

**BEFORE THE IMMIGRATION ADVISERS
COMPLAINTS AND DISCIPLINARY TRIBUNAL**

Decision No: [2013] NZIACDT 71

Reference No: IACDT 003/12

IN THE MATTER

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

BY

The Registrar of Immigration Advisers

Registrar

BETWEEN

MSC

Complainant

AND

Rosemarie Scholes

Adviser

NO INFORMATION IDENTIFYING THE COMPLAINANT TO BE PUBLISHED

DECISION
(IMPOSITION OF DISCIPLINARY SANCTIONS)

REPRESENTATION:

Registrar: Ms K England, Ministry of Business, Innovation and Employment, Auckland.

Complainant: Mr H Weischede, NZ Immigration Help Service Ltd., Auckland.

Adviser: Mr S Laurent, Laurent Law, Auckland.

Date Issued: 25 November 2013

DECISION

INTRODUCTION

- [1] The Tribunal issued a decision dated 10 September 2013 upholding the complaint in this matter.
- [2] The Tribunal determined Ms Scholes had breached the Code of Conduct. The Registrar had referred the complaint on that ground alone.
- [3] The Registrar did not refer the matter on any ground of dishonest or misleading behaviour and the complainant did not contest this at the time.
- [4] The findings were essentially that Ms Scholes failed to investigate the complainant's needs, and enrolled her in a course at a school in which she had a financial interest. If Ms Scholes had made proper inquiries, she would have appreciated that was not appropriate. In addition, she failed to initiate the professional engagement and document her instructions in accordance with the Code of Conduct.
- [5] The Tribunal gave the parties the opportunity to address the Tribunal in relation to sanctions. It also requested that the Registrar provide information regarding the cost of investigating the complaint.
- [6] In the course of responding, both parties revisited factual matters.
- [7] This present decision addresses two issues:
 - [7.1] The parties' positions on further factual matters.
 - [7.2] The sanctions imposed.
- [8] The decision finds there is a factual matter that will be corrected. Both parties agree on the correction. However, the correction does not alter the grounds on which the complaint was upheld. In other respects, the decision concludes the factual issues raised by the parties require no alteration to the grounds in the decision upholding the complaint.
- [9] The decision accordingly censures Ms Scholes, imposes a financial penalty, makes directions for further training, and orders compensation.

THE FACTUAL BASIS OF THE DECISION – FURTHER FACTUAL MATTERS

The issues

Background

- [10] The Tribunal is required to hear complaints on the papers, subject to the discretion to request information and appearances.
- [11] The matter proceeded with the Registrar filing a Statement of Complaint, which had some 900 pages of documentation attached; the parties have filed further material subsequently. The adviser and the complainant both filed statements of reply. The parties did not seek an oral hearing.

IELTS level

- [12] Among the factual issues was the complainant's need to gain an IELTS level 7 to meet the English language requirements for working as a nurse in New Zealand.
- [13] Ms Scholes had an interest in a school in New Zealand that provided IELTS training. The complainant was enrolled in a course at the school. In the documentation before the Tribunal, including the terms of a limited purpose visa issued for that reason, was a description of the course. The description stated that it was "in preparation for IELTS Level 5".

- [14] Both the adviser and the complainant accept that in fact the course was a New Zealand Qualifications Authority level 5 course, which provided training at least to the level of preparing to be examined for IELTS level 7.
- [15] In making the substantive decision, the Tribunal had understood that the specific course in which the complainant was enrolled was for IELTS level 5, not IELTS level 7. The implication being that the course was too elementary for the complainant's skill level, and insufficient to qualifying for nursing.
- [16] It is necessary to address this issue, and any significance it has in relation to determining the sanctions to be imposed.

Email of 2 May 2011

- [17] A disputed fact in the complaint concerned when Ms Scholes ascertained that the complainant had already passed an IELTS test at level 7.5, which was more than sufficient to meet the English language requirements for nursing in New Zealand.
- [18] The complainant claimed that she had told Ms Scholes at a meeting in February 2011. Ms Scholes said she found out in an email of 2 May 2011, and not before that.
- [19] The Tribunal found Ms Scholes' explanation unpersuasive. However, that was not the basis for upholding the complaint. The Tribunal found Ms Scholes had a positive duty to make inquiries at the February 2011 meeting. She did not do that; so whether the complainant expressly said she had an IELTS pass at level 7.5 was not necessary for the finding the Tribunal made.
- [20] Ms Scholes through her counsel claims the Tribunal failed to take account of the 2 May 2011 email.

