

IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2023] NZIACDT [8]

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
Dated 22 March 2023

REPRESENTATION:

Registrar: Self-represented

Complainant: Self-represented

Adviser: Self-represented

PRELIMINARY

[1] The complainant, BC, consulted the adviser, Nirmala Krishna Murthy, concerning obtaining residence. He alleges she filed a type of application which Immigration New Zealand (Immigration NZ) was not then processing, did not communicate with him and did not refund any of her fee when he terminated the engagement.

[2] A complaint by the complainant against Ms Murthy 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 she was negligent or breached the Licensed Immigration Advisers Code of Conduct 2014 (the Code), both being grounds for complaint under the Immigration Advisers Licensing Act 2007 (the Act).

BACKGROUND

[3] The complainant is a national of Ireland. He has held working visas since 2015.

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

[5] On 1 April 2020, Immigration NZ suspended selections from the pool of expressions of interest (expressions) in the skilled migrant category. Expressions filed from that date remained in the pool until the selection process resumed.

[6] On 18 September 2020, the complainant and Ms Murthy met in her office. He signed her service agreement. She agreed to process for him a skilled migrant residence application for a fee of \$4,025 (incl. GST). He paid the fee at the meeting. Ms Murthy says she gave him an invoice for \$4,025 (dated 18 September 2020) at the meeting, as well as a receipt (18 September 2020).

Expression of interest filed

[7] An expression was filed by Ms Murthy with Immigration NZ on 7 December 2020.

[8] The complainant sent an email to Ms Murthy on 27 January 2021 requesting a copy of the expression. He wanted to know if the application had been made. He said he had repeatedly rung but received no answer. Ms Murthy sent the complainant a copy of the expression on the same day. She would inform him as soon as Immigration NZ started selecting expressions.

[9] The complainant emailed Ms Murthy on 5 August 2021 querying the status of his residence application. He informed her that he had married a New Zealand woman and wanted to know if this would affect his application. Ms Murthy replied the next day to say she had updated his relationship status in the expression and would let him know as soon as Immigration NZ commenced the expression selection process.

[10] On 16 September 2021, the complainant asked Ms Murthy by email whether a partnership visa was the best option for residence, given that Immigration NZ was not then processing any residence applications. Ms Murthy immediately replied with information about her fee and asking him how long they had lived together. He responded on 23 September answering her question.

[11] On 14 October 2021, the complainant asked Ms Murthy to go ahead with the partnership visa application. He pointed out that his visa would expire on 30 December. She did not reply.

Complainant terminates engagement

[12] The complainant sent an email to Ms Murthy on 6 December 2021 terminating the service agreement on the ground that she had not fulfilled her obligations. She had failed to inform him at the commencement that Immigration NZ was not processing expressions. The complainant listed a number of other shortcomings of her service. In particular, he had received no updates from her and she did not return his phone calls. The only correspondence he had received was after he had made numerous enquiries. He expected reimbursement of \$4,025 by 17 December, otherwise he would take the matter to the Authority.

[13] Ms Murthy sent an email to the complainant on 7 December 2021 at 16:36. She said he was eligible for the 2021 resident visa. She would be happy to answer his queries.

[14] At 17:22 on the same day, Ms Murthy replied to the complainant's email of 6 December 2021. She said she had told him expressions were not being selected, but they could be filed and would be selected as soon as Immigration NZ commenced the process. She had been in regular touch with him. No refund was owed.

[15] The complainant responded to Ms Murthy on 17 January 2022. While she had completed the expression, it was not the best option for him moving forward. He was happy to pay the fee for the expression filed. The only communication was after numerous attempts from him and when she eventually responded, the information was

incomplete. She never contacted him regarding the expiry of his work visa and he sorted that out himself. He asked for a breakdown of the \$4,025 and to refund what did not relate to filing the expression.

