BEFORE THE IMMIGRATION ADVISERS COMPLAINTS AND DISCIPLINARY TRIBUNAL

Decision No: [2013] NZIACDT 27

Reference No: IACDT 026/11

IN THE MATTER	of a referral under s 48 of the Immigration Advisers Licensing Act 2007
BY	**Immigration Advisers Authority** Authority
BETWEEN	**Chantal Geldenhuys** Complainant
AND	**Christine Lai Chun Yap** Adviser

DECISION

REPRESENTATION:

Complainant: In person

Adviser: In person

Date Issued: 12 April 2013

DECISION

Introduction

[1] Ms Yap is a licensed immigration adviser based in New Zealand. Ms Geldenhuys was located in South Africa, and wished to migrate to New Zealand. She engaged Ms Yap to assist her.

[2] Ms Yap works in a corporate practice where there are other licensed immigration advisers. Ms Geldenhuys' initial engagement with the practice was with one of the other licensed immigration advisers.

[3] When Ms Geldenhuys decided to engage Ms Yap to provide assistance with migrating, Ms Yap had a discussion with her and wrote her a letter regarding fees.

[4] Ms Yap led Ms Geldenhuys to believe she would be charged fees that were in line with what other licensed immigration advisers charged. An initial payment was made as a "sign on" fee, some of which could be credited towards professional fees.

[5] As it transpired, Ms Geldenhuys' immigration plans had some difficulties and she did not proceed with the proposed steps.

[6] Ms Geldenhuys was not satisfied with various aspects of the professional service, including the fees charged.

[7] The Tribunal has examined the question of whether the process of agreeing and charging fees was proper and whether the other aspects of the Code of Conduct, concerning client engagement and service delivery, were met.

[8] The Tribunal has concluded that Ms Yap was not responsible for any professional failure in relation to the commencement of the professional engagement in terms of the steps required by the Code, other than in relation to fees, or for any service delivery issues.

[9] However the Tribunal has found Ms Yap was responsible for Ms Geldenhuys being told that the fees she would pay were competitive when they were in fact grossly inflated. That was in terms of the hourly rate which was in excess of $500/hour, the total fee, a series of devices to inflate the fees charged, and also the use of a "sign on fee". The overcharging when combined with a process of actively representing that fees were "in line" with the fees of other licensed immigration advisers has satisfied the Tribunal Ms Yap was dishonest in her dealings with Ms Geldenhuys. The "sign on" fee was also in breach of the Code.

[10] Accordingly, the Tribunal has upheld the complaint.

The Complaint

[11] The complaint against Ms Yap is as follows.

[12] Ms Yap is a licensed immigration adviser. Her practice is based in Christchurch. She works in conjunction with other immigration advisers under the trading name "New Zealand & Australia Migration Bureau", which appears to be used by a company named Oceania Development Group (EMEAR) Ltd (Oceania). It appears Ms Yap is employed by the company.

[13] Ms Geldenhuys is a South African national who wished to lodge an expression of interest so she could then apply for a residence permit. She approached Oceania to assist her. Three or more licensed immigration advisers were engaged with her affairs. They were Ms Yap, Ms Jessy Mathenge and Ms Megan Groves.

[14] On 14 January 2011, Ms Geldenhuys prepared a form supplied to her by Oceania. The form had details of her circumstances. She paid $190 and sent it to Oceania. The document did not amount to an agreement for the provision of services that complied with the Code of Conduct.

[15] On 14 February 2011, Ms Groves wrote to Ms Geldenhuys reviewing her immigration opportunities. The key points in the report were as follows:

[15.1] It purported to be a full assessment of Ms Geldenhuys' eligibility to migrate to New Zealand.

[15.2] The report indicated that if Ms Geldenhuys had her qualifications favourably assessed by the New Zealand Qualifications Authority (NZQA) and had an offer of employment, she could expect to be able to migrate successfully.

[15.3] The "points" system, which was a key factor in eligibility, operated with the effect that a person with 140 or more points could expect to have their expression of interest selected without a job offer, and those with more than 100 points would succeed if they had an appropriate job offer.

[15.4] After reviewing Ms Geldenhuys' circumstances, the report said she should have:

[15.4.1] 100 points without a job offer;

[15.4.2] 150 points with a job offer; and

[15.4.3] 160 points with a job offer outside Auckland.

[15.5] Each tally appeared to depend on Ms Geldenhuys' qualifications being approved by the NZQA, though the letter said she would have "100 [points] without a job offer and assessment of qualifications". It appears that in fact there would be 100 points only if there was a favourable assessment of qualifications.

[15.6] The letter said Ms Geldenhuys could potentially lodge an expression of interest, and make it subject to obtaining an offer of skilled employment.

[15.7] A schedule of fees was attached. This schedule contained the representation that the fees were "in line with industry standards". It contained a "Plan B", which Ms Geldenhuys selected. This estimated that fees would be:

[15.7.1] In the range of $3,050 to $4,575 (excluding GST) for lodging an expression of interest and residence application in the Skilled Migrant category.

[15.7.2] In the range of $2,400 to $3,050 (excluding GST) for preparing a qualifications assessment.

[15.7.3] In the range of $1,525 to $3,050 (excluding GST) for obtaining a visa.

[15.7.4] The actual fees would be between $252/hr to $450/hr for professional services.

[15.7.5] There would be a "non-refundable sign on fee".

[15.7.6] There were also various charges such as a monthly file review and an administrative fee for closing a file.

[16] Ms Yap discussed the issues with Ms Geldenhuys by telephone. It became clear that Ms Geldenhuys' relatives who were New Zealand citizens were her brother-in-law, through her former husband (which was different from Ms Grove's understanding).

[17] Ms Geldenhuys could therefore not gain the 10 points for close family support. Further, she did not wish to settle outside Auckland, so she could not obtain the 10 additional points for a skilled job offer outside Auckland.