The complainant seeks to open new issues

- [21] The complainant also invited a review of a range of material; however, it is largely the production of new information relating to issues already decided.

DISCUSSION

Jurisdiction and powers

- [22] The position taken for Ms Scholes is that the Tribunal is still seized of the complaint and it is therefore open to correct a factual error as the Tribunal is not *functus officio*. The argument was then made that, in the absence of a specific provision which states that once a decision under s 50 is made that decision is final, the Tribunal may reopen its findings as it has the power to regulate its own proceedings (s 49(1)).
- [23] As counsel for Ms Scholes also alluded to, there is a distinction to be drawn between the power of the Tribunal to regulate its own procedure within its jurisdiction and its inability to confer any jurisdiction on itself other than that created by statute (*JM v AHX* [2011] NZIACDT 15 at [10]). In accordance with the law relating to other bodies with statutory jurisdiction, the Tribunal has: (*Department of Social Welfare v Stewart* [1990] 1 NZLR 697 at 702 referred to in *JM v AHX*)

the right to do what is necessary to enable [it] to exercise the functions conferred on it by statute on the one hand, that right arising as a matter of statutory implication, and the duty to see that there is not abuse of process

- [24] While it has no inherent jurisdiction, it is usual for an adjudicative body to have the inherent power to correct errors while a matter remains live and within the jurisdiction so as to avoid an abuse of process (*Department of Social Welfare v Stewart* [1990] 1 NZLR 697 at 702).
- [25] The submission was not opposed, and I accept it. The Tribunal becomes *functus officio* when it has completed dealing with a matter. That is not the case in the present matter. Pursuant to section 50 of the Act, the Tribunal hears the complaint, a decision is made first as to whether

to dismiss or uphold the complaint, and then whether to take no further action or impose specific sanctions. Only the first step is complete prior to this present decision being issued.

- [26] This view is further supported by sections 81(1) of the Act, which set out the rights of appeal from a decision of the Tribunal. The relevant paragraphs are set out as follows:

A person may appeal to a District Court against any of the following decisions:

...

(c) A decision of the Tribunal to cancel or suspend the person's licence:

(d) Any other decision of the Tribunal imposing on the person a sanction of a kind referred to in [section 51\(1\)\(a\) to \(i\)](#):

- [27] These paragraphs make it clear that the right of appeal arises only on the imposition of a sanction; accordingly the Tribunal is not *functus officio* until that point.
- [28] These comments should not be taken as expressing a view that re-litigating factual findings is usually appropriate when dealing with sanctions. Rather, that in exceptional cases the option is not closed. In the present case the complainant and the adviser both agree that wording in a document has a different meaning to how it is expressed literally. I am satisfied those circumstances justify intervention.
- [29] The complainant also invited a review of a range of material; however, it is largely the production of new information alleging dishonest or misleading behaviour in relation to issues which have already been decided on the basis of a breach of the Code of Conduct alone. It appears from the Tribunal's records the complainant was served with the adviser's Statement of Reply (service is required by clause 4.6.2 of the Practice Note), however she appears to have overlooked the document at the time. The Registrar did not refer the complaint on the basis of dishonest or misleading behaviour, and the complainant did not challenge the basis of referral prior to the substantive decision being issued. There are no circumstances that warrant the issue being revisited at this point.
- [30] It is important that this Tribunal maintain boundaries, and only regard exceptional situations as justifying reconsideration of issues that have been determined. I am satisfied that the issues raised by the complainant should not be considered further. They essentially revisit issues that have been determined in her favour or raise issues of dishonesty that were not part of the original complaint referred by the Registrar, and contend they should now be taken into account in relation to sanctions.
- [31] In this instance, the Tribunal is not willing to look into matters alleging dishonest or misleading behaviour as that was not the basis of referral, and neither the complainant nor the adviser challenged that. Ms Scholes was entitled to have the complaint addressed on the basis of the breaches of the Code of Conduct raised by the Registrar.