COMPLAINT

[16] On about 1 May 2022, the complainant lodged a complaint against Ms Murthy with the Authority alleging:

- (1) Throughout the process, there were no updates or communications.
- (2) He had no idea Immigration NZ were not processing residence applications at the time.
- (3) After terminating the agreement, she refused a refund.

[17] The complainant asked for \$3,000 of the fee returned.

[18] The Authority required Ms Murthy's file on 25 May 2022, to be provided within five working days. She sent the file electronically on the same day.

[19] On 27 June 2022, the Authority wrote to Ms Murthy informing her of the particulars of the complaint and inviting her explanation.

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

Explanation from Ms Murthy

[21] Ms Murthy provided an explanation to the Authority on 27 July 2022:

- (1) At the time the complainant consulted her, Immigration NZ was accepting expressions.
- (2) She had now gone through the file and agreed to refund 50 per cent of the fee, being \$2,012.50. She apologised for the delay.
- (3) She recognised the shortfalls in customer service and was working to improve this and client communications. They had installed a new client service management system, HubSpot. It helped to set reminders and to maintain client communications. She had worked on improving their file management and the new system helped them to manage client files more systematically and efficiently.

- (4) She had been diagnosed with a [health condition disclosed], experiencing symptoms during July/August 2020 and recovering by July 2021. During this period, she did not work full time and relied on her staff to do the administration work, while she attended to the adviser's work. There were some customer service and administration errors.

[22] At the same time as sending her explanation, Ms Murthy sent copies of numerous additional documents to the Authority, being email communications between her and the complainant.

Complaint filed in the Tribunal

[23] The Registrar filed a statement of complaint (12 September 2022) in the Tribunal alleging against Ms Murthy negligence or alternatively breaches of the specified provisions of the Code:

- (1) Failing to charge fair and reasonable fees, in breach of cl 20(a).
- (2) Failing to provide invoices for the fees paid, in breach of cl 22.
- (3) Failing to promptly make a fair and reasonable refund, in breach of cl 24(a) and (c).
- (4) Failing to recognise the complainant's funds remained his property until payable and invoiced, in breach of cl 25(a).
- (5) Failing to withdraw the complainant's funds only when payable and invoiced, in breach of cl 25(e).
- (6) Failing to provide the Authority with a complete client file, in breach of cl 26(e).
- (7) Failing to maintain a well-managed filing system, in breach of cl 26(a) and (d).
- (8) Failing to confirm in writing to the client all material discussions, in breach of cl 26(c).
- (9) Failing to confirm to the client when the expression was filed and to provide timely updates, in breach of cl 26(b).

- (10) Failing to inform Immigration NZ that she was no longer representing the complainant, in breach of cl 28(b).

JURISDICTION AND PROCEDURE

[24] 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.

[25] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.¹

[26] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.² It has been established to deal relatively summarily with complaints referred to it.³

[27] 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

[28] The sanctions that may be imposed by the Tribunal are set out in the Act.⁵ The focus of professional disciplinary proceedings is not punishment but the protection of the public.⁶

[29] 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

¹ Immigration Advisers Licensing Act 2007, s 45(2) & (3).

² Section 49(3) & (4).

³ *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].

⁴ Section 50.

⁵ Section 51(1).

⁶ *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151].

⁷ *Z v Dental Complaints Assessment Committee*, above n 6, at [97], [101]–[102] & [112].

[30] The Tribunal has received from the Registrar the statement of complaint (12 September 2022), with supporting documents.

[31] The complainant responded on 25 October 2022 to Ms Murthy's reply to the statement of complaint. He said that he was quoted \$4,025 on the phone, but when he got there she asked for \$6,000. As he got up to leave, she agreed to honour the initial quote.

[32] On 20 October 2022, Ms Murthy replied to the statement of complaint. Her answers to the alleged breaches will be discussed below. At the request of the Tribunal, Ms Murthy provided further information on 20 and 21 February 2023.

[33] At the request of the Tribunal, the Registrar provided further information on 21 February 2023. This included information that Immigration NZ resumed selections from the skilled migrant expressions pool on about 24 October 2022.