[18] Accordingly, the number of points she would have without a skilled job offer was 80, and she could gain an additional 50 points for a job offer within Auckland, a potential maximum of 130. Ms Yap assured Ms Geldenhuys that was sufficient to apply.

[19] On 9 March 2011, Ms Geldenhuys sent a signed agreement to Ms Yap for the provision of services dated 8 March 2011. The agreement said the fees charged were "in line with industry standards". The agreement, however, did not identify the services to be provided or the actual fees to be charged. Ms Geldenhuys paid $1,950.

[20] On 28 March 2011 Ms Yap wrote to Ms Geldenhuys. The key points in this letter were:

[20.1] Ms Yap would provide services, and Ms Mathenge would supervise the application.

[20.2] The fees would be as outlined in the 14 February 2011 letter, and an initial payment of a $1,950 sign on fee had been paid.

[20.3] The total fees were estimated at $10,675 to obtain a residence visa.

[20.4] The points total was presented indicating:

[20.4.1] 90 points with no offer of employment, but with qualifications recognised;

[20.4.2] 140 points with a job offer in Auckland; and

[20.4.3] 150 points with a job offer outside Auckland.

[20.5] This was 10 less points than in the 14 February 2011 letter, as Ms Yap said "you have a brother and sister in law (your ex-husband's siblings)" who are New Zealand citizens, but they would not count for "Close Family Support" points, as Ms Geldenhuys' ex-husband was not included in the application.

[20.6] Ms Geldenhuys was entitled to a "2 hour enrolment onto [Oceania's] Jobseeker Programme".

[20.7] The letter generally set out information relating to the process of migrating to New Zealand.

[21] On 3 May 2011, Ms Geldenhuys requested that her file be "placed on hold" as she had to undergo a medical procedure. Ms Yap replied on 4 May 2011, and said the file was on hold for two months, but she would nonetheless continue to undertake chargeable work.

[22] On 5 May 2011, Ms Geldenhuys wrote to Ms Yap and asked what the $1,950 was used for. She also raised a concern that she was originally told she had 100 points, and later Ms Yap said she had 80 points. She had made the decision to pay the fees and commit to migration on the basis of the original advice. She said she had discussed the fees she was being charged with other people and had the impression she was being overcharged.

[23] On 9 May 2011 Ms Susan Atherton, who Oceania describes as a "Client Care and Compliance Officer", said:

> When a client begins with us they pay a sign on fee. You had paid us NZ$1,950. It is our practice to apply 50% of the value of the sign on fee as a complimentary credit to the opening invoice and to then apply a further credit to the value of the remaining 50% to the closing balance on client accounts.

[24] She went on to say that half of the payment had been applied in that way.

[25] On 24 May 2011, Ms Geldenhuys replied to Ms Atherton and said she did not believe her concerns were being understood. She explained how she had been told that she had 100 points, not the 80 she later understood.

[26] On 30 May 2011, Ms Geldenhuys referred to her medical procedure and said she needed to re-evaluate her migration plans. She requested that part of what she had paid be refunded.

[27] Ms Catheryn Faid, an administrative officer with Oceania, questioned the genuineness of Ms Geldenhuys and accidentally forwarded an email expressing that to Ms Geldenhuys on 30 May 2011.

[28] On that day Ms Atherton wrote to Ms Geldenhuys. The letter said that the way Ms Geldenhuys had written regarding her family in Auckland had reasonably left Ms Groves with the impression that Ms Geldenhuys' brother lived in New Zealand and she qualified for 10 points on "Close Family Support" grounds. The fact that it was her brother-in-law (through her former husband) and his wife only became apparent when Ms Yap had a telephone discussion. This was after Ms Geldenhuys had agreed to commence a professional relationship. Ms Yap gave the correct advice that the points were not available on this ground.

[29] The letter also said that accurate information had been provided regarding the two hours of service relating to support for seeking employment.

[30] The letter concluded with a confusing explanation in relation to the fees that had been paid. Ms Atherton said:

> The fee you had paid [$1,950] was a sign on fee and this is clearly documented within our literature. We applied an initial complementary credit to your first invoice of $975. We can then apply a closing complimentary credit to an account for a further $975, which together total a value equivalent to your sign on fee.
>
> ...
>
> We will arrange for your account to be closed without charge and we will apply the closing credit to your account for $975. The remaining balance of $694.81 remains due for the professional work undertaken on your behalf.

[31] It appears Ms Atherton was intending to convey that the sum of $1,950 was a fee paid to allow Ms Geldenhuys to receive services from Oceania, and any other application of the money was "complimentary". It is was not apparent whether Ms Atherton was intending to say Ms Geldenhuys owed $694.81, or that Oceania owed her a balance.

[32] Ms Geldenhuys did not receive any invoices. On 8 June 2011 she emailed Ms Atherton and requested that she be refunded $1,255, as the approximate difference between the work of $694.81 and what she had paid.

[33] Ms Atherton replied on 10 June 2011 and said there would be no refund, but there was nothing due or outstanding.

[34] Ms Geldenhuys has complained that:

[34.1] There were unacceptable delays in sending the 14 February 2011 assessment, which was requested on 14 January 2011.

[34.2] Ms Yap advised her to proceed when she could not obtain sufficient points. Ms Geldenhuys should have been advised an application was not likely to be viable.

[34.3] She was misled as she understood she had access to Oceania's employment agency, without the restriction to 2 hours of service.

[34.4] Internal mail accidentally sent to Ms Geldenhuys was unprofessional, and tarnished the relationship.

[34.5] No substantive work was done on Ms Geldenhuys' application; she developed a medical condition, and ought to have been given a refund of at least part of what she had paid on request. She believes that the amount of work undertaken has been exaggerated.