IELTS and NZQA Levels

The parties

- [32] The adviser contended that the level of the course should have been identified as NZQA level 5 not IELTS level 5.
- [33] The complainant accepts the relevant course was NZQA level 5, and would have provided training to IELTS level 7. However, her contention is this did not materially affect the decision, as it was not appropriate to enrol in the course regardless.
- [34] The complainant had advanced in her English language skills to a level where the course offered by Ms Scholes' school was not appropriate. She had passed at level 6.5 already, so the level 7 qualification could be achieved much more cheaply in the Philippines, and indeed that is what occurred.

Correction

- [35] I accept, as both the adviser and complainant do, that the course in which the complainant was enrolled could have allowed the complainant to progress to IELTS Level 7, which she required for nursing in New Zealand. Further, that the wording on the visa: “*undertaking a Certificate in Preparation for IELTS Level 5 from 9 May to 4 November 2011*” should be regarded as meaning preparation for IELTS at NZQA level 5.

Consequences

- [36] Ms Scholes is entitled to have this Tribunal record that the course the complainant was enrolled in, and for which the limited purpose visa was issued, was not for IELTS level 5. It could have taken her to level 7, which was sufficient for nursing in New Zealand.
- [37] However, the issues requiring determination by the Tribunal raised a less specific question than the level that could be attained in the course.
- [38] The issue was whether Ms Scholes performed her duties in accordance with the Code of Conduct. The material finding by the Tribunal was:

Ms Scholes filed the second application for a student visa on which a limited purpose visa was issued, without first satisfying herself that the course of study was necessary or appropriate.

- [39] It is clear, quite independently of the level of the course, that it was not appropriate. That was for two reasons.
- [40] The first reason being that when the complainant first engaged with Ms Scholes she was close to attaining the required level. She got to that point in the Philippines, and she did not need to commit to the financial burden of attending a course in New Zealand at Ms Scholes’ school. The complainant did, in fact, complete the necessary IELTS training and examination in the Philippines.
- [41] The second reason was that by the time Ms Scholes proceeded with the enrolment at her school, and a visa was issued for the purpose, the complainant had already passed IELTS at level 7.5. She had no need for further preparation at Ms Scholes’ school or otherwise. Ms Scholes’ knowledge of the issue at the time she enrolled the complainant is discussed further below.

Notification of passing IELTS at level 7.5

- [42] The complainant said she told Ms Scholes when she met with her in February 2011 that she had passed IELTS at level 7.5. Ms Scholes says she was first informed in an email of 2 May 2011 at which point she had already applied for visa, and enrolled the complainant in her school in ignorance of the complainant attaining a pass at level 7.5.
- [43] Through her counsel, Ms Scholes claims the Tribunal has overlooked the email of 2 May 2011, and should reconsider its findings.
- [44] The difficulty with the claim that the email was overlooked is that the reference to the email is an inherent part of Ms Scholes’ claim she was first told well after the February 2011 meeting. The Tribunal’s decision recognised that was her position.
- [45] There were in excess of 900 pages of material produced by the parties in relation to this complaint. It is neither necessary nor appropriate for the Tribunal to catalogue the documents. The principal significance of the email is that Ms Scholes says it was the first notification of the pass at level 7.5; the complainant says it was only a reiteration of a prior oral notification.
- [46] The particular email is written only partly in English, and the balance has not been translated. An analysis of the accessible wording is not determinative. As far as it goes, the appearance of the email is consistent with a deferential client politely reminding Ms Scholes that she had already attained level 7.5. In any case, the Tribunal did not place weight on this particular document, beyond the fact of communication on that date.

