**IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2020] NZIACDT 10

Reference No: IACDT 002/19

| | |
|---|---|
| **IN THE MATTER** | of a referral under s 48 of the Immigration Advisers Licensing Act 2007 |
| **BY** | **THE REGISTRAR OF IMMIGRATION ADVISERS** Registrar |
| **BETWEEN** | **IMMIGRATION NEW ZEALAND (MICHAEL CARLEY)** Complainant |
| **AND** | **BENJAMIN NEIL STEWART DE'ATH** Adviser |

---

**DECISION**
**Dated 19 February 2020**

---

**REPRESENTATION:**

| | |
|---|---|
| Registrar: | Self-represented |
| Complainant: | Self-represented |
| Adviser: | P Moses, counsel |

## PRELIMINARY

[1] The complainant, Mr Michael Carley, an Immigration New Zealand manager, has made a complaint against Mr Benjamin Neil Stewart De'Ath, an adviser. It concerns the tone and content of Mr De'Ath's communications with Immigration New Zealand.

[2] The complaint was made to the Immigration Advisers Authority (the Authority). It was referred by the Registrar of Immigration Advisers (the Registrar), the head of the Authority, to the Tribunal. It alleges that Mr De'Ath's communications with Immigration New Zealand are unprofessional and disrespectful, in breach of the Licensed Immigration Advisers Code of Conduct 2014 (the Code).

[3] It is relevant to note that this is not the first complaint made to the Tribunal concerning Mr De'Ath's correspondence with Immigration New Zealand. The Tribunal upheld an earlier complaint.[1] Indeed, Mr De'Ath has a poor disciplinary record, as two other complaints against him have also been upheld.[2]

[4] The essential issue here, however, is whether any unprofessional communications which are the subject of this complaint warrant a disciplinary process.

## BACKGROUND

[5] Mr De'Ath is a licensed immigration adviser. He is a director of The Regions Immigration Law, based in Hamilton.

[6] A national of the Philippines, Mr B, first arrived in New Zealand in 2015 and subsequently held essential skills work visas to work as a dairy worker on farms.

[7] On 9 March 2018, Mr De'Ath lodged an essential skills work visa application on behalf of Mr B as his then current work visa was about to expire.

[8] Immigration New Zealand sent a letter to Mr De'Ath on 19 March 2018 stating that Mr B's offer of employment did not comply with all the relevant employment and immigration laws. In particular, the accommodation deduction in his employment contract had doubled from $100 to $200. The agency was not satisfied that this increase was reasonable and met immigration instructions. His comments were invited.

---

[1] *Immigration New Zealand (Foley) v De'Ath* [2018] NZIACDT 44 & 51.
[2] *Green v De'Ath* [2018] NZIACDT 43 & 50, *Immigration New Zealand (Carley) v De'Ath* [2018] NZIACDT 45, [2019] NZIACDT 1.

[9] On 27 March 2018, Mr De'Ath responded to Immigration New Zealand's letter. He advised that the accommodation was being deducted at a market rate in line with Inland Revenue's policy statement. Statistics concerning rural rents in Southland obtained from a government department were sent to Immigration New Zealand.

*Work visa declined*

[10] Immigration New Zealand declined Mr B's work visa on 4 April 2018 on the ground that his employment agreement was not compliant with employment and immigration law, due to the significant increase in the accommodation deduction. There was no evidence of any improvements to the accommodation that could have warranted such an increase.

[11] Mr De'Ath sent an email on 16 April 2018 to an immigration manager, Ms R, asking for her view on the case. He said that the accommodation deduction was at the market rate, as shown in the evidence previously sent. The employer had taken steps to ensure compliance with the relevant tax policy and so had adjusted the accommodation cost to meet the market rate. It appeared that Immigration New Zealand was missing the fact that the earlier deduction was not at the market rate. It was focusing on improvements to the accommodation, rather than on the reasonableness of the deduction.

[12] According to Mr De'Ath, the quality of the accommodation was not the issue. This was where the assessment had gone off course and resulted in an unfair and incorrect outcome. As Immigration New Zealand's decision affected dozens if not hundreds of his upcoming applications, he asked for advice on where he had gone wrong, or for Immigration New Zealand to roll back the decision.