[34.6] Ms Geldenhuys considers that the "no refund" policy relied on by Ms Yap has exploited her situation.

[34.7] Ms Geldenhuys has not received invoices which account for the fees charged.

[34.8] Ms Geldenhuys was not advised to seek legal advice before signing the agreement.

The Response

[35] Ms Yap responded to the complaint in a letter to the Authority dated 8 August 2011. She stated:

[35.1] The time taken for the initial assessment was longer than it should have been. Ms Yap was not responsible for this work. Ms Geldenhuys has been "credited the charge of $190".

[35.2] Ms Yap never advised Ms Geldenhuys to proceed with 80 points. She had given her accurate advice; in essence, that to qualify she had to obtain 50 points for her qualification (depending on a NZQA assessment), and then she could get a job offer in Auckland. Otherwise, she would need a job offer outside Auckland. Ms Yap had written to Ms Geldenhuys explaining that on 9 May 2011.

[35.3] The 2 hours of service without additional cost for seeking employment had been clearly explained in the assessment dated 14 February 2011.

[35.4] The internal email was sent to Ms Geldenhuys in error, and was not intended to cause offence.

[35.5] Significant work had been performed for Ms Geldenhuys before she communicated her change of plans. Ms Geldenhuys paid $1,950 which was not refundable, and that was credited toward the work undertaken.

[35.6] Ms Geldenhuys had been sent invoices for the work undertaken. Ms Yap said that accompanying documents proved that to be the case. However, on appeal no invoices have been produced. There are two screenshots in which Ms Yap says shows a computer record of documents being printed and emailed, but the documents and the email record are not included in this material.

[35.7] The no-refund policy was appropriate. Ms Geldenhuys had failed to disclose her medical circumstances, and work had been undertaken.

[35.8] When the file was closed:

> [T]he outstanding balance for work on her account, after her sign on fee had been credited from the balance in full, stood at over $795.00.
>
> We credited this amount in full and without obligation as a gesture of goodwill in recognition of the circumstances Ms Geldenhuys faced and in order to assist her. We believed this to be a generous gesture.

[35.9] Ms Yap produced an email dated 10 June 2011 from Ms Atherton with further details of the fees charged and credits.

[35.10] Ms Geldenhuys had not been exploited, misled or misadvised. There was a careful process of setting out terms in writing, and telephone communication which ensured Ms Geldenhuys was fully informed.

[35.11] The process of engagement was not rushed and gave Ms Geldenhuys every opportunity to consider her circumstances and the services offered. Ms Geldenhuys was remiss in not informing Ms Yap of her medical situation.

The Tribunal's Minute

[36] On 30 November 2012 the Tribunal issued a Minute which explained that the Tribunal had conducted a review of the material then before the Tribunal. The Minute identified apparent issues, potential factual findings, and emphasised that the parties would have the opportunity to respond, and that the Tribunal had reached no conclusions at that point.

[37] The key elements of the complaint, and the response identified in the Minute, were as outlined above.

[38] The Authority and the complainant do not lay charges, and are not responsible to prove them. The Tribunal is an expert inquisitorial body, which receives complaints, and determines whether the proof before it is adequate to uphold the complaint, and if so in what respects. Accordingly, the Minute identified issues and potential conclusions on the material presented before the Tribunal in order to give the parties the opportunity to consider their positions and provide submissions and further proof if they wished.

The issues to be determined

[39] The Minute identified the relevant professional standards identified as follows.

[40] Clause 1 of the Code of Conduct requires:

[40.1] A licensed immigration adviser to act with professionalism. In doing so, they must ensure that the terms of professional engagements are fair and appropriate.

[40.2] They must carry out the lawful informed instructions of clients.

[40.3] The client engagement must be established on terms set out in writing, and accepted in writing; and only after providing a copy of the Code to the client and informing them of their entitlement to seek independent legal advice.

[40.4] That a licensed immigration adviser must discharge professional engagements with due care, diligence and respect. That requires them to ensure their professional service delivery meets proper standards.

[41] Clause 2.1(h) requires that a licensed immigration adviser must hold written authority from their client.

[42] Clause 3 requires that full records must be maintained of all engagements, including reporting to clients and confirming in writing the details of material discussions. It also provides that fees must be refunded at the end of an engagement, when repayable.

[43] Clause 4 of the Code treats receipts, to the extent that they are held on behalf of clients, as trust funds, and a licensed immigration adviser must bank them separately.

[44] Clause 8 of the Code prohibits a licensed immigration adviser from setting a fee that is not "fair and reasonable".

[45] Clause 9 requires that clients must receive a copy of the adviser's internal complaints procedure before any agreement is entered into.

[46] Section 44 of the Act provides that breaches of the Code, negligence, incompetence, dishonesty and misleading behaviour are all grounds for complaint.

[47] The Minute identified the issue for the Tribunal to determine as whether it is satisfied Ms Yap breached any of these professional standards. The questions will be primarily determined by factual findings.

Potential conclusions

[48] The Minute emphasised its purpose was to identify potential findings on the basis of material presently before it, and quite different conclusions may follow if further information was presented, or submissions made as to the effect of the material presently held.

[49] The Minute related the potential factual findings to the professional standards required under the Code, and the Act.

[50] The Minute stated, on the papers before the Tribunal at the time, the following findings below appeared to be open.

Preliminary

[51] The Minute noted Ms Yap works in an environment where it appears there were three or more licensed immigration advisers.

[52] It is not possible for a company to hold a licence, and the Code of Conduct makes it clear that it is necessary for a licensed immigration adviser to be identified, and hold written authority from a client (clause 2.1(h) of the Code). The Code does not leave open the possibility of a licensed immigration adviser providing professional services without personally holding a written record of their authority from the client.

[53] Written authority to act on the client's behalf is an essential element of the licensing regime. Licensed immigration advisers are personally responsible for dealing with client funds, fees and all professional obligations under the Code of Conduct. They cannot avoid personal responsibility by pointing to an employer or other party.