- [47] There is documentation that shows Ms Scholes after she apparently received the 2 May 2011 email, continued to take steps for the complainant to attend the school for a course she did not need. The papers include an email from Ms Scholes to Immigration New Zealand dated 3 May 2011 confirming the complainant was to study at the school.
- [48] However, none of that material was critical to the findings the Tribunal made. The relevant finding was that in February 2011 Ms Scholes had a positive duty to look actively into her client's needs, circumstances, and requirements. That was her professional obligation, and she failed to discharge it.
- [49] The factual finding relating to the February 2011 meeting was:

Ms Scholes claims she was not told until the time the limited purpose visa was issued, that the complainant had passed IELTS at above level 7. In contrast the complainant says she met with Ms Scholes and told her she had passed at that level and Ms Scholes said she could study at the School at a higher level. It is not plausible the complainant would withhold the information; it was obviously in her interests to tell Ms Scholes and get advice on how she should pursue her nursing registration. Regardless, Ms Scholes had a duty to make proper inquiries regarding what the complainant's true needs were.

I am satisfied the material before me proves a failure to make proper inquiries into what the complainant's immigration prospects were and tailor an immigration strategy to meet them.

- [50] That finding was consistent with the issues put before the Tribunal by the Registrar, and accepted by the parties. As there was no issue of dishonesty raised, the finding that there was a failure to make proper inquiries was sufficient to address the material. It was not necessary to make a finding that Ms Scholes did have information of the IELTS pass at level 7.5 and regardless intentionally enrolled the complainant in course that was of no use to her. The Tribunal did not make that finding.
- [51] Whatever view is taken of the email of 2 May 2011, it cannot diminish the findings made against Ms Scholes.

Conclusion on challenge to factual findings

- [52] Ms Scholes is entitled to have the Tribunal record the references to the course in which the complainant was enrolled was a course at NZQA level 5, which could provide training to IELTS level 7.
- [53] Accordingly, the course was suitable for preparation for a nurse seeking to migrate to New Zealand.
- [54] However, that does not affect the determination of the issues in the Tribunal's decision.
- [55] The Tribunal found Ms Scholes:
- [55.1] Failed to evaluate her client's immigration prospects, and channelled her to a course which would lead to Ms Scholes benefitting financially. The course was not appropriate for her client, who was able to complete her preparation in the Philippines with less expense, and did so.
- [55.2] Permitted an unqualified person to provide professional services she was required to deliver personally.
- [55.3] Filed an application without ensuring it was compliant.
- [55.4] Failed to ensure a course of study was necessary or appropriate.
- [55.5] Did not get her client's informed instructions, but did not act contrary to the instructions she did have.
- [55.6] Failed to initiate and document her instructions properly.
- [56] The issues raised do not affect those findings. It is not appropriate to review other factual issues raised, as they were not part of the complaint.

SANCTIONS

Findings

[57] Given the preceding discussion, it is appropriate to reiterate the findings in the substantive decision. When filing the Statement of Complaint, the Registrar only raised issues relating to breaches of the Code of Conduct, not other matters that may arise under section 44(2). He identified the issues set out below, and the adviser and the complainant did not dispute them in their Statements of Reply. The Tribunal made the findings on the issues that are also set out below:

[57.1] **Issue 1:** Did Ms Scholes perform her services with due care, diligence, respect and professionalism:

Conclusion: Ms Scholes failed to meet her duties of care, diligence, respect and professionalism.

First, Ms Scholes failed to evaluate her client's immigration opportunities and instead channelled her to a course which would lead to Ms Scholes benefitting financially and which was not required or appropriate for her client. In doing so she disregarded the serious financial burden she was imposing on her client and failed to provide the disinterested professional advice her client was entitled to.

Second, she allowed an unqualified person to provide the professional services Ms Scholes was required to deliver personally (or through another licensed immigration adviser). That person was not supervised or supervised adequately, and took the opportunity of exploiting her client and her client's family.

Third, Ms Scholes filed the first application for a student visa in a form that was rejected. It was rejected as Ms Scholes had failed to personally ensure that the financial support required to grant the visa was in place; she had delegated that responsibility to a person who later advanced loan finance intending to deceive Immigration New Zealand.

Fourth, Ms Scholes filed the second application for a student visa on which a limited purpose visa was issued, without first satisfying herself that the course of study was necessary or appropriate for her client.