ASSESSMENT

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

Fees

20. A licensed immigration adviser must:

- a. ensure that any fees charged are fair and reasonable in the circumstances

...

Invoices

22. A licensed immigration adviser must, each time a fee and/or disbursement is payable, provide the client with an invoice containing a full description of the services the fee relates to and/or disbursements that the invoice relates to.

Refunds

24. A licensed immigration adviser must:

- a. ensure that refunds given are fair and reasonable in the circumstances

...

- c. promptly provide any refunds payable upon completing or ceasing a contract for services.

Client funds

25. A licensed immigration adviser must, if taking payment for fees and/or disbursements in advance of being payable and invoiced:
- a. recognise that these client funds remain the property of the client until payable and invoiced
 - ...
 - e. withdraw client funds only when payments for fees and/or disbursements are payable and invoiced
 - ...

File management

26. A licensed immigration adviser must:
- a. maintain a hard copy and/or electronic file for each client, which must include:
 - i. a full copy of the client's application or other immigration matter
 - ii. copies of all written agreements and any changes to them
 - iii. copies of all written communications (including any file notes recording material oral communications and any electronic communications) between the adviser, the client and any other person or organisation
 - iv. copies of all invoices and receipts relating to the client
 - v. copies of all personal documents relating to the client supplied to the adviser, and
 - vi. evidence of the safe return of the client's original documents
 - b. confirm in writing to the client when applications have been lodged, and make on-going timely updates
 - c. confirm in writing to the client the details of all material discussions with the client
 - d. maintain a well-managed filing system
 - e. maintain each client file for a period of no less than 7 years from closing the file, and make those records available for inspection on request by the Immigration Advisers Authority, and
 - ...

Termination of services

28. A licensed immigration adviser must ensure that:
- ...

- b. where they cease to act for the client for any reason other than the completion of agreed services, they inform Immigration New Zealand or the Immigration and Protection Tribunal, as appropriate, that they are no longer representing the client, and

...

Ms Murthy's health

[35] In her submissions to the Authority (27 July 2022), Ms Murthy refers to her health (redacted) during July/August 2020 until recovering in mid-2021. She did not work full time and relied on her staff to undertake administration, while she attended to the adviser's work. No medical evidence was sent to the Authority. This is not a factor she mentioned in her submissions of 20 October 2022 to the Tribunal.

[36] Ms Murthy referred to this matter in the two earlier complaints upheld by the Tribunal.⁸ The Tribunal noted they provided some context but no defence to those complaints, as Ms Murthy herself acknowledged.

[37] It is not material to the Tribunal's assessment of the current complaint. If Ms Murthy wishes to rely on her medical condition at the sanctions stage of the Tribunal's process, she will have to produce medical evidence.

[38] The first five heads of complaint dealing with Ms Murthy's fee are conveniently dealt with together.

- (1) *Failing to charge fair and reasonable fees, in breach of cl 20(a)*
- (2) *Failing to provide invoices for the fees paid, in breach of cl 22*
- (3) *Failing to promptly make a fair and reasonable refund, in breach of cl 24(a) and (c)*
- (4) *Failing to recognise the complainant's funds remained his property until payable and invoiced, in breach of cl 25(a)*
- (5) *Failing to withdraw the complainant's funds only when payable and invoiced, in breach of cl 25(e)*

[39] The first head alleges that Ms Murthy's fee was not fair and reasonable. The fee of \$4,025 was for the expression and a subsequent residence application on the

⁸ *LS v Murthy* [2022] NZIACDT 5; *LS v Murthy* [2022] NZIACDT12; *SU v Murthy* [2022] NZIACDT 17; *SU v Murthy* [2022] NZIACDT 22.

assumption that the expression led to an invitation to apply for residence. The Tribunal accepts that a fee of \$4,025 was reasonable for such a combined service.