[54] Accordingly, the Minute noted Ms Yap should be in a position where she had control of these issues, and ensured that if she was to conduct her practice in association with Oceania, the company respected and preserved her professional control over all material financial and professional matters in relation to clients. Under the Act she is personally responsible and liable for orders for the refund of fees, compensation and other enforcement powers contained in section 51 of the Act.

Code compliance in relation to client engagement

[55] The Minute noted the view appeared to be open that when Ms Yap engaged with the file there were a number of serious irregularities in relation to the engagement, and Ms Yap accepted and advanced the instruction without addressing or rectifying them. In particular:

[55.1] There did not appear to be a written agreement which complied with the Code. The agreement does not contain a "full description of the services to be provided by the adviser", as required by clause 1.5(b) of the Code. The document appears to be generic and not prepared with any regard to Ms Geldenhuys' circumstances. It does not identify the steps involved in applying for the immigration status she sought, and it does not identify that she wished to migrate to New Zealand.

[55.2] There was no evidence before the Tribunal that Ms Geldenhuys:

[55.2.1] was advised she was entitled to seek independent legal advice before entering into an agreement (clause 1.5(c) of the Code);

[55.2.2] had a copy of the Code supplied to her (clause 1.4(a) of the Code); or

[55.2.3] was provided with a copy of the internal complaints procedure (clause 9(c) of the Code).

[55.3] There is no evidence before the Tribunal that Ms Yap held written authority from Ms Geldenhuys to act for her (clause 2.1(h)) of the Code.

[55.4] The view is open that Ms Yap was required to satisfy herself that all of these matters were in order before she commenced work incurring costs.

Ms Yap's behaviour in relation to fees

[56] The Minute noted it appeared Ms Yap was fully aware of the representations made to Ms Geldenhuys, and had relied on them in dealing with this complaint.

[57] The representation was made repeatedly to Ms Geldenhuys that the fees she would be charged would be "in line with industry standards". This representation is contained in the written agreement dated 8 March 2011. The same representation was made in the fee estimate dated 17 February 2011. In Ms Yap's letter dated 28 March 2011 she said the total fees were estimated at $10,675 to obtain a residence visa.

[58] The Minute recorded the view was open that the fees were not in line with industry standards and were in fact grossly in excess of industry standards, and the representation that they were in line with industry standards must have been known to Ms Yap to be false.

[59] The hourly rates (excluding GST) were between $98/hr and $130/hr for administrative staff. For professional staff the hourly rates were between $252/hr and $450/hr. Those rates appeared grossly in excess of industry standards, and were apparently inflated further by a series of devices that neither represent industry standards nor amount to a fair manner of pricing professional services.

[60] The hourly rates were inflated by 6 per cent to cover disbursements. If disbursements were to be charged, the Minute noted they should be identified. The view was open that it is not acceptable to nominate a figure for the cost of services and then inflate that figure on account of disbursements without regard to the cost of disbursements.

[61] Routine "mail outs", which appear to be what might be regarded as marketing rather than a client cost, were charged on the basis of arbitrarily allocated time, said to be 2 to 4 six-minute units. Accordingly, for 4 units of a midrange professional the cost could be 4 units of an hourly fee of $360. That would be in excess of $140. The Minute indicated that was excessive, and inappropriate.

[62] There would be a monthly file review with 2 to 3 units of time charged.

[63] There would be an administrative fee of $190 for closing a file.

[64] Accordingly the Minute stated the view appeared open that: clients were systematically charged fees that are not in line with industry standards; the fees were not "fair and reasonable" (as required by clause 8 of the Code); that fees were systematically uplifted by additional charges that did not relate to the cost of the services; and, clients were dishonesty misled to believe the fees were representative of other licensed immigration advisers.

Non-refundable "sign on" fee

[65] The Minute also noted Ms Yap appeared to take the view that, provided notification was given, it was permissible for her to take a "sign on" fee. The correspondence indicated Ms Yap claimed the money was not refundable as she was entitled to have a client pay her $1,950 for the opportunity of entering into a professional relationship with her. On that basis Ms Yap says that the crediting of those fees was "complimentary".

[66] The view was said, in the Minute, to be open that in ordinary circumstances, it was neither fair nor reasonable to charge a client for entering into a professional relationship, and doing so involved a breach of clause 8 of the Code.

[67] Further, to do so was unprofessional, and amounted to the exploitation of a client.

[68] The Minute recognised there could be exceptional circumstances where a professional person may accept a retainer to keep time free, at the cost of not accepting other work, or to charge a fee for undertaking an assessment of a potential instruction. However, no exceptional circumstances appeared to be present in this case.

[69] The view was accordingly potentially open that the obligation to charge fees that are "fair and reasonable", and the obligation to refund fees that are payable at the end of an engagement:

[69.1] only permits a licensed immigration adviser to charge fairly for work performed, costs incurred, or opportunities foregone; and

[69.2] fees paid may not be treated as non-refundable; they must be charged on the basis described, and the balance refunded.

[70] The view accordingly appeared to be open that Ms Yap's demand for a non-refundable "sign on fee" was in breach of the Code, and she was required to refund any fees not properly charged.

Misrepresentation as to the hourly rate charged

[71] The Minute also noted the screen shots Ms Yap produced to prove invoices had been sent, appeared to disclose the hourly rates used. They varied from $545/hr to $587/hr, and were inflated by a further 6 per cent as a charge for disbursements. The rates could be considered to be both gross overcharging and substantially above the rates quoted.

Failure to invoice work

[72] The Minute noted that while Ms Geldenhuys received correspondence from Ms Yap without difficulty, she had complained she has not received invoices. The material before the Tribunal did not include invoices.