[13] Ms R replied on 19 April 2018 advising that she had looked at the reasons for the decline which were sound and clearly articulated. If Mr B was not satisfied, he could lodge a complaint and it would be looked at further.

[14] Mr De'Ath then sent an email to Ms R on 23 April 2018 advising that Immigration New Zealand's comments did not make sense, because it was the earlier accommodation deduction that was unreasonable and not at the market rate. Now the employer was being punished for being compliant. He did not think a complaint would assist, so he would advise the employer and Mr B to simply relodge the application.

[15] Mr De'Ath sent a further email to Ms R on the same day questioning whether that was the best way ahead.

[16] Mr De'Ath then sent another email on 23 April 2018 to Ms R (*verbatim*):

> … we provided facts and evidence to show that the deduction is reasonable (as it is within market rate) and lawful (as evidenced by the IRD policy).
>
> On the otherhand – INZ provided no basis to its claim – it just didn't *like* the situation, and despite the evidence provided, declined the application. INZ can do what ever it wants, i accept that within the realm of temporary entry visa instructions – INZ visa officers have a licence to do whatever they want and get away with it, as we have seen in this application and then the management team get in behind what is in fact a shonky decision all the while the employer and employee are left hanging but a bad bureaucratic outcome.

[17] According to Mr De'Ath's email, Immigration New Zealand had not relied on any evidence to support the claim but merely on its own opinion, which was a breach of process and unfair decision-making. Ms R had the power to reopen and allocate the case to a new officer and address the decision with the previous officer as a learning opportunity. The employer also thought the deduction was reasonable and in line with the market rate. These points made it hard for Immigration New Zealand to defend the decision.

[18] Mr De'Ath added that Immigration New Zealand had got caught up in improvements and value increases over 12 months and forgotten that the accommodation was not at the market rate 12 months ago. The employer was within his rights to set the value of the accommodation at the market rate. By processing the application in this manner, the decline itself was unreasonable and unfair. He asked again for the case to be reopened as Mr B and the employer should not have to pay a further fee and waste any more time because of Immigration New Zealand's mistake.

[19] Ms R advised Mr De'Ath on 25 April 2018 that she had forwarded his email to the complaints team and someone would be in contact as soon as possible.

[20] On 30 April 2018, Mr De'Ath lodged a new essential skills work visa application for Mr B, with what is assumed to be an identical accommodation deduction.

[21] As Mr B's visa had expired while waiting for the outcome of his work visa application, he was issued with an interim visa by Immigration New Zealand on 2 May 2018. It allowed him to continue working lawfully for his employer while a decision on the new visa application was made.

[22] On 24 May 2018, Mr De'Ath sent a long email to Ms R. He asserted that Ms R had contradicted herself in the reasons given for the decline. He asked her to "re-articulate" a number of excerpts from her earlier communications. He argued that the immigration instructions and the legislation supported his interpretation. It is not clear whether the full email has been produced to the Tribunal.

[23] Ms R replied on 26 May 2018 to advise that she would not re-articulate the complaint process since it was clear. It was noted that a new application had been made.

*Work visa approved*

[24] On 31 May 2018, Immigration New Zealand approved Mr B's new work visa application.

[25] Mr De'Ath sent an email to Ms R on 6 June 2018 quoting from their earlier communications. He asked why she was inviting further inquiries if she had no intention to answer them. Mr B had received a visa and the first decline had been overturned with a submission identical to that previously declined, but it had cost Mr B and the employer $1,798 in extra costs. This had given them stress.

[26] On 12 June 2018, Mr De'Ath sent an email to Ms R with two questions (*verbatim*):

> To whom do you report at Inz?
>
> On what date did you contract into starting to perform the role of acting immigration manager, and what role were you performing prior to that?

[27] Later on the same day, Mr A, a senior manager at Immigration New Zealand sent an email to Mr De'Ath introducing himself. He said he had discussed the situation with Ms R and was seeking advice, given that the issues were likely to be repeated in the future. It would be good if the correct approach was made clear for future applications.