[40] The fee became unreasonable only when the complainant terminated Ms Murthy's engagement, as the residence work could not then be undertaken. At that point, she should have made an appropriate refund. However, that wrong concerns Ms Murthy's obligations concerning a refund, which the Tribunal will shortly assess. The failure to charge a reasonable fee (because a reasonable refund is not given) is the same wrong as the failure to make a reasonable refund. While Ms Murthy has admitted breaching cl 20(a), the Tribunal declines to uphold the breach. The first head is dismissed.

[41] In the second head, the Registrar alleges Ms Murthy did not provide an invoice to the complainant. He apparently paid her \$4,025 by bank transfer at their meeting on 18 September 2020. Ms Murthy says she gave him a hard copy invoice at the same time. The complainant says he was not provided with an invoice at any time. The Registrar states Ms Murthy did not provide an invoice to the Authority when she sent her file. The Tribunal notes though that an invoice is listed as an attachment in her email of 25 May 2022 to the Authority. Whether or not she actually attached it, it appears to have existed. She will be given the benefit of the doubt that such a document existed and was given to the complainant. The second head is dismissed.

[42] The Registrar further alleges Ms Murthy failed to provide an invoice when requested by the complainant at the termination of the agreement. The Tribunal can identify no such request. The request he made on 17 January 2022 was for a breakdown of her fee, not for an invoice. In any event, the Tribunal has found that she gave him an invoice on 18 September 2020.

[43] The third head alleges that Ms Murthy failed to promptly make a fair and reasonable refund. The complainant terminated Ms Murthy's services on 6 December 2021 and requested a full refund. She eventually refunded half the fee (\$2,012.50) on 27 July 2022, after being notified of the complaint. In her submissions to the Tribunal, Ms Murthy acknowledges the breach and apologises. Despite her admission that the refund is not fair and reasonable, it is not established that a refund of half the fee is not an appropriate amount given that the expression part of the service was completed. There is no breach of cl 24(a). Plainly, the refund was late. This is a breach of cl 24(c). The third head is partially upheld.

[44] The fourth and fifth heads of complaint are based on Ms Murthy's statement to the complainant on 7 December 2021 (at 17:22). In response to the termination and request for a refund, she said she did not believe any refund was owed as she had "extended" (presumably, performed) the service as set out in the service agreement.

[45] However, Ms Murthy had not finished her services as no residence application had been made. Under the terms of her agreement, the fees would not have become payable until all the contracted work (the expression and residence) was finished, as the agreement did not provide for payment by instalments. The monies paid in advance therefore remained the property of the complainant. While she had earlier invoiced these monies, they were not payable until the residence service was completed.

[46] Ms Murthy accepts responsibility and apologises for the error. She has breached cl 25(a) and (e). The fourth and fifth heads are upheld.

(6) *Failing to provide the Authority with a complete client file, in breach of cl 26(e)*

(7) *Failing to maintain a well-managed filing system, in breach of cl 26(a) and (d)*

[47] The sixth head alleges Ms Murthy failed to provide the Authority with a complete client file. On 25 May 2022, the Authority required Ms Murthy to provide her client file within five working days. She did so on the same day. It did not contain about 17 email communications with the complainant which she later sent to the Authority on 27 July 2022. Ms Murthy does not expressly admit this breach in her submissions of 20 October 2022. Her failure to copy the complete file to the Authority within the deadline set is a breach of cl 26(e). The sixth head is upheld.

[48] The seventh head alleges Ms Murthy failed to maintain a well-managed filing system. The Registrar identifies the missing documents as invoices, records of material discussions and records of phone calls.

[49] The obligation to maintain a well-managed "filing" system (cl 26(d)) is not an obligation to create documents (such as notes of discussions), but an obligation to retain, organise and be able to conveniently retrieve such hard copy and electronic documents as are created or obtained from the client or others. There are other specific provisions in cl 26 and elsewhere in the Code requiring the creation of documents (for example, cls 26(b) and (c), 18(a), 22 and 23).

[50] Ms Murthy appears to have had an invoice. While she did not create file records of discussions, that is not a breach of cl 26(a) or (d) or any other provision of the Code.