[73] The screenshots Ms Yap had produced did not have figures that reconciled with her explanations, did not show what was or ought to have been stated in invoices, and provided no information that established details of where invoices were sent to.

[74] Unless Ms Yap could produce further information regarding the content of the invoices, when they were sent and where they were sent, the Minute noted the conclusion may be open that they were not sent.

[75] The only specific information then available was that Ms Atherton (in an email of 10 June 2011) said invoice S1026272 was for work to the value of $2,526.09, and S1026272 for work to the value of $118.72, with a further invoice for closing the file being S1027034 for $100.91.

Aspects of the complaint potentially not upheld

[76] The Minute indicated that if there were delays in the initial work they did not appear to be Ms Yap's responsibility, and potentially fell short of being of sufficient gravity for the Tribunal to make an adverse disciplinary finding.

[77] The concern that Ms Yap encouraged Ms Geldenhuys to proceed with only 80 points, without warning her she would need to secure employment outside Auckland, appeared to potentially involve some miscommunication. On the information then available this issue did not appear sufficiently founded to result in an adverse disciplinary finding.

[78] The information appeared to indicate Ms Geldenhuys was informed of the extent of the assistance available to seek employment without additional cost.

[79] The misdirected email was not Ms Yap's responsibility, and she appears to have acted professionally when the error occurred.

Request for Further Information from Ms Yap

[80] In the Minute, pursuant to section 49(4)(a), the Tribunal requested that Ms Yap produce all of the records relating to Ms Geldenhuys.

[81] The Code (clause 3) requires Ms Yap to maintain complete client records for seven years, and confirm in writing the details of material discussions with clients. Accordingly, she should be in a position to present a fully documented record of the professional engagement which is subject to the complaint.

[82] Ms Yap was required to fully explain the factual position in relation to the adverse potential conclusions.

[83] Ms Yap was specifically requested to explain:

[83.1] The apparent failure to have provided a complying written agreement, disclosure of the Code, the internal disputes process, and advice on taking independent legal advice. Ms Yap should consider that if the Tribunal were to find she had misled Ms Geldenhuys in relation to fees, those failures would be consistent with having done so dishonestly. It appears she has failed to comply with provisions of the Code intended to provide protection against such misconduct.

[83.2] The apparent misrepresentation that fees were in line with other licensed immigration advisers, when they are potentially grossly excessive.

[83.2.1] If Ms Yap contended the fees were consistent with industry standards, she should justify the basis for that belief, and was referred to the Authority's published data that was not consistent with that claim.

[83.2.2] If Ms Yap contended the hourly rates represented to Ms Geldenhuys and the higher rates actually charged are not gross overcharging, she should justify the rates. She was expected to do so by disclosing the cost structure, including her salary and annual chargeable hours, and reference the mechanisms used for determining hourly rates for professional services.

[83.3] The apparent strategy to inflate fees using charges that bore little or no relationship to the cost of the service, or the justification given to the client for the charge (including the 6 per cent addition for disbursements, apparently arbitrary charges for mail outs, and administrative tasks such as closing files).

[83.4] The use of a "sign on" fee and it being treated as "non-refundable" to be used at the discretion of the licensed immigration adviser. The view is open that the fee was charged in breach of the Code, and the money received was client funds to be dealt with in accordance with the Code.

[83.5] Why it appeared that the hourly rates charged were different from the rates quoted to Ms Geldenhuys, and there has been a series of correspondence claiming that Ms Geldenhuys had been invoiced in accordance with the agreement. Ms Yap is warned that in the absence of an explanation, the view could be open that that the explanation provided to Ms Geldenhuys when she complained was not consistent with the facts.

[84] Ms Yap was warned in the Minute that the allegations included dishonest representations in relation to fees, gross overcharging, and a failure to disclose the true position in relation to fees when the complaint was made. Ms Yap was warned she should be aware they are of sufficient gravity that, were adverse findings to be made, the question of her fitness to hold a licence would potentially be in issue. She was informed of the observations of the High Court in *ZW v Immigration Advisers Authority* [2012] NZHC 1069 at [41] regarding the value of legal advice for a person in such circumstances.

Response to the Minute

[85] Ms Geldenhuys did not respond to the minute and was not required to respond.

[86] Ms Yap responded in a submission dated 31 January 2013.

[87] Ms Yap's submission addressed the following matters.

The engagement process, and agreement to provide services

[88] Ms Yap explained that there was a process for client engagement which commenced with contact through a website, and a "full check immigration assessment" completed by a licensed immigration adviser. After that stage an agreement for the provision of services would be completed.

[89] Ms Yap's personal role in relation to Ms Geldenhuys was after the full check assessment had been completed. That earlier process had resulted in the relevant disclosure material required under the Code, and a written agreement for the provision of professional services completed on 8 March 2011.

[90] Ms Yap first became involved as the assigned licensed immigration adviser, and spoke by telephone to Ms Geldenhuys on 28 March 2011. Ms Yap was satisfied that the proper client engagement processes under the Code had been complied with.

[91] The process used for client engagement was known to the Authority, and any recommendations were implemented.

[92] The service agreement with Ms Geldenhuys was in a form approved by the Authority. As Ms Geldenhuys signed the service agreement Ms Yap was "deemed to have held a written authority from [Ms Geldenhuys] to act for her (clause 2.1(h) of the Code)". Ms Yap said Ms Geldenhuys did not specifically complain there was no written agreement referring to her.

[93] The service agreement did not "outline the work to be undertaken and the fees specifically, those are outlined clearly in the New Zealand Estimation of Fees schedule".

Disclosure of professional fees

[94] Ms Yap referred to the document "New Zealand Fee Estimate", and said that combining the information in that document with the correspondence and discussions it must have been clear to Ms Geldenhuys what fees she could expect to pay.