[28] Mr De'Ath sent an email to Mr A on 13 June 2018 stating that there were two issues, the first being the unresolved complaint and the second being the dismissive and disrespectful approach taken by Ms R.

[29] Later the same day, Mr De'Ath said in a further email to Mr A (*verbatim*):

> The non response, an inaction which is inadvertently proposed following the disappointing conduct of senior recipients of public funds is disappointing this is not going away.

[30] Mr A responded on the same day to advise that he would reply within the next seven to 10 days.

[31] This prompted Mr De'Ath, in his third email that day, to reply to Mr A (copied to an opposition Member of Parliament) expressing bemusement as to what would take seven to 10 days, adding (*verbatim*):

> In light of delegated decision maker decision making criteria and contracted roles – I suggest this is a crude attempt at delaying accountability in light of [Ms R]'s omissions and false statements.

> Please address this third tier of concerns in light of this.
>
> The first and second tier of concerns are still unanswered – i assume you can read previous emails?
>
> [Mr W], this is where public funds are being spent. This is a farce.

[32] Mr A replied by email to Mr De'Ath on 14 June 2018 stating that he was seeking advice on the concerns raised and would send a response in seven to 10 days.

[33] Mr De'Ath replied to Mr A on 20 June 2018 (*verbatim*):

> We are now at day 8 of [Mr A]'s 7 to 10 day requested window to investigate this matter.
>
> I have researched the matter further, specifically the requirements and expectations of [Ms R]'s role following her written statements and omissions.
>
> I cite the new Minister of Immigration when he recently stated: New Zealand's immigration system "lacks integrity" and is so financially hamstrung it can't investigate fraud and exploitation cases,
>
> …
>
> [Mr A], I would like to point out that if IM's such as [Ms R] are now engaging in practices which *compels the placement of system resources (yourself, myself, the clients and the CFT process)* as opposed to open discussion and addressing the points asked of [Ms R] (which she invited be asked if I had further queries) I fear that this compounds the concerns of the minister as cited above.
>
> I fear it will further strain the resources to compel potentially un-necessary complaints – and if internal process and competency issues with senior INZ staff are not to be reviewed – what hope can we as stake holders have that more serious issues such as fraud and under funding/poor resource allocation of the Immigration department, can be redressed?
>
> Equally – the Immigration system lends itself to "voiceless victims" this is to say those effected by immigration decisions often do not have the legal, financial or time requirements to understand, much less challenge decision making – the work visa holder when subject to a inequitable decision generally looses their work rights and income, the employer has to move on to run their busy business, and the lawyer/adviser tends to move on to a new fee paying client, once the "victims" ability to fund ongoing dialogue with INZ are removed.
>
> I suggest [Ms R]'s actions of refusing to look into such concerns and written contradictions of which she was the author, is a crude further exploitation of the voiceless victim nature of the system – all of which would have gone unchecked had I not been willing to take a stand.
>
> I invite your comment on this.
>
> As you contemplate this, I would like to remind you of comments which were made by The Auditor General's in the 2009 ("Inquiry into Immigration Matters" 2) where it was stated the inquiry shows that – at that stage at least – a number of serious concerns regarding the quality of immigration decision-making existed. Findings established excessive variation between branches, targets focused on quantity not quality, a culture where staff do not feel safe enough to raise concerns, a 'silo culture' and poor management practices and poor management of lack of integrity allegations.

[34] Mr A replied by email on 22 June 2018 stating he would address all Mr De'Ath's issues in his substantive response. However, he could not do it within the earlier time frame. He was seeking advice centrally. Mr A apologised for the delay. He was open to a telephone discussion.