[51] However, Ms Murthy's failure to send a large number of emails to the Authority on 25 May 2022 shows she did not have a well-managed filing system. In her statement of 27 July 2022, Ms Murthy apologises for missing the emails. Her acquisition of new client management software acknowledges this failure. This is a breach of cl 26(d). The seventh head is upheld.

(8) *Failing to confirm in writing to the client all material discussions, in breach of cl 26(c)*

(9) *Failing to confirm to the client when the expression was filed and to provide timely updates, in breach of cl 26(b)*

[52] These heads concern Ms Murthy's inadequate communications with the complainant. She accepts that some phone calls between the complainant and her office are missing which she has worked hard to remedy by installing new software. This is not actually a breach of the Code. She is not required to have a file note of every telephone discussion. What the Code requires is that Ms Murthy write to her client confirming all material discussions.

[53] At their meeting on 18 September 2020, Ms Murthy and the complainant must have discussed whether he met the criteria for the skilled migrant category, yet there was no written communication from her confirming the advice she must have given. Ms Murthy says the complainant requested an assessment of other options and she reviewed the file and advised him of the option of a partnership-based visa.⁹ She does not say when this happened. Ms Murthy was required to confirm any such oral advice in writing.

[54] Ms Murthy's failure to confirm in writing advice given by phone or at their meeting is a breach of cl 26(c). The eighth head is upheld.

[55] The ninth head concerns Ms Murthy's failure to confirm to the complainant when the expression was lodged and then to update him from time to time, even if it was only to say that Immigration NZ had extended the moratorium on selections. When the expression was lodged in December 2020, she said her staff phoned the complainant to confirm this, but they did not give him a copy of the expression. She says they phoned him several times to update him, telling him that the selection process had not resumed.

⁹ Statement of Ms Murthy (27 July 2022) at [9].

[56] Such phone calls are not sufficient. Ms Murthy had to inform the complainant in writing when the expression was lodged and then to update him from time to time (even if no progress was being made). Her failure to do so is a breach of cl 26(b). The ninth head is upheld.

(10) Failing to inform Immigration NZ that she was no longer representing the complainant, in breach of cl 28(b)

[57] It is alleged that Ms Murthy failed to inform Immigration NZ immediately following the complainant's email of 6 December 2021 terminating her authority, that she was no longer representing him. She says she was unsure who to inform as the expression had not been allocated to an immigration officer.¹⁰ Ms Murthy is an experienced adviser and will be well aware of the existence of Immigration NZ's general email address(es) and the call centre. She apologises for her failure to inform Immigration NZ. This is a breach of cl 28(b). The 10th head is upheld.

OUTCOME

[58] The complaint is substantially upheld. The third, fourth, fifth, sixth, seventh, eighth, ninth and 10th heads are fully or partially upheld. Ms Murthy has breached cls 24(c), 25(a) and (e), 26(b), (c), (d) and (e), and 28(b) of the Code.

SUBMISSIONS ON SANCTIONS

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

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

[61] This is the fourth complaint upheld against Ms Murthy. Consideration will be given to the suspension or cancellation of Ms Murthy's licence and/or an order preventing her from reapplying for a licence for a period. This could be accompanied by a condition permitting Ms Murthy to hold a provisional licence and requiring her to be supervised. Submissions from the parties are expressly invited on such options. Ms Murthy should inform the Tribunal of any proposal for supervision, including the name of a supervisor.

¹⁰ Submissions (20 October 2022) at item 25.7.

Timetable

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

- (1) The Registrar, the complainant and Ms Murthy are to make submissions by **14 April 2023**.
- (2) The Registrar, the complainant and Ms Murthy may reply to submissions of any other party by **28 April 2023**.

ORDER FOR SUPPRESSION

[63] The Tribunal has the power to order that any part of the evidence or the name of any witness not be published.¹¹

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

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

D J Plunkett
Chair

¹¹ Immigration Advisers Licensing Act 2007, s 50A.