[57.2] **Issue 2:** Whether Ms Scholes performed her services:

Conclusion: The complaint raises issues of lack of care, diligence, respect and professionalism in the performance of services and those findings appear under the preceding issue. There is no additional adverse finding regarding lack of performance.

[57.3] **Issue 3:** Whether Ms Scholes carried out the lawful informed instructions of her client:

Conclusion: Ms Scholes failed to gain informed instructions for the reasons identified as part of the first issue.

I am not satisfied Ms Scholes acted contrary to any instructions she held at the time she acted. There will be no adverse finding under this issue.

[57.4] **Issue 4:** Whether Ms Scholes returned personal documentation on request and without delay:

Conclusion: I am satisfied Ms Scholes took appropriate and adequate steps to comply with the request to return personal documentation. There will be no adverse finding under this issue.

[57.5] **Issue 5:** Whether Ms Scholes ensured that her client was aware of the terms of the agreement and all significant matters relating to it:

Conclusion: I am satisfied Ms Scholes wholly failed to inform her client of the effect of the agreement, or the nature and extent of the professional services she in fact required. Furthermore, it failed to accurately record the fees paid and their purpose.

[57.6] **Issue 6:** Whether Ms Scholes ensured changes to the terms of agreements were recorded in writing:

Conclusion: I am not satisfied the agreement accurately recorded the arrangements. While it included the fees paid, and contingencies regarding liability for fees, the agreement was unsatisfactory from its inception. No additional adverse finding will be made in addition to the findings in relation to Issue 5.

[57.7] **Issue 7:** Whether Ms Scholes provided the complainant with a copy of the Code of Conduct, and explained it to her:

Conclusion: Ms Scholes failed to comply with this requirement; she delegated it to a person who was not qualified to initiate the instructions and failed to ensure the duty was completed.

[57.8] **Issue 8:** Whether Ms Scholes worked in a manner that did not unnecessarily increase costs:

Conclusion: There is no evidence of working in a manner that increased professional costs; the issues relating to financially exploiting and disadvantaging the complainant appear as findings on Issue 1. There will be no further adverse finding under this issue.

[57.9] **Issue 9:** Whether Ms Scholes obtained an agreement to any material increase in costs:

Conclusion: Ms Scholes failed to initiate a professional relationship with the proper disclosure of costs and on a basis where she had no informed instructions. The issues relating to financially exploiting and disadvantaging the complainant appear as findings on Issue 1. There will be no further adverse finding under this issue.

[57.10] **Issue 10:** Whether Ms Scholes maintained professional business practices including confirming in writing the details of material discussions:

Conclusion: The evidence does not establish that Ms Scholes had the discussions she claims to have had. The issues relating to acting without informed instructions appear as findings on Issue 1. There will be no further adverse finding under this issue.

Submissions on sanctions

The complainant's submissions

[58] As mentioned above, the complainant's submissions on sanctions contained a considerable volume of material seeking to have further factual findings. That is not appropriate for the reasons discussed, and will not be addressed further.

[59] The complainant sought compensation of Php 149,750 in relation to:

[59.1] Fees paid of Php 23,000,

[59.2] Visa fees paid of Php 25,000,

[59.3] Interest on a loan of Php 13,250,

[59.4] Travel to complete visa requirements Php 10,000,

[59.5] A medical examination Php 8,500, and

[59.6] A lost return airfare of Php 70,000.

[60] The costs were claimed as the result of two unnecessary student visa applications, and enrolment and immigration processes for a course in Ms Scholes' school which was not required.

[61] The complainant reviewed the principles relating to the imposition of sanctions, and suggested that it would be appropriate to require suitable professional training.

Ms Scholes' submissions

[62] The adviser's position on sanctions was:

[62.1] She was willing to pay the compensation sought.

[62.2] She did however wish to have proof that the airfare was indeed non-refundable and forfeit.

[62.3] Further she claimed the actual loan interest was Php 5,000.

[62.4] She resisted undertaking training, claimed that the Authority had audited her practice as part of renewing her licence. She suggested that requiring further training would be to treat the Authority's assessment with contempt.

[63] She considered that adverse publicity resulting from the Tribunal's findings should be considered.