[35] On 25 June 2018, Mr De'Ath sent a further email to Mr A (*verbatim*):

> I set out for discussion points for matters which are as yet un-addressed.
>
> 1) My May 24th Email which I point out to [Ms R] the content and her "response" is contradictory and flawed.
>
> This has still not been addressed.
>
> 2) [Ms R], in the response had invited I seek clarify and further information if I required.
>
> When I did as [Ms R] requested, on 26 May [Ms R] refused to rearticulate or clarify her contradictory and incorrect statements.
>
> …
>
> 4) following the non response, on June 12th I asked for clarification whom [Ms R] reported to and for how long she had entered into the contracted agreement to perform the acting IM role.
>
> You then became involved, you promptly asked for "7 to 10 days" – this was a time frame you were unable to adhere to.
>
> …
>
> 5) I am concerned [Ms R] has breached her contractual agreements to engage with stakeholders to provide information, accuracy and competence for which she is paid public funds.
>
> 6) I am concerned that you [Mr A] as a branch manager need to seek guidance, on very straightforward actions and omissions by your staff, and further delay accountability and acknowledgement of error.
>
> …
>
> In this instance, I am not so naïve to think that this is an isolated incident, [Ms R] approached the situation as if she were insulated from having to substantiate her comments – refusing to address and support her positions when they sought to suggest instructions would be written, or could be interpreted, in a manner to compel a situation of IRD non compliance – an absurdity which belies words as to how an IM could reach such a position without understanding the infancy of the nature of the system we work within.
>
> But for me, taking a stand here, this would have gone unchecked.
>
> 7) The new MOI has acknowledged the system lacks integrity, I suggest what has occurred is a poignant example of this, I have invited feedback on this specific point – this is said to have been occurring for an extended period when corroborated with the Attorney General's 2009 comments.
>
> Given the absence of a shred of ownership or responsibility, what should have been a simple acknowledgement of error and written apology, has become a touch more serious – and I fear reflective of what will be occurring across a large sample size, given the "voiceless victims" nature of the Immigration system, and

> the sheer volume of work IMs are responsible for overseeing – when their professional calibrations are out of sync with the purpose of the Immigration Act itself, the outcomes will be far-reaching – even if seldom reported.

[36] Mr A sent an email on 28 June 2018 to Mr De'Ath thanking him for their "robust conversation". He set out in some detail his response to the "Discussion Points" Mr De'Ath had sent. He explained Ms R's process in handling the matter. He assured Mr De'Ath that her intention was not to be dismissive and disrespectful. Her wording could have been softened or expanded upon. He offered a sincere apology for these concerns. In summary, Mr A stated that he regretted any offence. The outstanding matter of how the instructions were applied in this case was under advice and he would send a detailed response when it was to hand, hopefully the following week.

[37] On 4 July 2018, Mr De'Ath sent a further email to Mr A (*verbatim*):

> …
>
> I copy [Ms R] in here to give her a chance to provide her own feedback.
>
> In the investigation which [Mr A] has conducted to this point, it has been suggested that [Ms R] has provided a statement which suggests
>
> *When [Ms R] received your message of 24 May requesting rearticulation/clarification of various matters, she reviewed the earlier correspondence and application related information and felt that these were matters (as they related to the issue of deductions) that had been previously canvassed and responded to*
>
> [Ms R] can you please confirm this is your position?
>
> If this is accurate, I submit this is a very poor reflection of you ability to decipher text from a page?
>
> How could it ever be believed that matters had been addressed when you received, in very clear writing, that you had contradicted yourself and your response did not come close to addressing the matters under discussion.
>
> Had matters been addressed you would have not received communication from me in the first place.
>
> It has **still** not been addressed why, in [Ms R]'s stage 1 complaint response, she invited any further questions, if she had no intention to answer them?
>
> I acknowledge [Mr A] has offered an apology
>
> *Ben, I am offering you and your client a sincere apology for the concern you have felt over these matters. We strive to always perform at or beyond what is expected of us so are disappointed if it's felt we have not measured up to these standards*
>
> This does not however acknowledge the damage done to the employer and the employee, the degenerative effect on Immigration system integrity which manifests itself if senior Immigration officials struggle to understand what is being said to them/decipher text from a page.
>
> This does not acknowledge the role [Ms R] has contracted into perform, and that it now appears it has not been performed in this instance.

[Mr A] please note [Ms R]'s performance in other areas is not under discussion, we are only discussing this incident and the omissions to redress it in the following month, thus any comments about how [Ms R] is held by her colleagues is inappropriate.