Whether the fees were excessive

[95] Ms Yap said that Oceania "provides a bespoke solution for each individual circumstance based upon a unique combination of service and cost control tools". Ms Yap emphasised the dynamic nature of the charging of costs saying there was "a range of hourly charges", there were "discounting tolls", discounts may be "10, 20, 30, 40 50%+".

[96] Ms Yap said Ms Geldenhuys was charged South African rates, as Oceania markets its services there, and she understands that the fees were comparable with others in that market. In support of that proposition Ms Yap referred to total fees for various procedures.

[97] Ms Yap states that Ms Geldenhuys agreed to the fees and she could have researched alternatives.

[98] Ms Yap believes the fees were in accordance with South African rates.

Hourly rates and fees

[99] Ms Geldenhuys was offered either a full service where she would be charged for the time engaged, or alternatively a "budget service" where she would pay a fixed fee and be allowed a set number of hours.

[100] Ms Geldenhuys elected to proceed with the full service option.

[101] Ms Yap said that "whilst the company has hourly rates these are not the sole method of calculating payments for the client"; she said that fees for particular services were capped.

[102] Ms Yap said that her "salary and annual chargeable hours do not reflect the calculation of the hourly rate charged out".

[103] She said:

> "All clients of the Company are charged out by all consultants at [Oceania] at the same rate so that a consistent standard of fees is charged. The hourly rate also differs depending on which country the clients are resident in and to which country they wish to migrate to, i.e. New Zealand, Australia or Canada. In determining the hourly rates for professional services, the company also takes into consideration the market rates charged by other immigration companies in their respective locality.
>
> The Tribunal has claimed that the hourly fee ranges charged by [Oceania] are outside industry standards. However, to my knowledge no industry standards for hourly rates in the immigration advice industry have ever been published. It is not possible to talk of industry standards when no one has measured and recorded what they are. If the Tribunal is in possession of such material then I now seek disclosure of it so that I can exercise a proper right of reply. If not, then it would be improper to make a negative finding without evidence to support it."

[104] Ms Yap then went on to suggest the Tribunal's Minute indicated the Tribunal considered the rate for a "midrange professional" was $360 per hour. This was in response to the observation in the Minute that using a midrange point in the schedule presented to Ms Geldenhuys to calculate that the fee charged for a mail out was $114. Ms Yap indicated there were approximately "60-80 files, [mail outs are] an effective method of ensuring that all clients are informed about any regulation changes that can affect their migration status moving forward".

[105] Ms Yap claimed that the mail-outs and closing of files was appropriate, as was a 6% surcharge on the hourly rate to cover disbursements.

Sign on fee

[106] Ms Yap said charging a sign on fee was "not treated as a deposit but enables our company to start work on the file". The fee was used for "file set up", accounting and administration cost, and the "cost in contacting the client to explain company procedure and payment plans, and the cost of maintaining infrastructure".

[107] She then went on to say that 50% of the fee was credited towards the first invoice.

[108] Accordingly, it appears Ms Yap's practice was to charge a fee of 50% of the sign on fee, in addition to the hourly rates; and if work did not proceed the "sign on" fee would be taken in its entirety. She said the practice had been changed.

Invoices

[109] Ms Yap produced copies of invoices, and said they had been sent to Ms Geldenhuys.

[110] She commented on the hourly rates shown in "screenshots", and said the accounts department had used an incorrect rate. She did not say what the rate should have been.

Refund of fees

[111] Ms Yap said that the invoices would be recalculated on the basis:

[111.1] Of using a different and unspecified hourly rate;

[111.2] Crediting half of the $1,950 to the first invoice;

[111.3] Since crediting the other half; and

[111.4] Crediting the last two invoices.

[112] Ms Yap said the unspecified amount would reflect the work undertaken in the initial stages of Ms Geldenhuys' visa application.

Discussion

Preliminary

[113] This decision will treat Ms Yap as having professional responsibility for her personal dealings with Ms Geldenhuys. She will not be held responsible for the work done earlier by other licensed immigration advisers.

[114] However, to the extent that she relied on or used information others have given Ms Geldenhuys, I am satisfied Ms Yap was well aware of that information. She will be responsible for her actions in relation to it.

[115] First, Ms Yap was obliged to ensure that the client relationship was established property. Second, she was directly involved in soliciting fees from Ms Geldenhuys, and knew and relied on the information Ms Geldenhuys had received.

Code compliance in relation to client engagement

[116] The Minute noted the view appeared to be open that when Ms Yap engaged with the file there were a number of serious irregularities in relation to the engagement. The specific issues were addressed in the Minute (refer paragraph [55] above).

[117] Ms Yap has addressed the issues and provided further material and I am satisfied that while the process may not have been ideal, any shortcoming fall short of justifying an adverse disciplinary finding.

[118] Ms Yap points to a combination of documents which together result in written material that contains a "full description of the services to be provided by the adviser", as required by clause 1.5(b) of the Code. The Code is clear that information must be contained in the agreement and given it is for the protection of consumers, it is not satisfactory to obscure the information by putting it into other documents. The documents do not present a clear picture. However, I do have some regard to the fact this work was not done by Ms Yap, rather it was the work of another licensed immigration adviser; Ms Yap had the lesser responsibility of relying on it for her engagement.

[119] I am now satisfied that Ms Yap has produced material that establishes Ms Geldenhuys:

[119.1] was advised she was entitled to seek independent legal advice before entering into an agreement (clause 1.5(c) of the Code);

[119.2] received a copy of the Code (clause 1.4(a) of the Code); and

[119.3] was provided with a copy of the internal complaints procedure (clause 9(c) of the Code).

[120] Ms Yap relied on a written agreement that made no mention of her to establish she held written authority from Ms Geldenhuys to act for her (clause 2.1(h) of the Code). I do not accept the contention this met the Code's requirements, however I am satisfied Ms Geldenhuys was made aware Ms Yap was acting for her, so the compliance is relatively slight.