Costs

Issue raised by the Tribunal

[64] The Tribunal noted in its previous decision it is appropriate for a disciplinary tribunal to consider the financial burden of a complaint on the profession as a whole when determining sanctions, as the profession is levied to fund the disciplinary regime.

[65] In this regard, the decision referred to *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850, and *O'Connor v Preliminary Proceedings Committee HC Wellington* CP 280/89, 23 August 1990.

[66] The decision suggested that the purpose of section 51(1)(g) was similar in effect to that applying in those authorities.

[67] The Tribunal observed the present matter had required a substantial investigation, resulting in a large volume of material being filed with the Tribunal. Further, that Ms Scholes had denied elements of the complaint, with resulting expense.

[68] The Registrar was requested to provide a schedule particularising the expenses of his investigation, inquiry and dealing with the complaint before the Tribunal.

The Registrar's position on costs

[69] The Registrar provided submissions on the issue. The position was the conventional approach that:

[69.1] An award of costs is discretionary.

[69.2] The order is for the purpose of recovery of expenses not punishment.

[69.3] There is a reasonableness element in determining quantum; it will not necessarily be a full recovery.

[69.4] The practitioner's conduct in the proceedings is a potential factor in the exercise of the discretion in relation to the determination.

[69.5] The party incurring costs should provide detailed and particularised accounts providing full information of the work actually done at each stage of the investigation, who performed the work, and at what hourly rate it was performed.

[70] The Registrar went on to submit that the provisions of section 51(1)(g) are narrow. The wording of the provision being:

“... the Tribunal may impose:

..

(h) an order for the payment of all or any of the costs or expenses of the investigation, inquiry, or hearing, or any related prosecution:”

[71] This wording, the Registrar submitted, should be compared with disciplinary proceedings under the *Lawyers and Conveyancers Act 2006*, and said:

... the provision for costs and expenses in such legal disciplinary matters are significantly wider (*Lawyers and Conveyancers Act 2006*, section 249(1)).

[72] The wording of section 249(1) is:

The Disciplinary Tribunal may, after the hearing of any proceedings, make such order as to the payment of costs and expenses as it thinks fit.

- [73] The Registrar said the costs provision in section 51(1)(g) is “more restrictive and does not expressly include the costs of salaries and staff”, but suggested it should include such internal expenses and disbursements.
- [74] The Registrar went on to say he is not in a position to provide particularised accounts of costs, and was reviewing his procedures. He did however provide a schedule setting out estimates of the costs.
- [75] However, the Registrar suggested that in the absence of the information required to provide actual costs, no costs order should be made.
- [76] The schedule showed there had been an estimate of 80 hours of work at an average hourly rate of \$26/hr, being a total of \$2,080.00; and disbursements of \$46.88.

The adviser’s position on costs

- [77] The adviser, through her counsel, initially made the following submissions on costs:
- [77.1] That she had not yet been furnished with a quantum of costs which can be addressed.
- [77.2] That Ms Scholes should not be liable for the cost arising from any duplication of effort due to the adoption of the current Statement of Complaint procedure, under the Tribunal’s *Practice Note 1* in May 2013.
- [77.3] That, although accepting that in the past the adviser had denied liability for most of the points raised, she was unrepresented at that time and now accepts that there were “defects in her practice.”
- [77.4] The adviser again noted that negative “publicity generated by the substantive decision” should also be taken into account.
- [78] After receiving the Registrar’s submission the adviser submitted:
- [78.1] The Registrar’s position that he did not seek costs should be given weight.
- [78.2] The adviser had not contributed unnecessarily to the bulk of material and issues.
- [78.3] The adviser had lacked the benefit of legal advice early in the process.
- [78.4] The claim that there had been 24 hours of time for the initial referral of the complaint, and 48 hours for the preparation of the Statement of Complaint was excessive.

The complainant’s position on costs

- [79] The complainant made no specific submissions on costs, and was content to leave the issue to the Tribunal.