As previously stated, if this is occurring in once case which happens to land with me, I fear how many other cases it might be occurring in, which are not being reported given the nature of the Immigration system.

In the attached role description, [Ms R] has contracted into perform tasks including, but not limited to:

**I offer the chance to reply to the following:**

1) I am concerned there has been a possible breach of gaining insight into customer needs – customers need their written correspondence to be understood (and answered) Neither has occurred in this instance.

2) I am concerned there has been a possible breach of "taking ownership and action on challenges"

While in this case the "challenge" was to simply clarify the contradiction and mis-information provided in the stage 1 complaint.

I suggest an apology does not turn the clock back, and that ownership, even to this point has not occurred.

3) While [Mr A]/onshore support has been involved, I suggest the decision quality here is still abysmal – this was cultivated by a mis-interpretation by INZ that IRD compliance was, or could ever be, anything other than mandatory, this was then reiterated in a complaint response.

I must add, as we still await those [Mr A] is in consultation with on the catalyst matter to come back to us – the contemplation that any delegated decision is ever going to come back and say IRD compliance is not required is a farce, as I said to you on the phone [Mr A] we both know what their answer is going to be.

I would go as far as to say that anyone whom [Mr A] is in communication with onshore about this matter, might as well tender their resignation if they have needed all of this time to consider where complying with NZ tax rules and regulations is in someway optional.

This is getting serious, and this will be my last olive branch on the matter, the defensive and dismissive approach has to stop, if this continues, this matter will be moved on to any opposition politicians who will take a look at it and the Ombudsman.

I suggest what is required moving forward is the acknowledgement of serious error and if not for my unwillingness to waiver seeking accountability, this would have been ignored – which I suggest is the standard MO given most LIA's do not have the resources to challenge system integrity matters and the victims (employers and employees) have other pressing concerns they must move onto, when short changed.

I suggest a written apology is appropriate, to both myself and the employer and employee, and a censure internally (which I understand will not be shared with me) – if it is upheld following your review of this content and the cited contracted role description tangents have not been adhered to.

[38] On 11 July 2018, Mr A set out in an email to Mr De'Ath Immigration New Zealand's position. He had received advice that the accommodation deduction was

reasonable and met the immigration instructions. The decision to decline was therefore incorrect and a sincere apology was offered to Mr B and his employer. The errors had been reviewed and the learning fed back to the staff. Mr B would be offered a refund of the work visa application fee. He had set out Immigration New Zealand's position in his email of 28 June 2018 and expanded on that in the email of 11 July.

**COMPLAINT**

[39] Immigration New Zealand's complaint to the Authority against Mr De'Ath was dated 16 July 2018. It alleged that a manager, Mr A, had been unfairly targeted, and that aspects of the communications were regarded by Ms R as being antagonistic, intimidating and not in proportion with the issue at hand. Despite attempts to engage in a dialogue to resolve the concerns and apologise for any errors, Mr De'Ath continued to be hostile and unprofessional.

[40] The Authority wrote to Mr De'Ath on 30 November 2018 formally advising him of the complaint, setting out the details and inviting his explanation.

*Explanation from Mr De'Ath*

[41] Counsel for Mr De'Ath, Mr Moses, replied on 21 December 2018 to the Authority. It was accepted that some of the language used by Mr De'Ath would have been perceived as unwelcome or offensive, and as unduly personal and abrasive. He could have expressed equally clear and forceful criticism of Immigration New Zealand without the same degree of abrasiveness.

[42] It needed to be borne in mind that the initial decline by Immigration New Zealand seriously prejudiced and inconvenienced Mr B and his employer. The decline was of major consequence to them. Mr B was faced with having to return to his home country at a not insignificant cost. The farmer employer was faced with having to personally cover the shifts Mr B was meant to work. Dairy farmers already had a punishing schedule, so this was frustrating and could have undermined their ability to safely and profitably manage the farm. Mr De'Ath was instructed by both of them to resolve the situation and ensure that Immigration New Zealand was held accountable for the inadequate and unreasonable decision.

[43] Mr De'Ath was, in good faith, reflecting his clients' frustration with Immigration New Zealand's attitude, in order to advance their interests.