[121] The jurisprudence from various authorities dealing with other professional disciplinary contexts is appropriately applied to understand the threshold for making an adverse disciplinary finding, while being mindful that it is necessary to consider the statutory context in each respective situation; they can be quite different.

[122] In the decision of *Re Tolland* HPDT 325/Mid10/146P, 9 September 2010, the Health Practitioners Disciplinary Tribunal observed at [39]:

> "Negligence, in the professional disciplinary context, does not require the prosecution to prove that there has been a breach of a duty of care and damage arising out of this as would be required in a civil claim. Rather, it requires an analysis as to whether the conduct complained of amounts to a breach of duty in a professional setting by the practitioner. The test is whether or not the acts or omissions complained of fall short of the conduct to be expected of a [practitioner] in the same circumstances[.] This is a question of analysis of an objective standard measured against the standards of the responsible body of a practitioner's peers."

[123] The professional setting is varied, but duties of competence, application of skill, honesty, disclosure and propriety are shared by a wide range of professionals. Immigration advisers have much in common with other professionals. Section 3 of the Act affirms it is intended to protect the interests of consumers receiving immigration advice, which corresponds to the duties other professionals have to the public engaging their services. The issue is properly understood under the Act as whether there has been a breach of duty in a professional setting.

[124] I find it is a necessary element of the test to determine whether any lapse is sufficiently serious to warrant the complaint being upheld as a professional disciplinary matter.

[125] Section 50 contemplates a complaint being upheld without necessarily imposing a sanction. It follows that it is not necessary to find that a disciplinary sanction should be imposed to uphold a complaint. It is important to recognise that not every lapse or manifestation of human frailty should result in an adverse professional disciplinary finding. There will be occasions when advisers are responsible for a lapse from acceptable standards, but that still does not justify upholding a disciplinary complaint.

[126] It is a reality that many errors and mistakes are too trivial to warrant an adverse disciplinary finding, and the Act recognises that. Section 45(1) of the Act provides that the Authority may treat a complaint as trivial or inconsequential and need not be pursued, or treated as a matter that is best settled between the parties.

[127] It is necessary and appropriate for this Tribunal to be mindful that there is a threshold before a complaint of negligence or want of care and diligence is established. Though the statutory context is quite different, there is a discussion of the underlying policy issues in *Orlov v New Zealand Law Society (No 8)* [2012] NZHC 2154.

[128] The Act does not attempt to further prescribe where the boundary lies, and any attempt by this Tribunal to do so is unlikely to be successful. It is necessary to consider the facts of each complaint.

[129] I now apply those principles to the present facts. The failure to have a full description of services in the essential document establishing a professional relationship is a significant failure, and mitigated only to a degree by being able to piece the information together from other documents. However, the fact Ms Yap only relied on the documentation rather than created it satisfies me that I should regard the failure as falling below the threshold for an adverse disciplinary finding.

[130] I take a similar view of the failure to get personal written instructions; given the full transparency of Ms Yap's role I regard the lapse as technical only.

[131] Accordingly, I make no adverse finding regarding the establishment of Ms Yap's client relationship with Ms Geldenhuys, other than as discussed below in relation to fees.

Ms Yap's dishonesty in relation to fees

[132] The Minute put Ms Yap on notice she faced a serious and stark allegation of dishonesty, and warned her of the consequences of an adverse finding.

[133] Ms Yap has accepted she was fully engaged in the process of getting Ms Geldenhuys to agree to pay fees. Ms Yap said in her response the Minute that on 22 March 2011 she spoke with Ms Geldenhuys and ensured she was clear on the services she was purchasing. She followed that up with a letter dated 28 March 2011, which discussed fees. Ms Yap was the licensed adviser who did the work, and was responsible for charging and refunding fees.

[134] Ms Yap was well aware that the representation was made repeatedly to Ms Geldenhuys that the fees she would be charged would be "in line with industry standards". This representation is contained in the written agreement dated 8 March 2011. The same representation was made in the fee estimate dated 17 February 2011. In Ms Yap's letter dated 28 March 2011 she said the total fees were estimated at $10,675 to obtain a residence visa.

[135] Ms Yap's response to the Minute has been to suggest that someone should provide proof that the fees she charged were not "in line with industry standards" (refer para.94). There are difficulties with Ms Yap's approach.

[136] The first difficulty is that the representation was made to her client; it is her representation. She should have been in a position as a professional to support that the representation was correct, and this Tribunal has exercised its statutory power to require her to do so. Her response is to say that it is not possible to establish what industry standards are. If she is right, she should not have allowed her client to be misled in that way.

[137] However, the greater difficulty for Ms Yap is that the fees charged were not "in line with industry standards"; they were grossly excessive and designed to exploit her client.

[138] In this regard, Ms Yap faced an allegation that the information before the Tribunal was that she in fact charged an hourly rate from $545/hr to $587/hr, and further inflated that by 6 per cent as a charge for disbursements. Ms Yap claimed that there should have been only one rate, but has not said the rate was outside that range.

[139] That rate is grossly excessive when compared with industry standards, and Ms Yap was invited to justify the fee in the usual way. It is a routine matter for professional's challenged in relation to overcharging to have to justify fees. The Minute notified Ms Yap she was expected to do so in the usual way by:

[139.1] Disclosing the practice's cost structure, including her salary and annual chargeable hours, and

[139.2] Reference the mechanisms used for determining hourly rates for professional services.

[140] Ms Yap failed to do that, she admitted that the fees were set without reference to her salary, and suggested that the fees were fees that could be charged as Ms Geldenhuys came from South Africa.

[141] I do not accept Ms Yap's claim that it was either proper to base fees on where her client came from, or that fees in South Africa are in the range of NZ$500 - $600 per hour, or inflated in the ways Ms Geldenhuys' fees were.