Discussion

- [80] In terms of the appropriate sanctions, the grounds on which the complaint was referred and the findings in relation to them are the foundation.
- [81] There are two particularly serious aspects of the complaint:
- [81.1] Ms Scholes allowed an unlicensed person to carry out important professional functions, and that person acted in a manner that was unprofessional; and
- [81.2] Ms Scholes was also in a position where her personal interests potentially conflicted with the interests of her client, and she failed to make the professional evaluation needed to ensure her client’s interests came first. Irrespective of that, she failed to make the sort of inquiries necessary to evaluate properly what her client’s needs were, and how she could provide the professional assistance required to meet them.

- [82] While both of those issues are serious, they do not involve allegations or findings of dishonesty on Ms Scholes' part. That is critically important.
- [83] In relation to the first aspect, the unlicensed person behaved in a grossly irregular way; though I have not found Ms Scholes was aware of that at the time, or condoned it. To her credit she accepts responsibility for the consequences of not taking personal responsibility for the work.
- [84] It is not appropriate to consider Ms Scholes had foresight of the conduct of her unlicensed agent, sanctions must only reflect:
- [84.1] the error of judgment in putting her in the position of having access to her client, and
- [84.2] the failure to supervise her agent so her client was protected.
- [85] Despite the absence of dishonesty, the failure to deal with her client's interests professionally is again a serious breach of the Code of Conduct; but must be addressed as an error of judgement not intentional deception. In the circumstances, I am satisfied that it is not necessary to consider suspension or cancellation of Ms Scholes' licence.
- [86] Ms Scholes contends that an audit by the Authority when renewing her licence is sufficient to ensure she has the professional skills and insight to deal with ethical issues in her practice; I do not accept that. The same would apply to any adviser who has had their licence renewed, and was audited by the Registrar in the course of that process. An audit for the purpose of renewing a licence is not a competence review. It is not an examination of the adviser's understanding and experience; rather it is a review of examples of the practitioner's work.
- [87] As the complaint is one of judgement and competence, there are really two, not necessarily exclusive, approaches to ensuring Ms Scholes continues in the profession and attains the standards required of her:
- [87.1] Requiring her to undertake relevant parts of the academic professional training that is required of entrants to the profession; and
- [87.2] Mentored professional practice for a period of the kind that applies to entrants to the profession holding a provisional licence.
- [88] Both approaches have their value. Ms Scholes did not immediately show the insight and acceptance of elements of the complaint. Since getting professional advice she has now done so, I give weight to her acceptance that she failed in her professional duties, and her commitment to address the issues.
- [89] In the circumstances, I am satisfied that it will not be necessary to restrict Ms Scholes to a provisional licence. However, it is important that she undertake the training required of new entrants to the profession in professional obligations and ethics. She will be required to do so.
- [90] It is appropriate that Ms Scholes is required to pay a penalty. I accept that there may well have been some lack of understanding in relation to allowing an unqualified person in the particular circumstances to provide professional services; however, given what occurred, it also involved a lack of supervision which provided an opportunity for serious misconduct. Furthermore, the failure to personally and disinterestedly evaluate the complainant's circumstances is a serious issue.
- [91] Allowing for Ms Scholes' acceptance, she must meet the burden of a financial penalty for these breaches, I am satisfied that a penalty of \$4,500 is appropriate. It is sufficient to mark the seriousness of the misconduct, without unfairly attributing the unforeseen conduct of Ms Scholes' agent. I have had some regard to the effect of adverse publicity; it, in itself, has an element of penalty and deterrence. However, the publication was a natural result of Ms Scholes' conduct; it cannot absolve her from other consequences.
- [92] Ms Scholes accepted if the compensation claimed was quantified properly, then she would accept liability.