[44] Against that backdrop, the strong language and forceful advocacy was easily understandable. Mr De'Ath was professionally required to pursue the matter vigorously. As a result of that advocacy, Mr B was eventually granted a visa and offered an apology.

[45] It was noted by Mr Moses that Mr De'Ath used no profanity or personal threats.

[46] The language used by Mr De'Ath was more robust and abrasive than many skilled and experienced advocates would use. Suggesting a manager was having difficulty deciphering text was neither ideal nor helpful. It did not advance the complaint, nor enhance an advocate's working relationship with Immigration New Zealand. The correspondence did not amount to 'best practice'.

[47] According to Mr Moses, a degree of leeway in relation to the use of robust language and criticism, which might be seen as offensive, was necessary. The elevation of the gravity of what was merely abrasive criticism to the level of disciplinary offending, would have a chilling effect on the ability of advisers to criticise Immigration New Zealand for failures. Criticism of public officials was an important aspect of professional practice.

[48] To put the matter in perspective, the officer and two managers had been quite fundamentally mistaken. It took three months and a significant amount of work for Mr De'Ath to rectify this.

[49] Mr Moses acknowledged that Mr De'Ath was on a 'learning curve'. The correspondence in this complaint occurred after filing of the earlier complaint concerning his communications, but before it was decided by the Tribunal. Mr De'Ath was now well aware of the warning given by the Tribunal and understood the need to moderate his language in communications with Immigration New Zealand.

[50] It was contended by Mr Moses that Mr De'Ath's conduct did not cross the disciplinary threshold.

*Complaint referred to Tribunal*

[51] The Registrar referred the complaint to the Tribunal on 15 January 2019. The following breach of the Code is alleged:

(1) communicating with Immigration New Zealand in a manner which was unnecessarily confrontational, abrasive and accusatory, in breach of the cl 1 obligation to be professional and respectful.

**JURISDICTION AND PROCEDURE**

[52] 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 Immigration Advisers Licensing Act 2007 (the Act):

(a) negligence;

(b) incompetence;

(c) incapacity;

(d) dishonest or misleading behaviour; and

(e) a breach of the code of conduct.

[53] The Tribunal hears those complaints which the Registrar decides to refer to the Tribunal.[3]

[54] The Tribunal must hear complaints on the papers, but may in its discretion request further information or any person to appear before the Tribunal.[4] It has been established to deal relatively summarily with complaints referred to it.[5]

[55] 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.[6]

[56] The sanctions that may be imposed by the Tribunal are set out in the Act.[7] The focus of professional disciplinary proceedings is not punishment but the protection of the public.[8]

[57] 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.[9]

[58] The Tribunal has received from the Registrar the statement of complaint (15 January 2019), with paginated supporting documents.

---

[3] Immigration Advisers Licensing Act 2007, s 45(2) & (3).
[4] Section 49(3) & (4).
[5] *Sparks v Immigration Advisers Complaints and Disciplinary Tribunal* [2017] NZHC 376 at [93].
[6] Section 50.
[7] Section 51(1).
[8] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [97], [128] & [151] (citation omitted).
[9] *Z v Dental Complaints Assessment Committee*, above n 8, at [97], [101]–[102] & [112].

[59] There are no submissions from the complainant.

[60] On behalf of Mr De'Ath, Mr Moses has filed a statement of reply (20 February 2019).

[61] No party has sought an oral hearing.

## ASSESSMENT

[62] The Registrar relies on the following provision of the Code:

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

*(1) Communicating with Immigration New Zealand in a manner which was unnecessarily confrontational, abrasive and accusatory, in breach of the cl 1 obligation to be professional and respectful*

[63] The Registrar relies on extracts from numerous emails Mr De'Ath sent to various Immigration New Zealand managers, some of which are lengthy, but he does not identify the particular words, phrases or sentences alleged to be confrontational, abrasive and accusatory. This would have been helpful.

[64] It is though obvious that Mr De'Ath tends to 'wear his heart on his sleeve'. He is a passionate, forceful and energetic advocate. That is to his credit.