[142] The Code (clause 8) requires that fees are fair and reasonable. There are also disclosure requirements.

[143] Ms Yap was based in New Zealand offering services to persons located in New Zealand and offshore through internet contact. Ms Yap has suggested that her practice has costs in South Africa; however she provided no evidence of what those costs were. Further, it is not "in line with industry standards" to charge clients more based on where they are located.

[144] Ms Yap in her response has said that South African rates for "similar services" ranged from $3,964 to $5,946. However, in her letter dated 28 March 2011 she said:

> "the total amount of our fees could be NZ$10,675 + tax (if applicable) and all extra costs (such as application fees, obtaining certified copies and all disbursements). This total amount is dependent on how much work we undertake for you. Whatever the upper level of your quote, our computer systems have an automatic blocking system that prevents the firm from billing you more than that which you initially agreed to without you being clearly informed as to a variation."

[145] Ms Yap has provided vague and unsatisfactory explanations. I am satisfied the evidence requires me to find Ms Yap represented to her client the fees would be competitive, whereas in fact they were grossly excessive in comparison with other licensed immigration advisers.

[146] Further, Ms Yap charges her time at hourly rates from $545/hr to $587/hr. She says some unspecified correction was needed, however they appeared to be higher than the quoted rates, she has not explained that in any satisfactory way.

[147] I am also satisfied that various devices were used to further inflate very high hourly rates. The charges for mailing out general information that may or may not have any relevance to a client, charging a percentage on the hourly rate for "disbursements", and the like were not justified.

[148] What is "fair and reasonable" fees may on occasions be calculated at a very high rate, typically where a client that is fully informed, and demands exceptional service delivery they may fairly agree to pay a substantial premium. However, that was not the case with Ms Geldenhuys.

[149] Ms Geldenhuys was a client who was concerned to limit her costs, while getting a proper professional service. The fees she was charged were not fair or reasonable.

[150] The most serious aspect is that Ms Yap misled Ms Geldenhuys by causing her to believe fees that were extremely high were "in line" with the fees charged by other licensed immigration advisers. Ms Geldenhuys trusted her, and it is most unimpressive that Ms Yap now contends that Ms Geldenhuys should have done her own research. Ms Yap is a licensed professional, and she was trusted as a result of her status. It was dishonest to abuse that trust by misleading her client.

[151] I am satisfied that Ms Yap engaged in dishonest and misleading behaviour, which is grounds for complaint under section 44(2)(d) of the Act.

Non-refundable "sign on" fee

[152] Ms Yap took the view that provided notification was given, it was permissible for her to take a "sign on" fee. Ms Yap claimed the money was not refundable as she was entitled to have a client pay her $1,950 for the opportunity of entering into a professional relationship with her. On that basis Ms Yap says that the crediting of those fees was "complimentary".

[153] I am satisfied it was neither fair nor reasonable to charge a client for entering into a professional relationship, and doing so involved a breach of clause 8 of the Code. I accept there can be occasions where a "retainer" can be appropriate, where a fee is paid to ensure that a licensed immigration adviser keeps them self available and forgoes other professional opportunities. There may be other instances where a fee of that kind is appropriate. There was no justification in the present case.

[154] Ms Yap attempted to justify the fee in terms of it covering the cost of routine administrative tasks involved in commencing a professional engagement. The explanation is unconvincing. First, it was not supported with any costing information. Second, given the extremely high hourly rates it is not evident why Ms Yap could expect to separately recover the cost of incidental administrative tasks.

[155] I am satisfied Ms Yap's demand for a non-refundable "sign on fee" was in breach of Clause 8 of the Code, and she was required to refund any fees not properly charged pursuant to Clause 3 of the Code. A breach of the Code is grounds for complaint pursuant to section 44(2)(e) of the Act.

Miscellaneous aspects of the complaint not upheld

[156] Given Ms Yap's explanation I cannot be satisfied that invoices were not sent, or at the least that Ms Yap took the necessary steps to be satisfied she had caused that to happen.

[157] I accept any delays in the initial work were not Ms Yap's responsibility.

[158] In relation to the concern Ms Yap encouraged Ms Geldenhuys to proceed with only 80 points, without warning her she would need to secure employment outside Auckland, I am satisfied this involved some miscommunication. There will be no adverse finding on this issue.

[159] I am satisfied Ms Geldenhuys was informed of the extent of the assistance available to seek employment without additional cost.

[160] The misdirected email was not Ms Yap's responsibility, and I am satisfied she acted professionally when the error occurred.

Decision

[161] Pursuant to section 50 of the Act, the complaint is upheld in respect of Ms Yap as she:

[161.1] Engaged in dishonest and misleading behaviour concerning the fees she charged Ms Geldenhuys; and

[161.2] Breached the Code in relation to charging a "sign on" fee.

[162] In other respects, the complaint is dismissed.

Submissions on Sanctions

[163] As the complaint has been upheld, section 51 allows the Tribunal to impose sanctions.

[164] The Authority and Ms Geldenhuys have the opportunity to provide submissions on the appropriate sanctions, including potential orders for costs, refund of fees and compensation. Whether they do so or not, Ms Yap is entitled to make submissions and respond to any submissions from the other parties.

[165] Any application for an order for the payment of costs or expenses under section 51(1)(g) should be accompanied by a schedule particularising the amounts and basis for the claim.

Timetable

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

[166.1] The Authority and Ms Geldenhuys are to make any submissions within 10 working days of the issue of this decision.

[166.2] Ms Yap is to make any further submissions (whether or not the Authority or Ms Geldenhuys make submissions) within 15 working days of the issue of this decision.

[167] The parties are notified that this decision will be published with the names of the parties after five working days, unless any party applies for orders not to publish any aspect.

DATED at WELLINGTON this 12th day of April 2013

_____

G D Pearson
Chair