- [93] There were two matters she contested:
- [93.1] First whether the unnecessary airfare had been lost, and
- [93.2] Second that the interest on the loan advanced by Ms Scholes' agent should be limited to Php 5,000.
- [94] The complainant took issue with the first of the two points and identified the relevant itinerary as showing a non-refundable class of ticket. She did not contest the second point regarding the interest on the loan.
- [95] I am satisfied the airfare was non-refundable, and the interest will be limited to Php 5,000.
- [96] Accordingly, the orders relating to the refund of fees and awarding of compensation will be:
- [96.1] Fees of Php 23,000 to be refunded,
- [96.2] Compensation for:
- [96.2.1] Visa fees of Php 25,000;
- [96.2.2] Interest on a loan of Php 5,000;
- [96.2.3] Travel to complete visa requirements Php 10,000;
- [96.2.4] A medical examination Php 8,500;
- [96.2.5] A lost return airfare of Php 70,000.
- [97] The order in New Zealand dollars will be:
- [97.1] A refund of fees of \$670.00, and
- [97.2] Compensation of \$3,500.
- [98] The exchange rate is based on February 2011 rates. However, the point in time that is taken is not of great moment. I am conscious that the complainant has had professional assistance with this complaint, and has not sought compensation; she has also been "out of pocket" for an extended period. I am satisfied any element of approximation in the exchange rate is more than offset by those factors.

Costs

- [99] The general principles in relation to the recovery of costs in disciplinary proceedings are well established. Orders are discretionary, the quantum is set with regard to a range of factors including conduct of the parties in the course of addressing the complaint and the Tribunal should have information as to the actual costs incurred. Though, it may be only a portion of the costs incurred that are recovered.
- [100] There is no reason to suppose the Tribunal's jurisdiction is intended to be any different. The power in section 51(1)(g) is expressed widely as covering "all or any of the costs or expenses of the investigation, inquiry, or hearing". The jurisdiction also covers the costs of any related prosecution, though that does not arise in the present case.
- [101] The Registrar suggested this was more limited than the jurisdiction under the Law Practitioner's Act. It is difficult to see any reason for that. They are both expressed as wide permissive powers, no doubt constrained by the well-known principles relating to disciplinary processes.
- [102] The Registrar can and should cost the time that he and staff engaged in the investigation, inquiry and hearing processes on the basis of hourly rates that reflects the actual costs, including overheads. As he accepts, the authorities indicate he should provide a schedule of those costs fully analysing all his investigations and inquiries prior to the hearing of the complaint. The initial schedule should be incorporated into the Statement of Complaint.

- [103] In the present case, the Registrar has provided for an hourly rate of \$26.00 for all work relating to this complaint. It appears to be direct labour costs, not an hourly rate including overheads of a person who has the skill and experience to prepare a complaint for lodging before the Tribunal.
- [104] He has not provided for any of his own time undertaking the necessary statutory process of determination. In short, there is a minimal hourly rate essentially for clerical collation, and analysis of the complaint.
- [105] This complaint has resulted in some 1,000 pages of documents being filed.
- [106] It appears the costs are understated. However, I accept I must take account of the fact the Registrar does not seek a costs order. I further accept the submission for the adviser that 48 hours of professional time to draft a Statement of Complaint is at least open to challenge, when records have not been kept.
- [107] This Tribunal has over an extended period of time noted the absence of applications for costs. It is well established jurisprudence that the party incurring the costs is required to keep proper records to claim costs. I also accept the submission for the adviser that I must give weight to the Registrar's position, as he has the primary duty to protect the public revenue, and ensure the costs he expends are recovered to the extent possible.
- [108] In the circumstances, there will be no order for costs.

Order

- [1] Ms Scholes is censured.
- [2] She is ordered to pay a financial penalty of \$4,500 pursuant to section 51(1)(f).
- [3] She is required to undertake the following training within 18 months of the issue of this decision:
- [3.1] She is to complete successfully Modules 1, 2 and 10 of the Bay of Plenty Polytechnic course: *Continuing Professional Development in New Zealand Immigration Advice*.
- Or alternatively:
- [3.2] She is to meet the requirements to be issued a Graduate Certificate in New Zealand Immigration Advice Level 7.
- [4] Leave is reserved to Ms Scholes to apply for an amendment to the order relating to training if there are changes in the courses directed, or the range of courses available.
- [5] She is ordered to refund fees of \$670.00 to the complainant pursuant to section 51(1)(h) of the Act.
- [6] She is ordered to pay compensation of \$3,500 to the complainant pursuant to section 51(1)(i) of the Act.

Suppression of name

- [109] The name and other information that identifies the complainant is not to be published, at anytime, in relation to this complaint.

DATED at WELLINGTON this 25th day of November 2013

G D Pearson
Chair