[65] Unfortunately, Mr De'Ath does not know where the boundary between vigorous advocacy and unprofessional communication lies. He is emotive, intemperate, arrogant and lacks objectivity in his communications with Immigration New Zealand. Mr De'Ath is disrespectful and readily indulges in demeaning identified officers of the agency, gratuitously questioning their experience, suitability for their position, intelligence and level of literacy.[10] In addition to expressly questioning their personal qualities, he describes the standard of their work in extravagant terms, such as shonky, crude, absurd and farcical.

[66] It is somewhat self-evident that his correspondence is unprofessional. It is unnecessarily confrontational, abrasive and accusatory, as alleged by the Registrar. But

[10] Mr De'Ath's emails 12, 13 (3rd email), June and 4 July 2018.

the issue for me is whether it crosses the disciplinary threshold.[11] Does it justify a formal finding of unprofessional conduct, whether or not a sanction is subsequently imposed?

[67] Mr De'Ath's remarks about Immigration New Zealand's managers were not malicious. There is no reason to attribute to him ill-will or spite towards particular officers. There were no profanities. The officers may have taken offence, but I do not regard the communications as offensive. A comment regarded by the recipient as hurtful may be unprofessional, but that will not of itself warrant disciplinary action. Unlike the earlier *Foley* complaint upheld, there were no threats.

[68] It is appreciated that there is a lower disciplinary threshold for Mr De'Ath in respect of his communications than would be the case for other advisers, since a complaint regarding his communications with Immigration New Zealand has been upheld before. He is expected to have learned a lesson from the earlier complaint.

[69] However, as Mr Moses observes, the communications at issue here, in April to July 2018, while after the earlier complaint had been referred to the Tribunal, were before it had been upheld and a warning issued to him along with other sanctions. According to Mr Moses' submissions to the Authority, Mr De'Ath has been on a learning curve since the earlier complaint was raised and even before the Tribunal had issued its decision, he had modified his approach. He did not repeat the errors which led to the *Foley* complaint.

[70] To some extent, I think that Mr Moses is correct. Mr De'Ath though has, or at least did in mid-2018, have some distance on the curve yet to climb to achieve a professional standard in correspondence with Immigration New Zealand.

[71] There is another factor. Mr De'Ath was right and Immigration New Zealand was wrong in the initial decision concerning Mr B. Mr De'Ath had explained the reasonableness of the accommodation deduction as early as his reply of 27 March 2018 to Immigration New Zealand's letter of 19 March 2018 raising a concern about the deduction. Yet the agency overlooked or misunderstood his argument, wrongly declined the application and did not correct the mistake until 31 May 2018, two months later. The matter was not complex. A level of frustration on Mr De'Ath's part was understandable.

[72] While an interim visa had been granted in the meantime, both Mr B and the employer were left uncertain and anxious about the outcome. There is a kernel of truth to Mr De'Ath's criticism of the agency's prolonged resistance to his argument through

[11] *Orlov v New Zealand Law Society* [2012] NZHC 2154 at [79]–[80]; *Liston v Director of Proceedings* [2018] NZHC 2981 at [42]–[44].

various layers of management, though I regard as gratuitous his personalised criticism of individual officers.

[73] I also take into account Mr Moses' submission that criticism of public officials is an important aspect of professional practice. I have said this before.[12] Professionals will occasionally use stronger and more emotive or abrasive language than is desirable. As Mr Moses says, it is a result of both human nature and the importance of the matters at hand. It can occur in the energetic pursuit of a client's best interests. But there are limits. While vigorous advocacy will usually be in the client's best interest, gratuitous remarks about a decision-maker's level of intellect will never be.

*Conclusion*

[74] Mr De'Ath's correspondence with Immigration New Zealand is unprofessional, but it is not of sufficient gravity to warrant a disciplinary process. The threshold is not met, despite Mr De'Ath having been disciplined in the past for unprofessional communications with the agency.

**OUTCOME**

[75] The complaint is dismissed.

D J Plunkett
Chair

[12] *Immigration New Zealand (Foley) v De'Ath* [2018] NZIACDT 51 at [32], *Immigration New Zealand (Calder) v Horan* [2019] NZIACDT 13 at [43].