extremely difficult for her to pay, given the current financial strain on her business.

[49] It is noted that Ms Murthy was fined \$1,500 in the *SU* complaint and \$2,000 in the *NG* complaint.

[50] The wrongdoing here is moderate. It would not, of itself, warrant a penalty of \$6,500. Of course, Ms Murthy has a poor disciplinary history, which would elevate the financial penalty.

[51] The Tribunal recognises Ms Murthy's fragile financial circumstances. She has taken out one or more loans for her business and a domestic fire which caused her to relocate will have added further financial strain.

[52] The penalty will be \$3,500.

Refund and compensation

[53] Ms Murthy has already refunded to the complainant \$2,012.50, being half of the fee paid of \$4,025. Her total fee was for work regarding the expression and subsequent residence application. She retained half which she said represented the work for the expression. The complainant has accepted that Ms Murthy was entitled to be paid for the expression. The Tribunal does not disagree with Ms Murthy's estimate of the proportion of the total represented by the expression. No further refund will be directed.

[54] As for compensation, the complainant seeks \$2,000, being the fees of his solicitor and Immigration NZ to regularise his immigration status. However, that expense cannot be said to arise from any of the heads of complaint upheld. It is not the result of Ms Murthy's professional wrongdoing (to the extent upheld by the Tribunal). The claim for compensation is dismissed.

OUTCOME

[55] Ms Murthy is:

- (1) Censured.
- (2) Ordered to pay \$3,500 to the Registrar within one month.

ORDER FOR SUPPRESSION

[56] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.¹⁵

¹⁵ Immigration Advisers Licensing Act 2007, s 50A.

[57] There is no public interest in knowing the name of Ms Murthy's client, the complainant, or the details of her health.

[58] 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.

D J Plunkett
Chair